IN THE UNITED STATES 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.

Appeal from the United States District Court
for the District of New Union in
No. 66-CV-20119
District Judge: Romulus N. Remus

Team 8

## Table of Contents

**TABLE OF AUTHORITIES** ..... **i**

**STATEMENT OF THE ISSUES** ..... **1**

**STATEMENT OF THE CASE** ..... **2**

**SUMMARY OF THE ARGUMENT** ..... **4**

**ARGUMENT** ..... **5**

**I. THE DISTRICT COURT HAD JURISDICTION OVER CHAWN'S UNREASONABLE DELAY CLAIM BECAUSE THE EPA HAD A DUTY TO ACT AFTER FAILING TO DESIGNATE GHGS AS CRITERIA POLLUTANTS.** ..... **5**

**II. THE 2009 ENDANGERMENT FINDING IS VALID WITH RESPECT TO AN ENDANGERMENT OF PUBLIC WELFARE.** ..... **8**

**II. Section 202(a)(1) of the Clean Air Act (CAA), 42 U.S.C.S. § 7521(a)(1), requires the EPA to prescribe standards applicable to emissions of "any air pollutant" from any class of new motor vehicles which, in the EPA Administrator's judgment, cause or contribute to air pollution reasonably anticipated to endanger public health or welfare.** ..... **8**

**A. Congress included "climate" as one of the "effects on welfare."** ..... 8

B. **Persuasive authority exists for finding that greenhouse gases endanger public welfare.** ..... 9

**C. The EPA has not sought by rulemaking to rescind the Endangerment Finding.** .. 12

**III. The 2009 Endangerment Finding is valid with respect to an endangerment of public health.** ..... Error! Bookmark not defined.

**A. An endangerment to public health need not be premised on direct hazards to public health.** ..... 14

**B. The EPA's new position is not entitled to *Chevron* deference, but its 2009 Endangerment Finding position is.** ..... 15

**IV. IV. UNDER THE *TRAC* FACTORS, THE EPA UNREASONABLY DELAYED LISTING CRITERIA POLLUTANTS UNDER CAA § 108(A) FOLLOWING THE ENDANGERMENT FINDING BECAUSE THEY EXTENDED PAST 10 YEARS IN LISTING GHGS WHILE NOT PROVIDING A SUFFICIENT REASON TO DO SO AND THEY HAVE IMPROPERLY USED ECONOMIC REASONS WHEN COMPARING IT TO HUMAN HEALTH AND WELFARE THAT WOULD PREJUDICE GROUPS THAT WERE HARMED BY CLIMATE CHANGE.** ..... **18**

**V. THE EPA HAS A NON-DISCRETIONARY DUTY TO LIST GHGs AS "CRITERIA POLLUTANTS" BECAUSE IN THE INTERPRETATION OF § 108(a), THE EPA MAY LEAD ONE PROVISION TO CANCEL OUT THE OTHER, AND THAT THE LEGISLATIVE HISTORY AND POLICY SUGGEST THAT THE EPA SHOULD NOT HAVE FULL DISCRETION IN LISTING GHG'S.** ..... **24**

**CONCLUSION** ..... **28**

**SERVICE OF BRIEFS AND CERTIFICATION ..... 28**

## TABLE OF AUTHORITIES

### Cases

549 U.S. 497, 507 (2007) ..... 8
684 F.3d 102, 113 (D.C. Cir. 2012) ..... 9, 10, 17
*Bowen v. Georgetown Univ. Hosp.*, 488 U.S . 204, 212 (1988). ..... 15
*Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984) ..... 14
*Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. at 845. ..... 25, 26
*Ctr. for Biological Diversity v. EPA*, 749 F.3d 1079, 1083 ..... 26
*Ctr. for Biological Diversity v. United States EPA*, 794 F. Supp. 2d 151, 154 (D.D.C. 2011) ..... 7
*Doe v. Risch*, 398 F.Supp. 3d 647, 652 (N.D. Cal. 2019) ..... 22
*Envtl. Integrity Project v. United States EPA*, 160 F. Supp. 3d 50, 61 (D.D.C. 2015) ..... 6
*Humane Soc'ty of the United States v. McCarthy*, 209 F.Supp. 3d 280, 288 (D.D.C 2016) ..... 5
*In Re Barr Laboratories Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991) ..... 19
*In re Core Commc'ns, Inc*., 531 F.3d 849, 855 (D.C. Cir. 2008) ..... 19
*In re Public Emples.*, 957 F.3d. 267, 274 (D.C. Cir. 2020) ..... 19
*Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 509 (9th Cir. 1997) ..... 21
*Massachusetts v. FDIC*, 102 F.3d 615, 621 (1996) ..... 16
*Nader v. FCC*, 520 F.2d 182, 206 (D.C. Cir. 1975) ..... 19
*Nat. Res. Def. Council, Inc. v. Thomas*, 689 F. Supp. 246, 253 (S.D.N.Y. 1988) ..... 25
*Nat. Res. Def. Council, Inc. v. Train*, 545 F.2d 320 (2d Cir. 1976) ..... 23
*PCHRG v. FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984) ..... 18
*Potomac Electric Power Co. v. Interstate Commerce Com*., 702 F.2d 1026, 1034 (1983) ..... 18
*RDC, Inc. v. U.S. Envtl. Prot. Agency (In re Pesticide Action Network N. Am.)*, 798 F.3d 809, 814 (9th Cir. 2015) ..... 19
*Sierra Club v. Browner*, 130 F. Supp. 2d 78, 91 (D.D.C. 2001) ..... 7
*Telecomm. Research and Action Ctr. v. F.C.C.* 750 F.2d 70 (D.C. Cir. 1984) ..... 18
*United States v. Gillis*, 938 F.3d 1181, (11th Cir. 2019) ..... 13
*United States v. Mead Corp*., 533 U.S. 218, 229 (2001) ..... 17
*Wellesley v. FERC*, 829 F.2d 275, 277 (1st Cir. 1987) ..... 18
*Zook v. McCarthy*, 52 F.Supp. 3d 69 (D.D.C. 2014) ..... 24, 26

### Statutes

42 U.S.C § 7422(a ..... 26
42 U.S.C § 7604(a) ..... 17, 18
42 U.S.C. § 7502(a)(2)(B) ..... 20
42 U.S.C.A. § 7604(a) ..... 7
42 U.S.C.A. § 7607(b) ..... 5
42 U.S.C.S. § 7602(h) ..... 8
42 U.S.C.S. § 7604(a) ..... 5
42 U.S.C.S. § 7607(b) ..... 11
CAA § 108(a) ..... 24

*Coalition for Responsible Regulation* ..... 10

**Other Authorities**

Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Feb. 3, 2017) ..... 22

**Regulations**

74 F. Reg. 66,510-66,512 (Dec. 15, 2009) ..... 17
74 F. Reg. 66,527 (Dec. 15, 2009)..... 13

## STATEMENT OF JURISDICTION

Climate Health and Welfare Now ("CHAWN"), Coal, Oil and Gas Association ("COGA") and the United States Environmental Protection Agency ("EPA") each filed a timely Notice of Appeal. (D.A at 2). CHAWN, COGA, and EPA appealed the Order of the United States District Court for the District of New Union dated August 15, 2020. *Id*. The district court asserted jurisdiction under the Citizen Suit provision of the Clean Air Act, 42 U.S.C. § 7604(a), as well as federal question jurisdiction under 28 U.S.C. § 1331. (D.A. at 5). CHAWN filed his notice of appeal within the period set out in 42 U.S.C. 7604(b). *Id*. at 6.

