Team # 9

C.A. No. 20-000123

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CLIMATE HEALTH AND WELFARE NOW,
Plaintiff-Appellee-Cross Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant,

-and-

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

Appeal from the United States District Court for the District of New Union
(No. 66-CV-2019, Judge Romulus N. Remus)

BRIEF FOR CLIMATE HEALTH AND WELFARE NOW

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STATEMENT OF JURISDICTION

Climate Health and Welfare Now ("CHAWN") brought this action under Section 304 of the Clean Air Act, 42 U.S.C. § 7604(a), against the EPA Administrator for failure to perform a nondiscretionary duty without unreasonable delay. ROA at 4.[1] The district court had federal-question jurisdiction, 28 U.S.C. § 1331, and subject-matter jurisdiction, 42 U.S.C. § 7604(a). On August 15, 2020, the district court issued a final order, granting CHAWN's motion for summary judgment in part and denying in part. ROA at 14. Timely appealed followed. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Section 304 of the Clean Air Act gives district courts exclusive jurisdiction over citizen suits. Did the district court have jurisdiction over CHAWN's citizen-suit complaint that alleged the Administrator had failed to a nondiscretionary duty?

2. Courts should be deferential to the agency's reasonable interpretation of ambiguous terms. Did the district court err in finding the 2009 Endangerment Finding was legally invalid as to public health?

3. Was the district court correct in deferring to the agency's interpretation of public health and finding that the 2009 Endangerment Finding was legally valid as to public welfare?

4. Section 108(a)(1) states the Administrator "shall from time to time" list pollutants as a criteria pollutant when certain criteria have been met. Did the district court properly determine that the Administrator had a nondiscretionary duty to list GHGs as a criteria pollutant?

[1] Citations to "ROA" are to the Record on Appeal.

5. When there is no specific timeline attached to a statutory duty and parties seek a mandamus to compel agency action, the reviewing court should use an unreasonable delay standard. Was the district court correct in finding the EPA's ten-year delay was unreasonable?

INTRODUCTION

The oversaturation of greenhouse gases ("GHGs") in our atmosphere has significantly contributed to climate change, causing unprecedented heat waves, shorter winters, longer summers and posing existential threats to the public health and welfare of our nation. The Environmental Protection Agency ("EPA") has acknowledged the severe and pervasive effects of GHGs and, over the past ten years, has taken significant steps to reduce GHG emissions and mitigate the impacts of climate change. But the EPA has failed to perform mandatory actions, required by the nation's exacting Clean Air Act.

Climate Health and Welfare Now ("CHAWN") petitioned the EPA to list GHGs as a criteria pollutant for purposes of establishing national air quality standards. After ten years, the EPA has still done nothing. Relying on the Clean Air Act's citizen-suit provisions, CHAWN sought a judicial order to compel the agency to perform its statutory duties and list GHGs as a criteria pollutant.

STATEMENT OF THE CASE

I. The EPA Issued an Endangerment Finding in 2009 that Found GHGs Pose a Danger to Public Health and Welfare.

After years of litigation and policy changes, the EPA finally issued an Endangerment Finding in 2009, which outlined the ways GHGs endanger public health and welfare. ROA at 5. In making this momentous finding, the EPA relied upon thousands of scientific studies from around the globe, which corroborated the finding that elevated levels of GHGs would wreak havoc on public health and welfare over the coming decades. Endangerment and Cause or

Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R pt. 1).

The Endangerment Finding identified, in painstaking detail, the particularized harms that had occurred and that would continue to harm the United States. These effects range from the destruction of crops and increased prevalence of extreme weather events to short-term beneficial outcomes, such as longer growing seasons in higher latitudes. *Id*. at 66,535. Overall, however, the Administrator rationally determined that long term-harms that would befall future generations drastically outweighed the short-term benefits. *Id.* The Endangerment Finding also highlighted the fact that the United States emits nearly 20% of all GHGs around the globe even though the country accounts for only 4% of the world's population. *Id.* at 66,538.

II. CHAWN Petitioned the EPA to Rely on the Endangerment Finding to List GHGs as a Criteria Pollutant and Brough Suit Against the EPA Following the Agency's Failure to Take Any Action.

Following EPA's publication of the Endangerment Finding, CHAWN petitioned the EPA to list GHGs as a criteria pollutant under Section 108 of the Clean Air Act. ROA at 5. Doing so would then require the EPA to establish national ambient air quality standards for GHGS, which in turn, would require states to create plans to reach those standards. *Id.* "EPA has taken no action on the petition." *Id.* Yet over the past ten years, the EPA has promulgated a variety of GHG-targeted regulations under different programs within the Clean Air Act. ROA at 6–8. Although none of the regulations went unscathed, "the 2009 Endangerment Finding has, so far, been left intact." *Id.* at 7.

Despite their activity, however, the EPA has still failed to take any action regarding CHAWN's petition. *Id.* at 6–7. After waiting ten years for EPA action, CHAWN finally sought judicial relief. *Id.* at 5. In April 2019, CHAWN provided the necessary 180-day notice to the EPA that CHAWN intended to sue the agency. *Id.* In December, CHAWN filed a complaint in

the District Court of New Union in the Twelfth Circuit, fashioning the litigation as a citizen suit under Section 304(a) of the Clean Air Act. *Id.* EPA took no actions regarding CHAWN's lawsuit. *Id.* Coal, Oil, and Gas Association ("COGA") moved to intervene as of right, pursuant to Federal Rules of Civil Procedure 24(a); the district court granted this motion. *Id.* Once the lawsuit commenced, the both COGA and the EPA responded to the complaint. *Id.*

III. The District Court Granted CHAWN's Motion for Summary Judgment in Part and Denied in Part.

All parties moved for summary judgment. *Id.* COGA sought a declaration that the 2009 Endangerment Finding was contrary to law, which EPA joined in regards to the finding of endangerment as to public health but maintains the finding is valid in regards to public welfare. *Id.* CHAWN sought an order compelling the EPA to perform its mandatory duty; it also sought a declaration that states the Endangerment Finding trigged a nondiscretionary duty and that the ten-year delay was unreasonable. *Id.* CHAWN further asserted that the Endangerment Finding was valid as to public health and public welfare. *Id.* EPA denies any nondiscretionary duty and, in the alternative, states the regulatory complexities justify its ten-year delay. *Id.*

The district court found: (1) the 2009 Endangerment Finding is valid as to public welfare but not public health; (2) the EPA has a nondiscretionary duty to list GHGs as a criteria pollutant; and (3) the EPA's ten-year delay was unreasonable. *Id.* at 13–14.

This appeal followed.