## STATEMENT OF THE ISSUES

There are five issues before this Court:

**I. DID THE DISTRICT COURT HAVE JURISDICTION OVER CHAWN'S UNREASONABLE DELAY CLAIM UNDER CAA § 304(A) WHERE THE RULE SOUGHT WOULD BE A RULE OF NATIONWIDE APPLICABILITY SUBJECT TO REVIEW EXCLUSIVELY IN THE DC CIRCUIT UNDER CAA § 307(B)?**

**II. IS THE 2009 ENDANGERMENT FINDING VALID WITH RESPECT TO AN ENDANGERMENT OF PUBLIC WELFARE?**

**III. IS THE 2009 ENDANGERMENT FINDING VALID WITH RESPECT TO AN ENDANGERMENT OF PUBLIC HEALTH?**

**IV. DOES EPA'S TEN-YEAR DELAY IN TAKING ANY ACTION ON LISTING GHGS AS CRITERIA POLLUTANTS UNDER CAA § 108(A) CONSTITUTE AN UNREASONABLE DELAY?**

**V. DOES THE EPA HAVE A NON-DISCRETIONARY DUTY TO DESIGNATE GHGS AS A CRITERIA POLLUTANT UNDER CAA § 108 BASED ON THE 2009 ENDANGERMENT FINDING?**

*Suggested answers: In the affirmative.*

## STATEMENT OF THE CASE

In 1999, Climate Health and Welfare Now ("CHAWN"), along with several other environmental groups, petitioned the Environmental Protection Agency ("EPA") to make a finding that the emissions of greenhouse gases ("GHGs") from automobiles endanger public health and welfare. *Climate Health and Welfare Now v. EPA*, No. 66-CV-2019 at 9 (Dist. N.U. 2019) (Remus, J.). (D.A. at 6) After initially denying the petition, EPA responded and made a formal finding of Endangerment on December 15, 2009. *Id*. EPA found that the GHGs may present an endangerment to public health and public welfare because they were emitted by numerous mobile sources and were increasing global temperatures, changing storm frequency, and precipitation patterns. *Id*.

These 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, as well as other impacts. Climate change was determined to endanger public welfare by reducing agricultural productivity, reducing water supplies, and increasing property and economic damage due to storms and rising sea levels, as well as other impacts.

After the EPA made the endangerment finding, it promulgated various regulatory actions limiting the GHG emissions, but none of the regulatory initiatives were effective. *Id.* at 7. Furthermore, the EPA has not made any revisions to the 2009 Endangerment Finding. *Id*. To date, the EPA has not invoked authority to designate the GHGs as criteria pollutants. *Id*.

CHAWN and a coalition of environmental organizations brought a petition to compel the administrator of the EPA to list GHGs under CAA § 108(a), 42 U.S.C. § 7408, as criteria pollutants subject to the National Ambient Air Quality Standard ("NAAQS") program. *Id*. at 6.

The action asserted that having made the relevant finding EPA had a non-discretionary duty to list the GHGs as a criteria pollutant. *Id.* at 5. Ten years had passed since the issuance of the endangerment finding and the petition. *Id*. CHAWN properly served notice to sue on April 1, 2019. *Id*. The notice was for EPA's failure carry out its non-discretionary duty to regulate GHGs a criteria pollutant and for "unreasonable delay in carrying out its non-discretionary duty to for "unreasonable delay in carrying out its non-discretionary duty to designate GHGs as a criteria pollutant as demanded in the December 15, 2009 petition for rulemaking." *Id*. Since EPA did not take any action to CHAWN's notice, CHAWN commenced an action, invoking the citizen-suit provision of section 304(a) and sought an order directing EPA to include the CHHs as a criteria pollutant in a published new list. *Id*. Coal Oil and Gas Association ("COGA") moved to intervene as of right. *Id*.

The trial court granted Plaintiff's motion for summary judgment in part. *Id.* at 13. The court issued the following judgment:

> 1) the Endangerment Finding is valid with respect to an endangerment to public welfare,
> 2) EPA has unreasonably delayed action on responding to Plaintiff's petition for designation of GHGs as a criteria pollutant, and has unreasonably delayed designating GHGs as a criteria pollutant, and
> 3) EPA has a duty that is not discretionary to designate GHGs as a criteria pollutant. EPA is ordered to publish notice of a proposed rule designating GHGs as a criteria pollutant within 90 days of entry of this order, and to publish a final rule designating GHGs as a criteria pollutant within 180 days following publication of the notice of proposed rulemaking.

*Id*.

On August 15, 2020, CHAWN, COGA, and EPA each filed Notice of Appeal. *Id*. at 2. CHAWN appealed the District Court's determination that "EPA's 2009 Endangerment Finding that [GHGs] endanger public health is contrary to law." *Id*. COGA appealed the District Court's determination that "EPA's 2009 Endangerment Finding that GHGs endanger public welfare is

valid and that the EPA had a non-discretionary duty to designate GHGs as a criteria pollutant under § 108(a) of the Clean Air Act." *Id*. COGA also appeals "the District Court's holding that EPA's ten-year delay in taking action listing GHGs as criteria pollutants constitutes an unreasonable delay. "The Court of Appeals raised *sua sponte* the following issue:

> Whether the District Court had jurisdiction to hear CHAWN's unreasonable delay claim brought under CAA § 304(a), even when the rule sought would be a rule of nationwide applicability subject to review exclusively in the DC Circuit under CAA § 307(b)." *Id*.

## SUMMARY OF THE ARGUMENT

CHAWN has jurisdiction for the unreasonable delay claim pursuant to section 304(a), even though the rule sought would seek nationwide applicability because EPA had a mandatory duty to designate GHG as criteria pollutants.

The Endangerment Finding is valid as to public welfare because effects on climate are explicitly cited in the CAA as effects on welfare under section 304(h). Moreover, significant persuasive legal authority exists for finding that the effects on climate limned by the Endangerment Finding threaten the public welfare.

The Endangerment Finding is valid as to public health because the effects on climate, while exclusively defined as such, are also effects on health. The EPA's understanding and conception of these effects on health is supported by rigorous scientific data. The EPA's current position is not entitled to *Chevron* deference because it was forwarded for the first time in this litigation.

The EPA has unreasonably delayed agency action for listing GHG's as criteria pollutants. This is because under the first factor, the EPA instituted a roadblock for delay when they did not issue a timeline for secondary NAAQS, along with 10 years being consistently held to be unreasonable. Furthermore, the third, fourth, and fifth factors

weigh in favor of CHAWN because the Endangerment Finding suggests that interests are being prejudiced along with the human welfare being at stake.

The language in CAA § 108(a)(1)(C) is not ambiguous. This is because it was already conclusively decided that the EPA has a non-discretionary duty to list GHGs as criteria pollutants. Without this conclusion, the two different provisions in CAA § 108(a) subsections (A) and (C) would negate each other.

## ARGUMENT

### I. THE DISTRICT COURT HAD JURISDICTION OVER CHAWN'S UNREASONABLE DELAY CLAIM BECAUSE THE EPA HAD A DUTY TO ACT AFTER FAILING TO DESIGNATE GHGS AS CRITERIA POLLUTANTS.

In 2019, CHAWN sued the EPA for its unreasonable delay in carrying out its nondiscretionary duty to designate GHGs as a criteria air pollutant. This Court has, *sua sponte*, challenged the district court's jurisdiction to hear that claim.

The citizen-suit provision under CAA § 304(a) states that "any person may commence a civil action" against any other governmental instrumentality or agency "who is alleged to have violated . . . or to be in violation of an emission standard or limitation" under the Clean Air Act "or an order issued by the Administrator or a State with respect to such a standard or limitation," or "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator. 42 U.S.C.S. § 7604(a). The district courts "shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, . . . to order the Administrator to perform such act or duty . . . and to apply any appropriate civil penalties." *Id.* The statute further states:

> The United States district courts shall have "jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to

> compel agency action referred to in section 307(b) [42 USCS § 7607(b)] which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 307(b) [42 USCS § 7607(b)].

*Id*.

District courts have jurisdiction over actions alleging violations of non-discretionary duties imposed by the Clean Air Act and claims to compel agency action unreasonably delayed. *Humane Soc'ty of the United States v. McCarthy*, 209 F.Supp. 3d 280, 288 (D.D.C 2016).

The exception referenced in section 304 states:

> A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement...or other 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.

42 U.S.C.A. § 7607(b).

Unreasonable delay claims "allow a citizen suit to be brought in Federal district court against the Administrator where the plaintiff alleges that EPA has failed to act" where that "failure constitutes unreasonable delay." *Envtl. Integrity Project v. United States EPA*, 160 F. Supp. 3d 50, 61 (D.D.C. 2015) (quoting S. Rep. No. 101-228 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3757). The legislative history of the amendments demonstrate that Congress expressed a clear intention to expand the district courts' jurisdiction to include another type of claim — one to compel agency action unreasonably delayed under § 304(a). *Id*. at 60.

*Envtl. Integrity* is able to demonstrate when it would be proper to bring an action to the district court by invoking the citizen-suit provision pursuant to section 304(a). The *Environmental Integrity Project* plaintiffs submitted a formal petition to the EPA asking the district court to (1) find that ammonia gas pollution endangers the public health and welfare; (2) designate ammonia as a "criteria pollutant," and establish NAAQS for ammonia. *Id*. at 53. EPA

failed to respond to the petition. *Id*. Plaintiffs claim that EPA was unreasonably delayed in responding to their 2011 petition. *Id*. at 54. The district court held that if not for the notice requirement, Plaintiff would have jurisdiction under § 304. *Id*. at 62. Since EPA failed to provide a timely response to the 2011 Petition and the report written by Congress clearly indicated that Congress intended that such claims be brought before the district courts via the citizen-suit provision. *Id*. The report written by Congress shows that an unreasonable delay jurisdiction is designed to allow the courts to compel the Agency to respond to a petition for rulemaking or other request for Agency action if the Agency has made no response within a reasonable time after the request has been presented to it. *Id*.

*Envtl. Integrity* is similar to CHAWN's case because it is able to show that CHAWN properly invoked the citizen-suit provision for unreasonable delay in EPA's non-discretionary duty to designate GHGs as a criteria pollutant. EPA In *Envtl. Integrity,* the Plaintiff was seeking an order to compel a response from EPA after they failed to respond to their petition. This is similar to our case, where CHAWN seeks an order directing EPA to publish a new list of criteria pollutants that includes GHGs as a criteria pollutant, which EPA has failed to respond to. In *Envtl. Integrity*, the court ruled that EPA had a nondiscretionary duty to act on the petition to rulemaking, which required EPA to act in a reasonable time, which it did not. In our case, once EPA made the Endangerment Finding, it became subject to a non-discretionary duty to list GHGs as criteria pollutants. (D.A. at 5).

The citizen suit provision provides that the "district courts of the United States shall have jurisdiction to compel action unreasonably delayed. 42 U.S.C.A. § 7604(a). It also provides that, in any such action for unreasonable delay, notice to the EPA shall be provided 180 days before

commencing such action. *Ctr. for Biological Diversity v. United States EPA*, 794 F. Supp. 2d 151, 154 (D.D.C. 2011). In this case, notice is not at issue.

The district court has jurisdiction under Section 304(a)**,** even though the rule sought would seek nationwide applicability. Section 307(b) is not applicable because jurisdiction in the United States Court of Appeals is limited to cases involving EPA's failure to perform a nondiscretionary act and where the Administrator has undertaken a final action. *Sierra Club v. Browner*, 130 F. Supp. 2d 78, 91 (D.D.C. 2001). This would grant the Court of Appeals exclusive jurisdiction to review the Agency's final actions. *Id.* In our case, EPA has not undertaken a final action, therefore § 307 cannot apply.

## II. THE 2009 ENDANGERMENT FINDING IS VALID WITH RESPECT TO AN ENDANGERMENT OF PUBLIC WELFARE BECAUSE CONGRESS EXPLICITLY INCLUDED CLIMATE AS AN EFFECT ON WELFARE, AND SIGNIFICANT PERSUASIVE AUTHORITY SUPPORTS THE ENDANGERMENT FINDING'S VALIDITY.