SUMMARY OF THE ARGUMENT

Section 304(a) of the Clean Air Act waives sovereign immunity, which allows citizens to bring a civil action against the EPA Administrator for failing to perform a nondiscretionary duty. The Act also grants exclusive jurisdiction to federal district courts to review citizen suits and compel agency action, *see* part I.A, even if the venue is improper, *see* part I.B. Exercising its

authority. the district court properly found that (1) the Endangerment Finding is valid as to public welfare; (2) the EPA has a nondiscretionary duty to list GHGs as criteria pollutants; and (3) the EPA's ten-year delay was unreasonable. But the district court erred in finding that Endangerment Finding was invalid as it pertains to public health.

As to Endangerment Finding, the finding has been upheld for over a decade as a result of its solid grounding in widely accepted scientific studies showing that GHGs will harm the public health and welfare of future generations. The 2009 Endangerment Finding deserves deference from the court because the agency reasonably interpreted the Clean Air Act, *see* part II.

For the nondiscretionary duty, the plain language of the statute creates a nondiscretionary duty to list a pollutant as a criteria pollutant when two conditions have been met, *see* part III.A. Because the Endangerment Finding satisfied those two conditions, *see* part III.B, the EPA had a nondiscretionary duty to list GHGs under Section 108.

Finally, the EPA's failure to act for ten years was an unreasonable delay, *see* part IV. The plain language of the Clean Air Act in tandem with the *TRAC* factors shows that the ten-year delay since the Endangerment Finding is per se unreasonable.

STANDARD OF REVIEW

A district court's decision to grant or deny a motion of summary judgment is reviewed *de novo*, and the reviewing court applies "the same standard as the district court." *Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1989); *Gross v. Hale-Halseel Co.*, 554 F.3d 870, 875 (10th Cir. 2009). When reviewing an agency's statutory interpretation, a court should be deferential to the agency's reasonable interpretation, if the statute is ambiguous. *City of Arlington v. F.C.C*, 569 U.S. 290, 296–97 (2013); *see also Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984). "Whether the complaint alleges the failure of the Administrator to perform a

nondiscretionary duty sufficient to give rise to citizen suit jurisdiction is a legal determination reviewable *de novo*." *Farmers Union Cent. Exchange, Inc. v. Thomas*, 881 F.2d 757, 760 (9th Cir. 1989).

ARGUMENT

I. The District Court Had Jurisdiction Over CHAWN's Citizen Suit Because the Complaint Alleged a Failure of a Nondiscretionary Duty and the Parties Consented to the Venue.

The district court had jurisdiction to hear CHAWN's claim against the Administrator for an alleged failure of a nondiscretionary duty, and improper venue does not divest the court of jurisdiction. Section 304(a) of the Clean Air Act waives sovereign immunity, *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (explaining sovereign immunity is a "prerequisite for jurisdiction"), and allows citizens to bring civil actions against three types of parties: an entity violating pollutions standards, a party acting without necessary permits, and the EPA Administrator for failing to perform a nondiscretionary duty, 42 U.S.C. § 7604(a) (2018).

Federal district courts have "limited but exclusive jurisdiction" over these types of citizen-suit claims. *Id.*; *e.g.*, *Envt'l Defense v. Leavitt*, 329 F.Supp. 2d 55, 63 (D.D.C. 2004); *Friends of the Earth v. EPA*, 934 F.Supp. 2d 40, 47 (D.D.C. 2013); *Zook v. McCarthy*, 52 F.Supp.3d 69, 72 (D.D.C. 2014); *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 554 n.6 (D.C. Cir. 2015) (explaining that "Congress in the 1990 Amendments to the Clean Air Act abrogated [the jurisdictional holding in *Sierra Club v. Thomas*, 828 F.2d 783, 792 (D.C. Cir. 1987)] and shifted to the district court the power to compel EPA to act"). And, although there are multiple venue options among federal district courts, an improper venue does not divest district courts of jurisdiction over Clean Air Act citizen suits. *Herrington v. Verrilli*, 151 F.Supp. 2d 449, 457 (S.D.N.Y. 2001).

A. The district court had jurisdiction over CHAWN's suit because it alleged the Administrator failed to perform a nondiscretionary duty without unreasonable delay.

The district court had jurisdiction to hear CHAWN's complaint because Section 304 of the Clean Air Act grants exclusive jurisdiction to adjudicate citizen suits that allege the Administrator failed to perform a nondiscretionary duty. 42 U.S.C. § 7604(a); *e.g.*, *Envtl Defense*, 329 F.Supp.2d at 63; *Friends of the Earth*, 934 F.Supp. 2d at 47; *Zook*, 52 F.Supp.3d at 72. Although some courts have dismissed failure-to-act claims for lack of subject-matter jurisdiction, those courts erroneously conflated subject-matter jurisdiction with failures to state a claim. *See, e.g.*, *WildEarth Guardians v. Jackson*, 885 F.Supp. 2d 1112, 1118 (D.N.M. 2012) (dismissing for lack of subject-matter jurisdiction after it had adjudicated on its merits); *Kennecott Copper Corp., v. Costle*, 572 F.2d 1349 (9th Cir. 1978) (same); *Friends of the Earth*, 934 F.Supp.2d 40 (dismissing the case for lack of jurisdiction yet explaining it could not compel the Administrator to act, which speaks to relief, not jurisdiction).

These courts often dismiss a case "for lack of jurisdiction when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim." *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (quoting *Da Silva v. Kinsho Intern. Corp.*, 229 F.3d 358, 361 (2d. Cir. 2000)). Precise analysis is critical, however, as the Supreme Court has "described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit." *Arbaugh*, 546 U.S. at 511 (2006) (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 91 (1998)). Moreover, if parties do not move to dismiss for failure to state a claim, they cannot do so on appeal, and appellate courts "ordinarily refrain from reaching non-jurisdictional questions

that have not been raised by the parties or passed on by the District Court. . . ." *Acree v. Republic of Iraq*, 370 F.3d 41, 58 (D.C. Cir. 2004) (abrogated on other grounds).

Thus, in determining whether the district court has jurisdiction over a citizen-suit claim, this Court need only consider two factors: (1) whether the complaint alleges that the Administrator failed to perform a nondiscretionary duty and (2) whether the complainant provided adequate notice. Any further analysis—such as whether the Administrator actually failed to act, whether the duty was nondiscretionary, or whether there was an unreasonable delay—goes to the complaint's merits, not the court's inherent jurisdiction.

Here, after waiting ten years for the EPA to act, CHAWN gave the EPA the required 180-day notice that it was filing this lawsuit. In its complaint, CHAWN alleged that the EPA Administrator had both failed to perform a nondiscretionary duty and had done so with unreasonable delay. These factors alone gave the district court exclusive jurisdiction to consider these claims. Analyzing the merits of whether the EPA actually has a nondiscretionary duty to list GHG as a criteria pollutant or whether there has been an unreasonable delay, is irrelevant to the threshold question of jurisdiction. Regardless of the court's disposition on those merits, Section 304(a) grants exclusive jurisdiction to district courts for the *claims* alleging failure to perform nondiscretionary duties.

B. Improper venue does not impact a court's jurisdiction, and because no party objected to the venue, the district court had jurisdiction over CHAWN's claim.

Section 304(a) also includes a venue provision for claims regarding an unreasonable delay in performing a nondiscretionary duty. *See* 42 U.S.C. § 7607(b). If a duty is performed, then Courts of Appeal review challenges to that action, pursuant to Section 307(b); that section also specifies which Circuit should review those challenges. *See id.* In contrast, district courts review *failures to perform* those duties, pursuant to Section 304(a), and the venue for these

actions mirrors those of Section 307(b). *See id.*; *see* 42 U.S.C. § 7604(a). Section 307(b) is a jurisdictional and venue statute that requires challenges to actions that have nationwide applicability be filed in the D.C. Circuit Court of Appeals. 42 U.S.C. § 7607(b); *Texas Mun. Power Agency v. EPA*, 89 F.3d 858, 863 (D.C. Cir. 1996) (concluding that the section is a "matter of venue"); *see also New York v. EPA*, 133 F.3d 987 (7th Cir. 1998); *Texas v. EPA*, 829 F.3d 405, 418 (5th Cir. 2016) (citing *Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 887–80 (D.C. Cir. 2015) for the proposition that section 307(b) "confers jurisdiction on all courts of appeals and divides venue among them.").

Taking Sections 304(a) and 307(b) together, it follows that when an Administrator fails to perform a duty that has nationwide applicability, claims against the Administrator should be filed in the D.C. District Court. *See* 42 U.S.C. §§ 7604(a), 7607(b). But the Section 307(b) reference in Section 304(a) implicates venue only, not jurisdiction. *See* 42 U.S.C. §§ 7604(a), 7607(b). Nothing about Section 307(b) venue provisions affects the district court's exclusive jurisdiction over claims alleging a failure to perform a nondiscretionary duty. Instead, Section 304(a) grants exclusive jurisdiction to district courts and "divides venue among" the district courts, based on Section 307(a). *See id.*; *Texas*, 829 F.3d at 418 (citing *Dalton Trucking*, 808 F.3d at 887–80);

These statutes suggest that the D.C. District Court would have been the appropriate venue for CHAWN's complaint as it implicates a duty that will have nationwide applicability. Nevertheless, the court maintained jurisdiction over CHAWN's complaint for two reasons. First, "[i]mproper venue is not a jurisdictional defect," *Herrington*, 151 F.Supp. 2d at 457, and "in the absence of extraordinary circumstances," district courts should decline to raise an issue of venue *sua sponte*, *Concession Consultants, Inc. v. Mirisch*, 355 F.2d 369, 371 (2d. Cir. 1966); *see also, e.g.*, *Vintage Grapevine, Inc. v. Mara*, 151 F.Supp.2d 596, 598 n. 1 (E.D.Pa. 2001) (declining to

dismiss or transfer despite improper venue because "[a]las, the potential objections to . . . venue were waived"). Second, EPA did not object to the venue, so issue is waived and should not considered on appeal.[2] *See Dalton Trucking*, 808 F.3d at 880 (explaining "[p]arties normally may consent to be sued in a court that would otherwise be an improper venue"); *National Wildlife Federation v. Browner*, 237 F.3d 670, 676 (D.C. Cir. 2001) (holding that "objections to venue may be waived"); Fed. R. Civ. P.12(h)(1).

i. Improper venue cannot strip the district court of statutorily mandated jurisdiction over citizen-suit claims.

The district court had jurisdiction to hear CHAWN's claim even if a better venue existed because "venue 'is a doctrine of convenience, not of . . . jurisdiction." *Minnesota Automotive, Inc. v. Stromberg Hydraulic Brake & Coupling Co.*, 309 F.Supp. 614, 616 (D. Minn. 1970) (quoting *Japan Gas Lighter Ass'n v. Ronson Corp.*, 257 F.Supp. 219 (D.C.N. 1966)). As already established, the Clean Air Act provides jurisdiction to district courts and specifies venues for certain claims. 42 U.S.C. §§ 7604(a), 7607(b). Other federal statutes authorize district courts to transfer cases for improper venue if it would be in "the interest of justice." *See* 28 U.S.C. §§ 1404, 1406(a). Implicit in that transferal authority is the jurisdiction over the claims, even if proper venue is lacking. *See Japan Gas Lighter Ass'n*, 257 F.Supp. at 225 n.2; *see Dalton Trucing, Inc.*, 808 F.3d at 880 (explaining that courts "have the 'inherent power to transfer cases over which we have jurisdiction . . .'") (quoting *Alexander v. Comm'r of Internal Revenue*, 825 F.2d 499, 501 (D.C. Cir. 1987) (per curiam)).

[2]As an intervenor-defendant, COGA consented to the district court's venue and could not have raised a defense claiming improper venue. *Intrepid Potash-New Mexico, LLC v. United States Dep't of Interior*, 669 F.Supp.2d 88, 91 (D.D.C. 2009); *Defenders of Wildlife v. Bureau of Ocean Energy Management, Regulation, and Enforcement*, 791 F. Supp. 2d 1158, 1174–75 (S.D. Ala. 2011) (concluding it would "be fundamentally incompatible with the well-reasoned majority" of circuits to allow intervenor defendants to challenge venue).

In the present case, CHAWN challenged the Administrator's failure to perform a nondiscretionary duty and brought suit in a federal district court, which has exclusive jurisdiction over those claims pursuant to Section 304(a). The nondiscretionary duty—to list a pollutant as a criteria pollutant—has nationwide applicability and would therefore be properly adjudicated in a district court within the D.C. Circuit. Nevertheless, no party objected to the venue, and the district court properly exercised discretion in adjudicating the case without transferring to a different venue. Doing so did not strip the court of jurisdiction to hear CHAWN's claim.

ii. The district court appropriately exercised jurisdiction over CHAWN's actions because EPA consented to the venue by failing to object during pleadings.

By failing to assert an improper-venue defense, EPA waived any challenges to venue and this Court should not consider waived defenses on appeal. As a threshold matter, venue is a personal privilege that can be waived. Fed. R. Civ. P. 12(h)(1); *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939) (holding that venue, "[b]eing a privilege, it may be lost"). If no party objects to the venue of a court that otherwise has jurisdiction, then it is entirely appropriate for the district court "to assert jurisdiction (because of absence of objection) over a case that it would have been authorized to adjudicate if only the [action] to be reviewed had been [applicable to] to one part of the country rather than another." *New York v. EPA*, 133 F.3d at 990.