Section 202(a)(1) of the Clean Air Act (CAA), 42 U.S.C.S. § 7521(a)(1), requires the EPA to prescribe standards applicable to emissions of "any air pollutant" from any class of new motor vehicles which, in the EPA Administrator's judgment, cause or contribute to air pollution reasonably anticipated to endanger public health or welfare.

### B. Congress included "climate" as one of the "effects on welfare."

Congress did not define "public health" or "public welfare," but it did define "effects on welfare." 42 U.S.C.S. § 7602(h) states:

> All language referring to effects on welfare includes, but is not limited to, effects on soils, waters, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as

> effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.

COGA might argue that when this provision of the CAA was enacted, climate change concern was not within the range of concerns considered by Congress. The Supreme Court acknowledged this concern in *Massachusetts v. EPA*, the case which precipitated the EPA's Endangerment Finding. In that case, the Court acknowledged that "[w]hen Congress enacted these provisions, the study of climate change was in its infancy." 549 U.S. 497, 507 (2007). This did not prove fatal to any effort to issue an Endangerment Finding, however, *Id.* at 534-35 (implying that EPA *could* make an Endangerment Finding, but declining to rule on whether it *must*), and the EPA subsequently issued its Endangerment Finding in 2009.

COGA's challenges to the Endangerment Finding were offered to and rejected by the D.C. Circuit in *Coalition for Responsible Regulation, Inc. v. EPA*. In *Coalition for Responsible Regulation*, the D.C. Circuit Court dismissed a challenge to the rules promulgated by the EPA following its issuance of the Endangerment Finding, holding that the Endangerment Finding was not arbitrary or capricious, and further holding that the EPA properly interpreted the governing CAA provisions. 684 F.3d 102, 113 (D.C. Cir. 2012) (*aff'd in part and rev'd in part*, Util. Air Regulatory Group v. EPA, 573 U.S. 302 (2014)) (*judgment amended*, *Coalition for Responsible Regulation, Inc. v. EPA*, 606 Fed. Appx. 6 (2015) (holding that various regulations under review be vacated).

### C. Persuasive authority exists for finding that greenhouse gases endanger public welfare.

COGA's challenges to the Endangerment Finding were offered to and rejected by the D.C. Circuit in *Coalition for Responsible Regulation, Inc. v. EPA*. In *Coalition for Responsible Regulation*, the D.C. Circuit Court dismissed a challenge to the rules promulgated by the EPA

following its issuance of the Endangerment Finding, holding that the Endangerment Finding was not arbitrary or capricious, and further holding that the EPA properly interpreted the governing CAA provisions. 684 F.3d 102, 113 (D.C. Cir. 2012) (*aff'd in part and rev'd in part*, Util. Air Regulatory Group v. EPA, 573 U.S. 302 (2014)) (*judgment amended, Coalition for Responsible Regulation, Inc. v. EPA,* 606 Fed. Appx. 6 (2015) (holding that various regulations under review be vacated).

In addressing the validity of the Endangerment Finding, the court held that § 202(a) of the CAA requires only

> that the endangerment evaluation "relate to whether an air pollutant 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.'" At bottom, § 202(a)(1) requires EPA to answer only two questions: whether particular "air pollution"—here, greenhouse gases—"may reasonably be anticipated to endanger public health or welfare," and whether motor-vehicle emissions "cause, or contribute to" that endangerment.

*Id.* at 117 (quoting *Massachusetts v. EPA, supra*, at 532-33). In short, policy considerations have no place when making a finding of endangerment. *Id.* at 118. On the same basis, the court further rejected industry petitioners' claims that "because statutes should be interpreted to avoid absurd results, EPA should have considered at least the 'absurd' consequences that would follow from an endangerment finding for greenhouse gases." *Id.* at 118-19.

The court also considered industry petitioners' challenge to the Endangerment Finding as unsupported by the scientific record. The court held that both the type of evidence EPA relied upon and the final EPA decision to make the Endangerment Finding were appropriate. *Id*. at 119.

In the instant case, defendant-appellant COGA reasserts two of the challenges in *Coalition for Responsible Regulation*. *Climate Health and Welfare Now v. EPA,* No. 66-CV-2019 at 9 (Dist. N.U. 2019).

> First, COGA asserts that the Endangerment Finding failed to consider the absurd regulatory policy impacts that would follow from the endangerment finding. Second, COGA asserts that the science relied on by EPA concerning the role of anthropogenic GHG emissions in currently observed global temperature increases and the magnitude of future temperature increases is too uncertain to support a current finding of endangerment.

*Id.* These are the exact challenges presented to the court in *Coalition for Responsible Regulation.* This Court should dismiss these tired arguments for the same reasons that they were rejected by the D.C. Circuit.

On the first argument, "[P]olicy judgments . . . have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment." *Coalition for Responsible Regulation*, *supra*, at 118 (quoting *Massachusetts v. EPA*, *supra*, at 534).

As for the evidence, the science that the EPA drew on when developing the Endangerment Finding is well founded. Derived from IPCC, NRC, and USGCRP climate assessments, the evidence was used "not as [a] substitute[] for [the EPA's] own judgment" -- which would have been an improper delegation of its judgment to those independent bodies -- "but as evidence upon which it relied to make that judgment." *Id.* at 120. The D.C. Circuit noted nothing improper in such an approach.

> EPA simply did here what it and other decision-makers often must do to make a science-based judgment: it sought out and reviewed existing scientific evidence to determine whether a particular finding was warranted. It makes no difference that much of the scientific evidence in large part consisted of "syntheses" of individual studies and research. Even individual studies and research papers often synthesize past work in an area and then build upon it. This is how science works. EPA is not required to re-prove the existence of the atom every time it approaches a scientific question.

*Id*.

The EPA not only selected the right type of evidence, it also selected evidence that adequately supported its position that the root cause of climate change is anthropogenic

greenhouse gas emissions. The "body of scientific evidence marshaled by EPA in support of the Endangerment Finding is substantial," the D.C. Court noted in *Coalition for Responsible Regulation*. *Id*. Relying on three lines of evidence -- basic physical climate science, historical estimates of past climate change, and computer-based climate modeling -- the EPA effectively established all the major premises upon which the modern understanding of climate change is based (which we will not recount here). *Id*. at 120-21.

Given the degree of deference federal courts accord the D.C. Circuit in matters of administrative law (and, particularly, in Clean Air Act litigation, 42 U.S.C.S. § 7607(b), the decision in *Coalition for Responsible Regulation* should be adopted by this Court.