In *New York v. EPA*, a case remarkably similar to the one at hand, the Seventh Circuit had to determine the scope of Section 307(b)'s venue provision. *Id.* There, New York relied on Section 307(b) to challenge an EPA regional rule that potentially had nationwide applicability. *Id.* Before adjudicating on its merits, the court considered the threshold, "jurisdictional-seeming issue" of venue under Section 307(b).[3] *Id*. The court concluded that if Section 307(b) was a

[3] Although it was a court of appeals considering the venue provision in *New York v. EPA*, the court acted more like a district court because Section 307(b) requires certain petitions to be filed

venue provision,[4] then "any objection to [the court] entertaining the petition is waivable and has been waived" because no party had raised a question of venue. *Id.*

Here, CHAWN filed suit in the district court within the Twelfth Circuit and EPA waived its venue defense and thus implicitly accepted the venue of the district court. The district court acknowledged there was a question of venue but did not raise the issue *sua sponte*. Instead, the district court respected the parties' acceptance of venue and appropriately adjudicated the claim based on Section 304(a) jurisdiction. Because all the parties consented to the venue, the district court had jurisdiction over CHAWN's claims.

In summary, Section 304(a) grants district courts exclusive jurisdiction over citizen suits that allege a failure to perform a nondiscretionary duty by the Administrator, and improper venue did not change the jurisdictional authority of the district court. CHAWN appropriately filed in district court and the district court here had authority over the complaint. Because it had authority, it also properly found that the EPA had a nondiscretionary duty to list GHG emissions as a criteria pollutant.

II. The EPA's Endangerment Finding that GHG Emissions Endanger Public Health and Welfare is Legally Valid.

directly in Courts of Appeals, rather than district courts. 42 U.S.C. § 7607(b). Thus, *New York v. EPA* should not be seen as a court of appeals considering venue on appeal; for Section 304(a) claims, only district courts should properly consider venue. *See* 42 U.S.C. § 7604(a).

[4] The court did not need to reach that conclusion because it found venue on other grounds, specific to that case. *New York v. EPA*, 133 F.3d at 990. Nonetheless, the underlying logic applies to all Section 307(b) and 304(a) claims.

Following the 2009 Supreme Court decision, *Massachusetts v. EPA*, the EPA Administrator issued an Endangerment Finding for GHGs. *Massachusetts,* 549 U.S. 497 (2007); Endangerment Finding, 74 Fed. Reg. 66,496. Specifically, the Endangerment Finding held that increased levels of GHGs was leading to widespread climate change, which would endanger public health and welfare.

The Endangerment Finding has been upheld for over ten years, notwithstanding recent litigation challenges and regulatory rollbacks. Furthermore, not only was the Endangerment Finding based on irrefutable science, which finds that increased GHG emissions endanger public health and public welfare, but it was also issued in strict adherence to administrative procedural requirements. As a result, the Endangerment Finding is legally valid, as to both public welfare and public health.

A. The Endangerment Finding is valid with respect to public welfare because the Administrator relied on the plain meaning of the statute and applied a wide variety of scientific analysis before reaching the conclusion.

The Clean Air Act defines public welfare as any air pollutant that adversely effects "soils, water, 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." 42 U.S.C. §7602. The Supreme Court in *Massachusetts v. EPA,* and the D.C. Court of Appeal in *Coalition for Responsible Regulation Inc.*, found that the use of the words "any air pollutant" means that the Clean Air Act intended for the EPA to regulate "all airborne compounds of whatever stripe." *Massachusetts,* 549 U.S. at 500; *Coalition for Responsible Regulation, Inc. v. EPA,* 684 F.3d 102, 134 (D.C. Cir., 2012).

A plain reading of the Clean Air Act gives the administrator leeway to make an endangerment finding if an air pollutant "may reasonably be anticipated to endanger public

health or welfare," whether it affects a listed or unlisted topic. 42 U.S.C. §7408(a). The Administrator has to meet only this low threshold to make an endangerment finding with respect to public welfare. Congress wanted the EPA to consider a multitude of dangers that would both directly and indirectly harm humans when making the endangerment finding. As a result, in the 2009 Endangerment Finding, the Administrator considered GHG effects on food and agricultural production, forestry, and water resources, among other things, to validly determined that GHGs endanger the welfare of current and future generations. Endangerment Finding, 74 Fed. Reg. at 66,498.

The Administrator considered how the elevated levels of GHGs positively and adversely affect three major sectors across America. In making the finding, the Administrator consulted studies from certified scientists around the globe and conducted a notice and comment rulemaking period. Endangerment Finding, 74 Fed. Reg. at 66,505. The Administrator concluded that the negative long-term effects of elevated GHGs outweighed any short-term benefits to public welfare.

The EPA does not currently contest the endangerment finding with regards to public welfare, and the district court upheld the finding. It is not within the purview of this Court to analyze the scientific assumptions made by each study, but rather to ensure that the Administrator made a reasonable finding based on the record. This Court should uphold the Endangerment Finding with respect to public welfare, given the in-depth analysis the Administrator pursued and reports relied upon from reputable sources, such as the United State Global Climate Research Program and the Intergovernmental Panel on Climate Change.

The EPA has determined that increased concentrations of GHGs in the atmosphere pose current and future adverse effects to public welfare. The precautionary nature of the Clean Air

Act, and the broad definition of public welfare allowed the Administrator to reasonably find that increased air pollution as a result of GHGs will endanger public welfare. Understanding these findings to be true, and knowing that GHGs are air pollutants, the Administrator had a duty to issue an endangerment finding under Clean Air Act Section 202(a) to prevent harm to current and future generations. Since it has made that determination for GHGs, the EPA must regulate those pollutants under different sections of the Clean Air Act.

B. The EPA's 2009 Endangerment Finding is valid with respect to public health because the EPA reasonably interpreted an ambiguous statute and the EPA cannot sidestep the administrative rulemaking process through this litigation.

The Endangerment Finding is valid as it pertains to public health, which the EPA has interpreted to mean something that causes human sickness or death. Endangerment Finding, 74 Fed. Reg. at 66,527. Public health—unlike public welfare—is an ambiguous term, undefined by the Clean Air Act. Endangerment Finding, 74 Fed. Reg. at 66,527. The EPA used its expertise to interpret the term and, based on its definition, found that GHG emissions endanger public health. *Id*. Even though the EPA now contests its own definition in this litigation, this Court should uphold EPA's definition for two reasons. First, under *Chevron*, reviewing courts should defer to an agency's reasonable interpretation of ambiguous statutory language. *Chevron*, 467 U.S. at 842-843. Second, the EPA cannot use judicial review to avoid a rulemaking that would be required if the EPA sought to change its Endangerment Finding regarding public health. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018).

i. The EPA's interpretation of public health is reasonable and entitled to judicial deference.

Chevron articulated a two-step test to determine if an agency's construction of the statute was reasonable. *Chevron*, 467 U.S. at 843. First, the reviewing court must determine if Congress has spoked on the issue—in other words, if the statute is ambiguous. *Id*. at 842-843. Assessing

ambiguity involves looking at the plain language of the statute or through legislative history. *Id*. "[I]f the intent of Congress is clear, that is the end of the matter." *Id.* However, if the statute is ambiguous, then the court should determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. The court cannot substitute its own interpretation for the agency's otherwise reasonable interpretation. *Id.* It is not the place of the court to look at the decision of the Administrator "as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality." *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C.Cir.1976). Rather, the court must defer to the expertise of the officials leading the agency. *Am. Farm Bureau Fed'n v. EPA,* 559 F.3d 512, 519 (D.C.Cir.2009).