### D. The EPA has not sought by rulemaking to rescind the Endangerment Finding.

Finally, despite the fact that the EPA now denies that the Endangerment Finding is valid with respect to the endangerment of human health, it has not rescinded, nor has it sought to rescind, the Endangerment Finding itself. The simple explanation for the Agency's behavior is that legally, it cannot.

To return again to the statutory language of CAA 202(a), the EPA must prescribe standards applicable to emissions of "any air pollutant" from any class of new motor vehicles which, in the EPA Administrator's judgment, cause or contribute to air pollution reasonably anticipated to endanger public health or welfare. There is no viable path for the EPA to deny that GHGs endanger the public health or welfare.

COGA itself admits that an endangerment finding based "entirely on the consequential health harms resulting from changing climate" without relying "on any health impact resulting from breathing air with ambient concentration of carbon dioxide or other GHGs … might

support a finding of endangerment to public welfare." *Climate Health and Welfare Now v. EPA*, No. 66-CV-2019 at 10 (Dist. N.U. 2019).

For the foregoing reasons, we ask this Honorable Court to affirm the district court's grant of summary judgment and its conclusion that the Endangerment Finding is valid with respect to public welfare.

## III. THE 2009 ENDANGERMENT FINDING IS VALID WITH RESPECT TO AN ENDANGERMENT OF PUBLIC HEALTH BECAUSE THE EFFECTS OF ATMOSPHERIC GREENHOUSE GASES ARE ALSO EFFECTS ON HEALTH.

The 2009 Endangerment Finding summarized the legal problem vis-a-vis whether an endangerment of public health exists:

> While Congress defined "effects on welfare," it did not define either "public health" or "public welfare." In addition, the definition of ''effects on welfare'' does not clearly address how to categorize health effects that flow from effects on soils, water, crops, vegetation, weather, climate, or any of the other factors listed in CAA section 302(h). It is clear that effects on climate are an effect on welfare, but the definition does not address whether health impacts that are caused by these changes in climate are also effects on welfare. The health effects at issue are not themselves effects on soils, water, crops, vegetation, weather, or climate. They are instead effects on health. They derive from the effects on climate, but they are not themselves effects on climate or on anything else listed in CAA section 302(h). . . . The text of the CAA also does not address the issue of direct and indirect health effects. Contrary to commenters' assertions, the legislative history does not address or resolve this issue.

74 F. Reg. 66,527 (Dec. 15, 2009).

The key question, then, is whether the effects on public health (which are undefined) that flow from changes or effects on climate (which are defined as effects on welfare) can provide evidence of an endangerment to public health. CAA section 302(h) does not define effects on public health, nor does any other provision of the CAA.

But the many negative health effects of atmospheric GHGs noted by the EPA – including "the expectation that there will be an increase in the risk of mortality and

morbidity associated with increased intensity of heat waves," and "an increase in levels of ambient ozone, leading to an increased risk of morbidity and mortality from exposure to ozone," *Id*. – are also effects on health. Indeed, if there must be a choice between classifying increased mortality as a result of climate as endangering health or endangering welfare, it most clearly falls into the category of endangering health. *Id*. It is therefore clear that the Endangerment Finding is valid with respect to the endangerment of public health.

### A. <u>An endangerment to public health need not be premised on direct hazards to public health.</u>

COGA argues "that an endangerment to public health as contemplated by Congress consisted solely of the direct health hazards of air contaminants due to respiration or other personal exposure to the contaminants in the air." *Climate Health and Welfare Now v. EPA*, No. 66-CV-2019 at 10 (Dist. N.U. 2019).

This exact argument was considered by the EPA when it drafted the 2009 Endangerment Finding. F. Reg. 66,526- 66,528 (Dec. 15, 2009). The argument was premised on the fact that health and welfare are cited as separate concerns in the text of CAA § 202. *Id.* at 66,526. And while "effects on welfare" are defined by § 302(h), which includes climate and weather, no equivalent section exists defining effects on health. Therefore, critics charge, climate and weather impacts were not contemplated as health impacts by the congresses that drafted the CAA.

As the EPA pointed out, however, it has in other contexts previously considered indirect health effects to be public health issues. *Id*. at 66,527. In the case of ozone, for instance, when evaluating public health impacts under CAA § 109, the EPA considered not only the direct

health effects of inhaled ozone pollution, but also considered the way in which ozone pollution affects the screening of UVB rays as a public health issue. *Id*.

Since the EPA has previously considered indirect health effects when developing ambient air quality standards under CAA § 109, it's appropriate for it to use the same standard when evaluating public health concerns under a different section of the CAA. Such an approach is supported by the canons of statutory construction, which dictate that similar or identical language in related statutes carries the same meaning. *United States v. Gillis*, 938 F.3d 1181, (11th Cir. 2019).

### B. The EPA's new position is not entitled to *Chevron* deference, but its 2009 Endangerment Finding position is.

The EPA's position today is different than it was in 2009. Back then, the EPA argued vigorously that GHGs are subject to a finding of endangerment, but today, it agrees with intervenor-defendant-appellant COGA that the Endangerment Finding is invalid with respect to an endangerment of public health. The EPA's original position, however, is entitled to *Chevron* deference.

The principles of Chevron deference are well-settled.

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

*Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984).

Since, in the instant case, Congress has not spoken to the issue of whether public health includes indirect effects wrought by climate change, this Court must defer to the EPA's interpretation of CAA § 202 promulgated in the Endangerment Finding, which concludes that public health concerns encompass indirect effects of climate change.

The EPA's current interpretation is not entitled to *Chevron* deference because *Chevron* deference adheres only where the agency position is supported by regulations, rulings, or administrative practice. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S . 204, 212 (1988). In *Bowen v. Georgetown Univ. Hosp.*, for instance, the Supreme Court rejected an appeal for *Chevron* deference from the Secretary of Health and Human Services where, during litigation, he advanced for the first time an interpretation of a cost-limit provision. *Id*.

In the instant case, similarly, the EPA has advanced a novel claim that the Endangerment Finding is not valid as it pertains to an endangerment of the public health. Since, like the interpretation of the cost-limit provision in *Bowen*, *supra*, this claim was advanced for the first time in the present litigation, it cannot be accepted as valid.