Here, neither the plain language nor legislative history of the Clean Air Act gives insight into the congressional intent of the meaning of public health. As a result, the Administrator appropriately considered a variety of definitions that could be used to make the endangerment finding. Endangerment Finding, 74 Fed. Reg. at 66,547. This court must first analyze whether the EPA's construction of public health was reasonable in the endangerment finding.

On multiple occasions the Supreme Court has held that the language of Clean Air Act Section §202(a)(1) requires the Administrator to consider two factors before making an endangerment finding: (1) whether the air pollution is reasonably anticipated to endanger public health and (2) whether the source of the emissions causes or contributes to that endangerment. 42 U.S.C. §7521; *Massachusetts,* 549 U.S. at 532; *Coalition for Responsible Regulation Inc.,* 684 F.3d at 118. *Massachusetts* held that these two questions require the administrator to exercise a scientific judgement rather than put forward policy justifications. 549 U.S. at 501. Specifically, the court emphasized that policy judgements "have nothing to do with whether greenhouse gas

emissions contribute to climate change." *Id*. at 532. Recognizing that policy judgements have no bearing on an Endangerment Finding for GHGs, the Administrator correctly relied on scientific judgement to ensure that the public health of Americans would be protected.

For example, the Administrator considered, among others, the direct temperature effects on public health, air quality effects, and the potential changes in vector-borne diseases. Endangerment Finding, 74 Fed. Reg. at 66,524. The Clean Air Act allows the administrator to make an endangerment finding without identifying a specific quantitative threshold for which a pollutant becomes dangerous to public health, mainly because the "endangerment criteria was intended to be precautionary in nature, . . . and that the risk of harm needed to be considered in the context of the severity of the potential harm." Endangerment Finding, 74 Fed. Reg. at 66,509. With this wide latitude to reasonably make an endangerment finding without setting specific threshold danger levels, the Administrator based her finding on "the total weight of scientific evidence, and what the science has to say regarding the nature and potential magnitude of the risks and impacts across all climate-sensitive elements of public health. Endangerment Finding, 74 Fed. Reg. at 66,523.

More importantly, scientific uncertainty does not inherently make the Administrator's conclusion invalid. The D.C. Circuit in *Ethyl* found that if "a statute is precautionary in nature and designed to protect the public health, and the relevant evidence is difficult to come by, uncertain, or conflicting . . . the EPA need not provide rigorous step-by-step proof of cause and effect to support an endangerment finding." *Ethyl*, 541 F.2d at 28. The Supreme Court built on this reasoning on review and found that pollutants only need to be "potentially harmful" to warrant an endangerment finding. *Id.* Given the extreme deference to the Administrator's

conclusions, regardless of scientific uncertainty, it is clear that the Endangerment Finding was valid based on three specific categories of sound scientific considerations.

First, relied on evidence regarding GHGS direct temperature effects on public health. The Administrator found that in addition to heat being the leading cause of weather-related deaths in the United States, the number of severe heat waves are projected to intensify in magnitude and duration. Endangerment Finding, 74 Fed. Reg. at 66,524. This is expected to increase heat related mortality and morbidity, especially among the elderly, young and frail. *Id*. at 66,524–25. Although increases in temperature are also expected to reduce the risk of death related to extreme cold snaps, the Administrator aptly noted a USGCRP study that showed between 1989 and 2000, cold snaps increased death rates by 1.6 percent while heat waves increased death races by 5.7 percent. *Id.* This marked difference allowed the Administrator to reasonably conclude that the decrease in deaths due to warming is highly unlikely to outweigh the increases in heat-related mortality due to global warming. *Id.* These scientific findings and predictive models certainly meet the "potentially harmful" standard set out in Ethyl that allowed the EPA to make an endangerment finding.

Second, the EPA relied on sound science regarding the impact of increased GHGs on the ozone. Increased levels of GHGs in the atmosphere is expected to increase regional ozone pollution, which is associated with respiratory illness and premature death. Ozone is a criteria pollutant regulated by the EPA under the National Ambient Air Quality Standards ("NAAQS"). 42 U.S.C. §7409. Criteria pollutants are regulated for the purpose of reducing harm to public health and the environment. *Id.* The Administrator, in making a logical connection between GHGs increasing ozone pollution, and ozone being harmful to public health, again found that the

scientific evidence weighed heavily in support of making the Endangerment Finding. Endangerment Finding, 74 Fed. Reg. at 66,531.

Finally, the EPA relied on sound science when it considered relationship between GHGs and extreme weather events. The frequency of extreme weather events has increased around the globe in the last half-century, and the Administrator relied on IPCC findings to show that this increased frequency and magnitude of heavy precipitation, cyclones, hurricanes, and fires increase the risk of death and injury. Endangerment Finding, 74 Fed. Reg. at 66,525. Across the country, Americans have experienced a rise in extreme weather events from the gulf coast and eastern seaboard to the pacific northwest. Endangerment Finding, 74 Fed. Reg. at 66,531. All of these events impact public health and can lead to increased death, injury, infectious disease, and mental health problems. *Id.* These direct injuries to public health as a result of climate change remain infrequent; however, the greater risk associated with each extreme weather event supported the Administrators Endangerment Finding.

ii. If the EPA wants to change its endangerment finding relating to public health, it must go through notice-and-rulemaking and not rely on backdoor litigation.

In the instant case, the EPA has made a 180-degree about-face from the 2009 Endangerment Finding. In this litigation, the current Administrator believes that the Endangerment Finding was invalid with relation to public health—though nothing in the district court record suggests this is an agency-wide decision. ROA at 5. Courts should be wary of agency's using post-hoc rationalization in litigation, especially when those claims go against the policy that the agency has promulgated in the past. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018). Although the EPA has full discretion to reverse policy decisions, it must adhere to the Administrative Procedure Act to do so.

It's obvious why the EPA is attempting to use litigation rather than rulemaking to change its policy regarding this endangerment finding. Not only is rulemaking process arduous and expensive, but the change would be subject to judicial review under the *Fox Television* standard. The Supreme Court in *F.C.C. v. Fox Television Stations, Inc.*, found that if an agency is changing its stance on a previously determined final action, it must show that the new policy rests on facts that contradict the facts underlying the previous stance. 567 U.S. 239 (2012). In *Fox Television*, the Federal Communications Commission ("FCC") charged multiple radio stations for their use of fleeting expletives during live broadcasts after many years of allowing such language. *Id*. at 243. The court held not only that the FCC needed to give the radio stations advanced notice of the policy change before issuing penalties but also that new policies require reasoned explanations. *Id*. at 250. This was mostly due to the fact that industry practitioners had developed a serious reliance interests on previously promulgated policy and rules, and a whimsical change did not comport with typical due process rights. *Id.* Further, the Supreme Court found that deregulation requires in depth discussion from the agency in question if it is to avoid a ruling of arbitrary and capricious under section §706 of the Administrative Procedure Act. *Id.* at 254.