But Chevron deference still adheres for the position advanced in the Endangerment Finding, since it has long been supported by agency practice. As Judge Remus in the court below wrote:

> In the years following the Endangerment Finding, EPA embarked on a series of regulatory actions limiting GHG emissions. First, EPA established GHG emissions limits for new passenger vehicles and light trucks. These limits, and the underlying Endangerment Finding, were upheld in Coalition for Responsible Regulation v. EPA, 684 F.3d 102 (D.C. Cir. 2012), rev'd in part on other grounds sub nom in Utility Air Regulatory Group v. EPA, 573 U.S. 302 (2014). EPA also adopted New Source Performance Standards and Best Available Control Technology guidance under Title I of CAA, which would apply to major new sources of GHG pollutants, primarily consisting of power plants. EPA also adopted the so-called Tailoring Rule, which limited the scope of permitting and review requirements that would apply to GHG sources. See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring

> Rule, 75 Fed. Reg. 31,514, 31,550 (June 3, 2010); Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015). In 2015, EPA issued the so-called Clean Power Plan regulations, Carbon Pollution Emission Guidelines for Existing Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015), which directed states to modify their CAA implementation plans in order to achieve GHG emissions reductions consistent with EPA guidance on the Best System of Emissions Reductions under CAA § 111(d), 42 U.S.C. § 7411(d).

*Climate Health and Welfare Now v. EPA*, No. 66-CV-2019 at 7 (Dist. N.U. 2019). This litany of examples of administrative practice and rulemaking premised upon the Endangerment Finding justify adhering to the Endangerment Finding's conclusions under *Chevron* principles.

Defendants EPA and COGA will surely offer a different understanding of *Chevron*'s applicability. In *Massachusetts v. FDIC,* the First Circuit held that:

> [A]n agency certainly does not lose its entitlement to deference by changing its position on a matter entrusted to it by Congress. Indeed, Chevron itself involved a case where the agency changed its position in a formal rulemaking. 'The whole point of Chevron is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'

*Massachusetts v. FDIC*, 102 F.3d 615, 621 (1996) (citations omitted).

But, crucially, *Chevron* deference is only afforded where an agency proffers a reasonable interpretation of the statute it administers. *United States v. Mead Corp*., 533 U.S. 218, 229 (2001). The reasonableness of the Endangerment Finding position is self-evident, based as it is upon the multitude of independent scientific resources cited by the EPA, 74 F. Reg. 66,510-66,512 (Dec. 15, 2009), and acknowledged by the D.C. Circuit in *Coalition for Responsible Regulation, supra,* at 118-121.

The EPA's current position, on the other hand, is not reasonable. To accept that climate change is not a threat to human health means not only rejecting the carefully developed holding of *Coalition for Responsible Regulation,* but also rejecting the settled science of climate change as limned in the Endangerment Finding, which, the court below noted, argues forcefully that

climate change both now and in the future will "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, as well as other impacts." *Climate Health and Welfare Now v. EPA*, No. 66-CV-2019 at 6 (Dist. N.U. 2019).

For the foregoing reasons, we ask this Honorable Court to overturn the district court's partial grant of summary judgment to intervenor COGA declaring that the Endangerment Finding, insofar as it determines that GHGs endanger public health, is contrary to law.

## IV. UNDER THE *TRAC* FACTORS, THE EPA UNREASONABLY DELAYED LISTING CRITERIA POLLUTANTS UNDER CAA § 108(A) FOLLOWING THE ENDANGERMENT FINDING BECAUSE THEY EXTENDED PAST 10 YEARS IN LISTING GHGS WHILE NOT PROVIDING A SUFFICIENT REASON TO DO SO AND THEY HAVE IMPROPERLY USED ECONOMIC REASONS WHEN COMPARING IT TO HUMAN HEALTH AND WELFARE THAT WOULD PREJUDICE GROUPS THAT WERE HARMED BY CLIMATE CHANGE.

In 1990, Congress amended CAA § 304 to authorize District Courts to "compel agency action which is unreasonably delayed," 42 U.S.C § 7604(a), which is the source of the unreasonable delay claim. The purpose of this statute is to enforce an agency action when the Administrator does not successfully perform one of their duties. *Id.* To determine if an agency unreasonably delayed action on plaintiffs' demand that it take action, the court will use the six factors set out in *Telecomm. Research and Action Ctr. v. F.C.C.* 750 F.2d 70 (D.C. Cir. 1984), ("*TRAC*"), to assess these unreasonable delay claims. These six "*TRAC* factors" are intended to provide useful guidance in assessing claims of agency delay. The factors are as follows:

(1) The time agencies take to make a decision must be governed by a rule of reason;

(2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, the statutory scheme may supply content for this rule of reason;

(3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;

(4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;

(5) the court should also take into account the nature and extent of the interest prejudiced by the delay; and

(6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."

*PCHRG v. FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984). The factors help determine whether the court should issue a writ of mandamus to compel agency action. *Wellesley v. FERC*, 829 F.2d 275, 277 (1st Cir. 1987). Courts are also quick to point out that mandamus is a drastic remedy suitable only in extraordinary situations. *Id.* Overall, excessive delay saps the public confidence in an agency and their ability to handle responsibilities and create uncertainty for other parties that must take into consideration the possible effects of an agency decision when considering future plans. *Potomac Electric Power Co. v. Interstate Commerce Com.*, 702 F.2d 1026, 1034 (1983).

This Executive Order emphasizes economic regulation largely neglects the purposes and statutory obligations of the Clean Air Act that focus on public health and welfare. Because it emphasizes economic and business aspects that would place these considerations above human health and welfare, the EPA would be misappropriating the purposes of this Executive Order by arguing that economic reasons alone are more important than the public health and welfare of

individuals. Therefore, because this Executive Order is being used in a way that defeats the purpose of the Clean Air Act and would be a detriment to the agency duties in upholding public health and welfare, this factor should weigh in favor of CHAWN. *In Re Barr Laboratories Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991). In this case, because there was not any bad faith detected from either party, factor six will not weigh in favor of either party.

Of all of the TRAC factors, factor one is considered to have the most weight. *In re Core Commc'ns, Inc*., 531 F.3d 849, 855 (D.C. Cir. 2008). To analyze the first factor, the time it takes to make a decision that must be governed by a "rule of reason," if the delay satisfies the rule of reason, the length of the delay must be taken into consideration along with any roadblocks that can cause the delay. *NRDC, Inc. v. U.S. Envtl. Prot. Agency (In re Pesticide Action Network N. Am.),* 798 F.3d 809, 814 (9th Cir. 2015). If, based on all relevant facts and circumstances, the delay seems unreasonable, it will not pass the rule of reason applied by the first factor. There is not a per se rule as to how long is considered too long for agency action; a reasonable time is typically counted in weeks or months, not years. *In re Public Emples.*, 957 F.3d. 267, 274 (D.C. Cir. 2020).