In this case, the EPA has taken a similar action to that taken by the FCC in *Fox Television*. The EPA has arbitrarily decided that although the endangerment finding is valid with relation to public welfare, it is not valid with respect to public health. This change did not arise with a reasoned explanation. To make a change and show reason, the EPA would face the insurmountable task of justifying a change in facts—which the science does not support—and would have to consider the reliance interests of industry. This change would be subject to public

notice and comment, so that the EPA could prove that it came to a reasoned explanation for its change.

The EPA cannot rely on litigation to avoid these statutory requirements. *Regents of the Univ. of Cal.*, 908 F.3d at 492. The sudden change not only disrupts industry but also invites a ruling of arbitrary and capricious decision making that may be influenced by political pretext. *See Dep't of Com. v. New York*, 139 S.Ct. 2551, 2575–76 (2019) (overturning an agency decision because it was pretextual).

Overall, the EPA has made a change in their stance without going through the proper notice and comment rule making procedures, or even notifying industry to the change. This change with regard to public health is arbitrary and capricious, and the EPA needs to consider taking the adequately prescribed administrative path if they wish to erroneously continue down the path of not supporting the Endangerment Finding with regard to public health.

Because the Endangerment Finding is valid, the EPA has determined that GHGs endanger public health and welfare; this acknowledgement has prompted the EPA to take action, attempting to better control GHG and mitigate climate change. Some of these actions been discretionary, others mandatory.

III. Based on the Plain Language of Section 108 and the 2009 Endangerment Finding, the EPA has a Nondiscretionary Duty to List GHGs as a Criteria Pollutant.

The EPA has a nondiscretionary duty to list GHGs as a criteria pollutant under Section 108 because the Administrator determined that GHG emissions enter the ambient air through various mobile and stationary sources and endanger public health and welfare.

Section 108 of the Clean Air Act states that the EPA Administrator "shall from time to time" create a list of so-called criteria pollutants, for purposes of establishing national ambient

air quality standards (NAAQS). 42 U.S.C. § 7408(a).[5] Pollutants must be listed as criteria pollutants when three criteria are met: (A) the Administrator determines that emissions "cause or contribute to air pollution which may reasonably be anticipated to endanger public health and welfare"; (B) the emissions' presence "in the ambient air results from numerous and diverse mobile or stationary sources"; and (C) the Administrator "plans to issue air quality criteria." The latter is assumed when subparts (A) and (B) are met. *Natural Res. Def. Council v. Train*, 545 F.2d 320, 327 (1976) (explaining it would be "an exercise in futility if the Administrator could avoid listing simply by choosing not to . . .") [hereinafter *NRDC v. Train*].

A. The plain-language of Section 108 unambiguously imposes a duty on the EPA to list criteria pollutants.

Congress unambiguously created a duty to list criteria pollutants: the Administrator "shall from time to time" list criteria pollutants. 42 U.S.C. § 7408(a)(1). A statute that uses mandatory language such as "shall" suggests a mandatory duty. *Kingdomware Techs. v. U.S.*, 136 S.Ct. 1969, 1977 (2016) (concluding that compared to "the word, 'may,' which implies discretion, the word 'shall' usually connotes a requirement"); *see, e.g., Natural Res. Def. Council, Inc. v. James R. Perry*, 940 F.3d 1072, 1078 (9th Cir. 2019) (stating "the word 'shall' is a mandatory term"). Although this mandatory duty lies dormant "until the EPA first makes policy determinations" that a pollutant endangers public health and welfare, the duty is triggered once those conditions are met. *See Zook*, 52 F.Supp.3d at 74.

The duty exists even though there is no attendant date-certain provision because the mandate to revise "from time to time" "establishes a requirement 'under this chapter' to take a

[5] Although listing a criteria pollutant results in additional regulatory duties with strict deadlines attached, these subsequent regulatory duties are not relevant when determining whether the action was nondiscretionary.

particular action at some point." *Envtl. Integrity Project v. EPA*, 160 F.Supp.3d 50, 59–60 (D.C. Cir. 2015). In *American Lung Association v. Reilly*, the Second Circuit explained that when "a statute sets forth a bright-line rule for agency action," such as a specific time frame, then "there is no room for debate—congress [sic] has prescribed a categorical mandate that deprives [the agency] of all discretion *over the timing* of its work." 962 F.2d 258, 263 (2d. Cir. 1992) (emphasis added). For statutes that "require agency action at indefinite intervals," the agency has discretion *as to timing*—but discretion over timing is not discretion over performance. *See id.* The statute still demands action.

Here, the 2009 Endangerment Finding instigated the nondiscretionary duty to list GHGs as a criteria pollutant under Section 108.

B. The 2009 Endangerment Finding satisfies the prerequisites for Section 108(a)(1), prompting EPA's nondiscretionary duty to list GHGs as a criteria pollutant.

Nearly half a century ago, the Supreme Court unequivocally held that "once the conditions of [Section] 108(a)(1)(A) and (B) have been met, the listing . . . and the issuance of air quality standards . . . become mandatory." *NRDC v. Train*, 545 F.2d at 328. Since that time, courts have repeatedly upheld *NRDC v. Train*'s holding. *See, e.g.*, *Ctr. for Biological Diversity v. EPA*, 749 F.3d 1079, 1083 (D.C. Cir. 2014) (noting the "EPA is required to regulate any airborne pollutant which, in the Administrator's judgement, 'may reasonably be anticipated to endanger public health or welfare'" (quoting 42 U.S.C. § 7408(a)(1)(A))); *Zook*, 52 F.Supp.3d at 74 (stating "[Section 108] makes clear that EPA's listing duty is a nondiscretionary duty to list any pollutant that EPA determined meets the criteria in Section 108(a)(1)(A) and (B)"). In *Friends of the Earth*, plaintiffs filed a citizen suit, seeking to compel the EPA to both issue an endangerment finding for a pollutant and subsequently list it as a criteria pollutant under Section 108. *Friends of the Earth v. EPA*, 945 F.Supp. 2d at 51. The district court ultimately dismissed

the claim, but in its analysis explained that for Section 108 purposes, "[t]he finding or 'judgment' comes first, and it triggers the mandatory duty." *Id.*

Thus, for Section 108 purposes, two conditions must be met to trigger the duty. First, the Administrator must determine that the pollutants' emissions "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A). Second, the emissions' presence "in the ambient air results from numerous or diverse mobile or stationary sources." *Id.* §7408(a)(1)(B).