While the determination as to what qualifies as an excessive time for inaction is based on the specific facts and circumstances of each individual case, the usual rule of thumb is that 8 to 10 years was consistently ruled to be unreasonable. *See generally Potomac Electric Power, supra*, at 1034. Other cases have stated that 9 years should be considered enough time for any agency to decide almost any issue presented to them. *Nader v. FCC,* 520 F.2d 182, 206 (D.C. Cir. 1975). In *Pesticide Action Network*, the court held that a delay of 8 years was found to be unreasonable. *In re Pesticide Action Network N. Am.*, 798 F.3d 809 at 814 (9th Cir. 2015). In that case, the EPA did not issue a final response to an administrative petition that requested the

cancellation of organophosphate pesticide chlorpyrifos, which initially had provided a timeline and missed it. *Id.* The EPA stated they missed this because of additional uncertainty from "complex regulatory proceedings." *Id.* However, the court saw that reasoning as a "roadmap for further delay" and "stretching the 'rule of reason' beyond its limits." *Id*.

In this case, the district court correctly applied the first factor because like in *Pesticide Action Network*, not only did the EPA go beyond a 10-year period here, they also stretched the rule of reason and delays were improper. The EPA claimed it satisfied the rule of reason in delaying for 10 years because of the resolution of thorny policy and scientific issues in determining the correct NAAQS and the appropriate response to States unable to meet NAAQs in their implementation plans. (D.A. at 12). However, like in *Pesticide Action Network*, the EPA had a timeline for primary NAAQS for 10 years, but there was not a timeline for secondary NAAQS in resolving the petition which can be considered a "roadmap for further delay." Therefore, the first factor should be weighed in favor of CHAWN because the ten years fall consistently within delays along with the fact the EPA blamed the delay on policy and scientific issues without a designation on a timeline for secondary NAAQS like primary NAAQS that would create further delay.

The EPA argues that the Clean Air Act supplies content to the "rule of reason" consistent with the second factor and states that the 10-year timeframe is unreasonable for GHGs, which have long atmospheric residence times. Under the Clean Air Act, they can meet the secondary NAAQS "as expeditiously as practicable." 42 U.S.C. § 7502(a)(2)(B). From this interpretation, "expeditiously as practicable" can allow states plenty of time to satisfy the secondary NAAQS. While this factor may supply for the rule of reason, this interpretation can also be construed as the EPA needing to determine this similarly to the ten-year time frame of primary NAAQS

because regardless, it is essential that it should be expeditiously determined that it should not be construed to be a roadblock that gives the agency a broader time that can be longer than necessary to determine secondary NAAQs.

Courts consider factors three and five in conjunction with one another. *Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 509 (9th Cir. 1997). This is because they frequently overlap due to the regulatory spheres that shape the "nature and extent of the interests prejudiced by delay." *Id.* at 509 (9th Cir. 1997). Courts further apply both factors when individuals are in direct and immediate danger. *Id.* at 509 and 510. In *Babbitt*, appellants sought to compel appellees to determine the validity of the patent claims and that further delay would prejudice the employees of the mine along with the economy in Elko County that would affect public welfare. *Id.* The court failed to find that potential impact on the economic concerns of the town and its mining employees as there was not enough evidence to support assertions that the employee's jobs in the mines were in direct or immediate danger due to economic harm. *Id.*

In this case, GHGs have been found to pose an endangerment to the public welfare because the results from secondary GHGs in relation to climate change reduce agricultural productivity, reduce water supplies, and increase property loss along with economic damage from storms and rising sea levels. These are threats not only to the economy, but to human welfare, too. Factor three therefore favors CHAWN. Furthermore, in relation to factor five, those most harmed by GHGs and sea level rise are the property owners and young adults whose interests are being prejudiced as a result of these GHG emissions. Unlike in *Independence Mining Co*., where there was not any evidence to support an endangerment to public welfare, in the instant case, there is evidence of direct and immediate harm along with evidence

demonstrating that the public welfare is at stake and because of this damage, both of these factors together should weigh more in favor of CHAWN.

As for the fourth factor, courts must look to make sure that reordering agency priorities would not be detrimental to the agency in carrying out its duties. *Doe v. Risch*, 398 F.Supp. 3d 647, 652 (N.D. Cal. 2019). In this case, the courts are relying directly on an Executive Order which establishes its highest priority as the reduction of regulatory burdens on business and economic activity. The Executive Order states that "whenever an executive department or agency publicly proposes for notice and comment or otherwise promulgates a new regulation, it must at least identify two existing regulations to repeal and that the offset requirement provides that agencies must offset any new incremental cost that is associated with new regulation through the elimination of existing costs associated with two prior regulations." Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Feb. 3, 2017). Additionally, this executive order recognizes that it cannot override the agency's statutory obligations and cannot impair or affect the authority granted by law to an executive department or agency. *Id.*

This Executive Order emphasizes economic regulation largely neglects the purposes and statutory obligations of the Clean Air Act that focus on public health and welfare. Because it emphasizes economic and business aspects that would place these considerations above human health and welfare, the EPA would be misappropriating the purposes of this Executive Order by arguing that economic reasons alone are more important than the public health and welfare of individuals. Therefore, because this Executive Order is being used in a way that defeats the purpose of the Clean Air Act and would be a detriment to the agency duties in upholding public health and welfare, this factor should weigh in favor of CHAWN.

In balancing the *TRAC* factors, the court correctly states that these factors should weigh in favor of CHAWN because the EPA has stretched the rule of reason beyond its limit. Even though the EPA has a strong argument under the second factor, one factor will not weigh against

all the other factors. The public welfare was at stake as a result of climate change while prejudicing those affected by climate change. Finally, the executive order in favoring businesses, which are economic, goes against the purposes of the Clean Air Act. Therefore, the Court correctly held that there was unreasonable delay under CAA § 108(a).

## V. THE EPA HAS A NON-DISCRETIONARY DUTY TO LIST GHGs AS "CRITERIA POLLUTANTS" BECAUSE IN THE INTERPRETATION OF § 108(a), THE EPA MAY LEAD ONE PROVISION TO CANCEL OUT THE OTHER, AND THAT THE LEGISLATIVE HISTORY AND POLICY SUGGEST THAT THE EPA SHOULD NOT HAVE FULL DISCRETION IN LISTING GHG'S.