In the 2009 Endangerment Finding, the Administrator concludes that GHG emissions, stemming from a variety of mobile and stationary sources, endanger public health and welfare. The standards for an endangerment finding under Section 108 are the same for Section 202: the evidence must demonstrate that the emissions endanger public health and welfare and must come from a variety of sources. *See* 42 U.S.C. §§ 7521, 7608(a); *see also* Endangerment Finding, 74 Fed. Reg. at 66,506. Even though the 2009 Endangerment Finding was issued for Section 202 purposes, the scientific findings are statute-neutral. That is, the Administrator's determination that GHG emissions endanger public health and welfare stemmed from scientific analysis separate from any statutory regime. Endangerment Finding, 74 Fed. Reg. at 66,535. It would defy logic and be a quintessential example arbitrary and capricious decisionmaking to allow the Administrator change neutral, scientific findings for purposes of different statutory regimes. Therefore, if the Administrator finds a pollutant endangers public health and welfare, emissions of which enter the ambient air through varied mobile and stationary sources, then that conclusion must be true and valid, period.

Over the past ten years, the EPA's actions have reflected this understanding. After issuing the Endangerment Finding, the EPA has promulgated regulations based on the

Endangerment Finding. *See* ROA at 6–7. EPA knew that the Endangerment Finding created new responsibilities for the agency and it has been dutifully integrating GHG-emission into its regulatory scheme. *See, e.g.*, 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); *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (reviewing EPA's regulations of GHG emission in new passenger vehicles and light trucks), *rev'd* on other grounds in *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014); *see also* Carbon Pollution Emission Guidelines for Existing Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015).

Through the 2009 Endangerment Finding, the Administrator concluded that GHGs both emit from a variety of sources and endanger public health and welfare. Consequently, the Administrator satisfied the prerequisites under Section 108, thus prompting agency action. Since 2009, the EPA has had the nondiscretionary duty to list GHGs as a criteria pollutant under Section 108, the failure of which is reviewed under an unreasonable delay standard.

IV. Based on the Six *TRAC* Factors, The EPA Unreasonably Delayed When it Failed to List GHGs as Criteria Pollutants For Over Ten Years.

Under the so-called "*TRAC* Factors," EPA failure to act for ten years was an unreasonable delay. The D.C. Circuit established six factors that can be considered when evaluating whether a federal agency has unreasonably delayed completing a statutory obligation. *Telecommunications Research and Action Center v. F.C.C.* 750 F.2d 70 (D.C. Cir. 1984) [hereinafter "*TRAC*"].

A. The the rule of reason dictates that EPA's ten-year-delay is unreasonable.

The first factor in assessing claims of agency delay is whether the time taken by the agency to make the decision in question was governed by the "rule of reason." The rule of reason considers the complexity of the task, the significance of the outcome, and the resources available to the agency. *Potomac Electric Power Co. v. ICC*, 702 F.2d 1026, 1034 (D.C. Cir. 1983) [hereinafter "*PEPCO*"]; *see also Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003).

In *PEPCO*, the Interstate Commerce Commission delayed a decision on train tariffs for over eight years. The Commission closed and reopened the public record multiple times to collect more data in that time, which was allowed by Railroad Revitalization and Regulatory Reform Act of 1976; however, the court found that the "excessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for parties." *PEPCO*, 702 F.2d at 1034. (quoting *Nader v. F.C.C.*, 520 F.2d 182, 207 (D.C. Cir. 1975), for that proposition that excessive delay can lead to the breakdown of the regulatory process).

Similarly, in *MCI Telecommunications*, the D.C. Circuit found that the F.C.C had to make final tariff filings within a reasonable time frame after filing a proposed set of tariff revisions. *MCI Telecommunications Corp. v. F.C.C.* 627 F.2d 322, 340 (D.C. Cir. 1980). The court emphasized that the "best must not become the enemy of the good" when crafting final agency decisions, and that "nine years should be enough time for any agency to decide almost any issue. There comes a point when relegating issues to proceedings that go on without conclusion in any kind of reasonable time frame is tantamount to refusing to address the issues at all and the result is a denial of justice." *Id.* The court found that the "enormous complexity of

ratemaking" is not a legitimate reason to unduly delay, especially when it impedes upon the credibility of the agency. *Id.* at 340–341.

Here, the Administrator's delay of ten years between making the Endangerment Finding and regulating GHGs as criteria pollutants does not comply with the rule of reason. The EPA contested that extreme complexity was holding up the decision-making process, an excuse that was deemed unacceptable for unreasonable delay in *MCI*. *Id.* Further, public faith in federal agencies is tantamount to widespread compliance of promulgated regulations, and the regulation of GHGs is not different. The Administrator should not be searching for the absolute perfect answer to how to regulate GHGs as criteria pollutants at the cost of sapping the public's confidence in the EPA.

B. Without a clear-cut deadline, the EPA was required to regulate within a reasonable time frame, which is less than ten years.

A court must consider whether Congress provided a clear deadline at which it expects the agency to act. The Clean Air Act Section 108 does not provide a specific timetable but instead requires the Administrator to act "time to time,…revise, a list which includes each air pollutant." 42 USC §7408(a)(1).

The D.C. Court of Appeals found in *Auchter* that a three-year period between a finding of endangerment and a final rule promulgation was unreasonable. *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150 (D.C. Cir. 1983). In *Auchter*, the Occupational Safety and Health Administration ("OSHA") made a finding that elevated levels of ethylene dibromide and ethylene oxide, which are frequently used as sterilizing agents and pesticides, endangered the health of workers that were regularly around the chemicals. *Id*. at 1157–1158. OSHA proceeded

through the process of a proposed rulemaking after making the finding, but then waited for three years to issue a final rule. *Id.* at 1158. The court analyzed OSHA's enabling statute and found that the timeframe of "[t]hree years from announced intent to regulate to final rule is simply too long given the significant risk of grave danger." *Id.* at 1157. The court went on to consider that a three-year delay might be reasonable in the sphere of economic regulations, but when public health is at risk, a three-year delay was unreasonable, and the agency must move more expeditiously. *Id*. at 1158.

The D.C. Court of Appeals, one year later, found that when an agency's lack of action is being contested as unreasonably delayed, the reviewing court should consider the pace of the agency's decision making process. *Public Citizen Health Research Group v. Commissioner*,740 F.2d 21, 33–34 (D.C. Cir. 1984) [hereinafter ("*PCHRG*")]. In *PCHRG,* the Food and Drug Administration ("FDA") was considering a rule that would require pharmaceutical producers to label aspirin as potentially dangerous to children recovering from chickenpox. *Id*. at 22. The FDA released a notice of proposed rulemaking in June of 1982 and subsequently spent five months preparing a final rule. However, in November of 1982, the FDA received a letter from an industry group that encouraged them to conduct more research before issuing the final rule. *Id.* at 26–27. After receiving this letter, and having already considered conclusive scientific evidence that opposed the letter, the FDA reversed course and chose to refrain from issuing a final rule. The court found this to be an unreasonable delay. *Id*. at 28.