Like the court in *Train*, this Court concluded that "If the EPA interpretation were accepted and listing were mandatory only for substances "for which [the Administrator plans to issue air quality criteria…," then the mandatory language of § 108(a)(1)(A) would become mere surplusage." *Id.*

In *Train*, the EPA argued that lead had adverse effects on public health and welfare which resulted from multiple diverse and stationary sources that meet the requirements of CAA §§ 108(a)(1)(A) and (B). *Nat. Res. Def. Council, Inc. v. Train*, 545 F.2d 320 (2d Cir. 1976). *Train* provides that once the EPA determines that the Clean Air Act contains mandatory language, the Administrator shall publish a list of criteria pollutants. *Id. at 324* and 325. The court held that once it was found that lead had an adverse effect on public health or welfare and that it was found to result from numerous or diverse sources, the Administrator did not have discretion in including lead on the list of substances under § 1857c-3(a)(1). *Id.* at 322. court acknowledged that the language of 108(a)(1)(C) is facially ambiguous, when viewed in the context of the Act along with its legislative history, the meaning is clear. *Id.* at 327 Furthermore, while the Clean Air Act was amended in 1977 and 1990, this case still remains good law. The

EPA must therefore respect the longstanding legal precedent of *Train*.

### A. Review of a Discretionary Duty under CAA § 108(a)(1)(A) and (B)

In this case, the EPA may suggest that Chevron deference requries that its understanding of "shall from time to time thereafter revise," along with the phrase in the third subsection of 108(a)(1)(C) "but for which he plans to issue air quality criteria under this section," to allow them to have a reasonable and permissible construction that they carry with them discretion in timing and in how they list criteria pollutants.

Under the Clean Air Act, part of the duty to determine whether the Administrator shall list each air pollutant involves whether there are, "emissions of which, in his judgment, causes or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare: (B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources..." CAA § 108(a). It should be noted that the nondiscretionary duty to list pollutants does not exist until the EPA makes policy determinations to that pollutant. *Zook v. McCarthy*, 52 F.Supp. 3d 69 (D.D.C. 2014). In *Zook* it was determined that the plaintiffs could not state that AFO pollutants satisfy the criteria in Section 108(a)(1)(A) and (B) as there was not an endangerment finding to the public health and welfare of these pollutants.

Our case is different from *Zook* because GHGs satisfy subsections (A) and (B). Under subsection (A), the presence of the ambient air is a part of the Clean Air Act's definition of "air pollutant" and the Supreme Court has already determined that GHGs qualify under this rule. *Massachusetts* 548 U.S at 560. Under subsection B, it should not be contested that GHGs originate from sources numerous and diverse as there are millions of automobiles that qualify as numerous mobile sources that are in the country. Therefore, the EPA has a nondiscretionary duty to list GHG's under these two subsections. However, determining if there is a nondiscretionary

duty involves looking at the final provision under 108(a)(1)(C).

### B. Reviewing the language of "Shall" and CAA § 108(a)(1)(C).

Courts have noted that "shall" indicates a command, *Ecoe v. Zerbs*, 295 U.S. 490, 493 (1935), and that such plain language imposes a non-discretionary duty. *Nat. Res. Def. Council, Inc. v. Thomas*, 689 F. Supp. 246, 253 (S.D.N.Y. 1988). This case involves, however, a question of discretion that arises under the language of "for which he intends to establish an emission standard under this section," under CAA § 108(a)(1)(C) and the defendant in that case stated that the language was intended by Congress to give the Administrator discretion to choose sections to regular hazardous air pollutants. *Id.*

Like the court in *Train*, this Court concluded that "If the EPA interpretation were accepted and listing were mandatory only for substances "for which [the Administrator plans to issue air quality criteria…," then the mandatory language of § 108(a)(1)(A) would become mere surplusage." *Id.*

In this case, the EPA is advancing a similar argument that the provisions under subsection (C) that "plans to issue air quality criteria under this section," gives them more discretion in listing GHGs as criteria pollutants. However, like *Train* and *Thomas*, the construction of this language will lead the provisions in subsection (A) on the word "shall," which is the commanding language that gives the statue non-discretion, would be negated. Therefore, this argument should be rejected in favor of CHAWN as this would defeat the purpose of the Clean Air Act.

The EPA my seek to show that it has discretion in listing GHG's as criteria pollutants under the principles of Chevron deference. *Chevron* deference provides that when courts face

ambiguous statutory language, they will not impose their own construction of the statute but will instead review whether the administering agency's interpretation of the statute is permissible and reasonable. Chevron, U.S.A., Inc. V. NRDC, Inc., 467 U.S. at 842-846.

In this case, the EPA may suggest that Chevron deference requires that its understanding of will try and use that construction to interpret the phrase" shall from time to time thereafter revise," along with 108(a)(1)(C)'s language "but for which he plans to issue air quality criteria under this section," are reasonable and permissible constructions that grant the agency discretion in timing and in how they list criteria pollutants.

Additionally, the EPA may use the statutory language that Congress created in the 1977 Amendments in Section 122 to direct the EPA on "Listing of Certain Unregulated Pollutants." Section 122: "If the Administrator makes an affirmative determination with respect to any such substance, he shall simultaneously with such determination include such substance in the list published under section 108(a)(1)... or shall include each category of stationary sources emitting such substance in significant amounts in the list published under section 111(b)(1)(a)..." 42 U.S.C § 7422(a). The EPA will assert that if there was a positive endangerment finding for particular pollutants, the agency would have discretion to issue NAAQS in Section 108 or NSPS in Section 111. Therefore, there is more than one possible response than just listing GHGs as criteria pollutants and would have more discretion in handling GHG's.

However, the use of Chevron v. NRDC along with the 1977 amendments is not sufficient enough to displace the valid precedent of *Train.* Recent cases, such as *Biological Diversity* and *Zook* are still good case law in recent decisions. *Ctr. for Biological Diversity v. EPA*, 749 F.3d 1079, 1083; and *Zook*, 52 F.Supp.3d at 74. 108(a)(1)(C) is simply not ambiguous. Its meaning was established conclusively in *Train* and cannot be undone by appealing to the 1977

amendments or the EPA's own authority. Therefore, the Court has correctly decided that it will follow Trains' holding that the EPA has a non-discretionary duty to list GHGs as a criteria pollutant under CAA § 108(a)(1).

## CONCLUSION

For the foregoing reasons, we ask this Honorable Court to affirm the U.S. District Court of the District of New Union's grant of summary judgment insofar as it declares the Endangerment Finding valid with respect to an endangerment to public welfare, finds the EPA has unreasonably delayed designating GHGs as a criteria pollutant, and finds EPA has a nondiscretionary duty to designate GHGs as a criteria pollutant. We ask this Honorable Court to reverse the District Court's grant of summary judgment for intervenor COGA finding the Endangerment Finding invalid as to an endangerment to public health. Finally, we ask this Honorable Court to hold that the District Court had jurisdiction over plaintiff's CHAWN's unreasonable delay claim under CAA § 304(a).

## SERVICE OF BRIEFS AND CERTIFICATION

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

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Date: November 16, 2020

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