In the case at hand, the EPA made an endangerment finding for GHGs in 2009 and have let ten years pass without regulating them as criteria pollutants. Under the standards from *Auchter*, this court should consider that a three-year delay was considered to be unreasonable in terms of OSHA promulgating a final rule. *Auchter*, 702 F.2d at 1152. Similar to *Auchter*, the

Clean Air Act does not provide a set timetable for when the Administrator must regulate GHGs as criteria pollutants. 42 U.S.C. §7408. This court can look to the language of the statute to find that "from time to time" does not allow a ten-year delay, and according to *Auchter*, it might not allow a three year delay when public health is at risk. *Auchter*, 702 F.2d at 1158.

This court can also find that the EPA has made a similar reverse in course as the FDA did in *PCHRG*. *PCHRG*, 740 F.2d at 27. After making the 2009 Endangerment Finding, the EPA was obligated to regulate dangerous GHGs as criteria pollutants, but in their long-winded pursuit of economic and scientific fact-gathering, it has made a reverse in course and nearly decided to not regulate GHGs at all. This reverse in course and refrain from regulation is a tactic to unreasonably delay the statutory mandate laid out in Section 108 of the Clean Air Act.

C. Human health and welfare are at stake, so agency delay in regulation is not tolerated.

This Court must also consider whether the delay by the EPA was reasonable given the known health consequences of elevated levels of GHGs. In both *Auchter* and *PCHRG*, courts considered how the delay under review affected health and welfare and therefore was less tolerable than a delay in economic regulation. *Auchter*, 702 F.2d at 1157; *PCHRG*, 740 F.2d at 32 As discussed above, the court in *Auchter* found that when public health was at risk and OSHA refrained from regulating harmful chemicals, a three-year delay was unreasonable. *Auchter*, 702 F.2d at 1158. In *PCHRG*, the court found that a delay "is particularly troubling in that the pace of agency decisionmaking may jeopardize the lives of children." *PCHRG*, 740 F.2d at 34.

In terms of the Clean Air Act, the EPA made a resolute statement with its 2009 Endangerment Finding that public health would be adversely affected unless levels of

atmospheric GHGs were reduced. There is no question that, similar to *Auchter* and *PCHRG*, public health is directly at risk from elevated levels of GHGs, and as a result, agency delay should be more strictly scrutinized. In fact, it's possible that even a three-year delay was unreasonable for the passage of time between the endangerment finding and regulation of GHGs as criteria pollutants.

D. EPA's delay was unreasonable because delayed public health is jeopardized.

Although the judicial branch should not step in to dictate how an agency should prioritize daily work, multiple courts have found that regulating and rulemaking with regard to public health should receive an agency's highest priority. In *Auchter*, the D.C. Circuit did not dictate a set schedule for OSHA to regulate the harmful chemicals in question, but it did direct the agency to "proceed on a priority, expedited basis" given "the significant risk of grave danger to human life." *Auchter*, 702 F.2d at 1159. In *Auchter*, the court discussed the importance of assessing an agency's competing priorities for each particular case, ensuring that human life and public health be considered more important against other potentially competing priorities. *Id*. at 1157.

In this case, the administrator undoubtedly had other important priorities to consider. It's highly likely that other priorities to be considered by the EPA also affected public health. However, this court should consider the administrator's lack of expediency after making the endangerment finding. It was clear from the endangerment finding that seriously detrimental health outcomes would arise as a result of elevated GHG levels, however, that did not seem to encourage the administrator to proceed on an expedited basis, as was ordered in *Auchter*. Endangerment Finding, 74 Fed. Reg. at 66,498. This court may find it helpful to determine a specific deadline for the EPA to promulgate regulations for GHGs given the factual circumstances discussed above and the ten years of delay that have already passed.

E. Given the breadth and extent to which individuals, EPA's ten-year delay was unreasonable.

This Court must consider the risk posed by GHGs and the extent to which public health will be adversely affected. Because the public health risk posed by GHGs are quantitatively and qualitatively cognizable, this court should find that the administrator's ten year delay was unreasonable.

In *Auchter*, the D.C. Circuit examined evidence of the risk posed by ethylene dibromide and ethylene oxide and how many individuals were regularly exposed. 702 F.2d at 1155. The court found it important to understand not only the sheer number of individuals that were exposed on a daily basis, but also the magnitude of harm associated with each exposure. *Id.*

In the case of the Clean Air Act and GHGs, every single American's public health is adversely affected. There is potentially no public health concern that is more widespread than elevated levels of GHGs in the atmosphere, considering they are well-mixed and affect all people regardless of geography. Further, the public health concerns discussed above illustrate the magnitude of risk that comes from delay, ranging from mild asthma to extreme weather events that claim lives. This court should find that the breadth and magnitude at which GHGs affect public health is obvious, and as a result the ten year delay in regulation is unreasonable.

F. The court need not find any impropriety lurking behind agency lassitude to hold that agency action is unreasonably delayed.

The administrator's delay in regulating GHGs under Section 108 of the Clean Air Act should still be considered unreasonable even if it was not a cause of poor judgement or impropriety. 42 U.S.C. §7408. In *PCHRG*, the court stressed that they do not need to "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'" *PCHRG,* 740 F.2d at 34. Further, good faith of an agency in taking steps to address the delay is not dispositive in finding unreasonable delay. *Liberty Fund, Inc. v. Chao*, 394 F.

Supp.2d 105 (D.D.C. 2005). In *Liberty Fund*, the agency provided a sound justification for the delay, which was still not enough to stave off a finding of unreasonably delay, given the weight of the other *TRAC* factors. *Liberty Fund*, 394 F. Supp.2d at 120.

In this case, the EPA may be acting in good faith to find the best possible answer for regulating GHGs under the NAAQSs; however, a lack of faith, or even clear evidence of good faith to limit the delay, does not necessarily mean that the agency was diligent and reasonable in its delay. Importantly, the D.C. Circuit recently found that this 6th factor is "hardly ironclad, and sometimes suffers from vagueness." *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016). So, even if this court finds that the EPA was diligently working in good faith towards a regulatory solution, this sixth factor does not deserve as much weight as the other five previously discussed.

As many courts have stated, an analysis based on the unique circumstances of each case, considering all of the *TRAC* factors, is crucial to determine if an agency unreasonably delayed its obligation to act. This court should find that the administrator's ten year delay was unreasonable.

CONCLUSION

The EPA has a nondiscretionary duty to list GHGs as a criteria pollutant under Section 108(a), and a ten-year delay is per se unreasonable. For the foregoing reasons, this Court should: affirm the district court in that the (1) EPA had a nondiscretionary duty to act; (2) the EPA acted with unreasonable delay, and (3) the Endangerment Finding is valid as to public welfare; this Court should reverse the district court's determination regarding the Endangerment Finding relating to public health.