NO:

In the

Supreme Court of the United States

SAMUEL ZOOK, MICHELLE McCLAIN-KRUSE,
BIRGITTA MEADE, and ANNETTE LAITINEN,

Petitioners,

vs.

GINA McCARTHY and the UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Sections 108 and 111 of the Clean Air Act, 42 U.S.C. §§ 7408 and 7411, require the Environmental Protection Agency (EPA) to revise the list of regulated air pollutants and regulated sources of air pollution "from time to time," to add those pollutants and sources which in the EPA's judgment "may reasonably be anticipated to endanger public health or welfare."

The citizen suit statute in the Clean Air Act, 42 U.S.C. § 7604, authorizes citizens to sue the EPA for violation of a non-discretionary duty, including duties unreasonably delayed. The EPA has not listed pollutants from animal feeding operations (AFOs) as regulated pollutants nor listed AFOs as regulated sources of pollution under the Clean Air Act.

The question presented for review is whether the "endangerment clause" in §§ 108 and 109, in light of the mandatory structure of the statutes, makes the duty to list pollutants and sources discretionary, precluding enforcement under the citizen suit statute.

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III. OTHER AUTHORITIES

Jillian P. Fry, et al., Investigating the Role of State Permitting and Agricultural Agencies in Addressing Public Health Concerns Related to Industrial Food Animal Production, 2014, available at http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0089870

Pew Commission on Industrial Farm Animal Production, Putting Meat on the Table: Industrial Farm Animal Production in America (Washington, DC: Pew Charitable Trusts and Johns Hopkins Bloomberg School of Public Health, 2008)

Robert J. Martineau, The Clean Air Handbook (2nd Ed.) 2004

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PRIOR OPINIONS IN THIS CASE

The following opinions in other courts in this case are attached and identified as follows:

Appendix A – The Ruling of the United States District Court for the District of Columbia, filed June 28, 2014.

Appendix B – The Judgment of the United States Court of Appeals for the District of Columbia Circuit, filed April 24, 2015.

Appendix C – The Order of the United States Court of Appeals for the District of Columbia Circuit, Denying Petitioners' Petition for Rehearing, Filed June 19, 2015.

JURISDICTION

The Judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the district court's dismissal of the Petitioners' Complaint was filed on April 24, 2015. The Order of that Court denying the Petitioners' Petition for Rehearing was filed on June 19, 2015. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THIS REVIEW

Section 108 of the Clean Air Act, 42 U.S.C. § 7408, sets out the requirements for establishing and regulating criteria pollutants:

(a) Air Pollutant List; publication and revision by Administrator; issuance of air quality criteria for pollutants.

(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant -

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;
(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and
(C) for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section.

Section 109 of the Clean Air Act, 42 U.S.C. § 7409, which comes into play after the listing of criteria pollutants pursuant to Section 108, provides:

(a) Promulgation.

(1) The Administrator —

(A) within 30 days after the date of enactment of the Clean Air Amendments of 1970, shall publish proposed regulations prescribing a national primary ambient air standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date of enactment; and
(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such

proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after the date of enactment of the Clean Air Amendments of 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare.

(1) National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

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(c) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions.

(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 108 [42 U.S.C. § 7408] and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 108 and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

Section 111 of the Clean Air Act, 42 U.S.C. § 7411, sets out the requirements for designating and listing stationary sources of air pollutants that must be regulated by the EPA:

(b) List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards.

(1)(A) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health and welfare.

(B) Within one year after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford

interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one year after such publication, such standards with such modifications as he deems appropriate.

The citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604, provides:

> (b) Authority to bring civil action; jurisdiction. Except as provided in subsection (b), any person may commence a civil action on his own behalf —
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> **********
>
> (2) 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,
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> **********
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States 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 U.S.C. § 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 U.S.C. § 7607(b). In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) shall be provided 180 days before commencing such action.

STATEMENT OF THE CASE

A. Procedural Background

The Petitioners brought this case in the United States District Court for the District of Columbia pursuant to the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604. The Petitioners alleged that the Environmental Protection Agency (EPA) has a non-discretionary duty under the Clean Air Act to list ammonia and hydrogen sulfide as regulated pollutants under the Clean Air Act and to list animal feeding operations (AFOs) as stationary sources of pollution to be regulated under the Clean Air Act.

EPA filed a motion to dismiss the Petitioners' Complaint, alleging that the EPA does not have a non-discretionary duty as alleged by the Petitioners. On June 28, 2014, the district court granted EPA's motion and entered a judgment dismissing the Petitioners' Complaint. The Petitioners appealed that decision.

The United States Court of Appeals for the District of Columbia Circuit entered a judgment on April 24, 2015, affirming the decision of the district court. The Petitioners filed a motion for panel rehearing. That motion was denied by the Court of Appeals on June 19, 2015.

B. Statement of the Facts

The Petitioners are residents of Winneshiek County, Iowa, who previously attended North Winneshiek School, currently teach at the school, or have children who attend

the school. The school is near several animal feeding operations.

A description and definition of animal feeding operations is found in EPA regulations at 40 C.F.R. § 122.23. An animal feeding operation is an open feed lot or a confinement building where animals are confined and fed or maintained for a total of 45 days or more in any 12-month period and there are no crops, vegetation, forage growth, or post-harvest residue in the area in and around the lot or confinement building. The animal feeding operation also includes the crop fields where manure from the livestock is applied.

An animal feeding operation is designated as a concentrated animal feeding operation (CAFO) based primarily on the number of animals present, e.g., more than 2,500 hogs, 1,000 beef cattle, 700 dairy cattle, 125,000 chickens. It is the concentration of animals that causes the problems of air and water pollution.

CAFOs usually have more than the minimum number of animals to qualify as CAFOs. It is common for hog confinement operations to have as many as 10,000 hogs, and it is not uncommon to have as many as 20,000 to 30,000 animals. Beef cattle in open feedlots can number as many as 4,000 to 5,000 head. These are not farms that one pictures

where animals are outdoors munching on grass. Animals in animal feeding operations are confined, either cramped into buildings or in feedlots.

Manure from open feedlots is collected in piles on a short-term basis and then applied to the land. Manure from confinement operations is usually collected in large pits under the facility. The manure is then emptied once or twice a year and applied (or over applied) to crop fields.

During the time that the manure is in the piles or in the pits, it is undergoing anaerobic digestion, constantly generating and sending poisonous sewer gases into the air. But unlike a municipal sewage treatment plant, the animal waste is not treated and the pollutants are not diluted. Thus, the manure from hogs, which is 5 times more polluting than human waste, in a 10,000 head CAFO is the same as the waste from a city of 50,000 people, without the pollution control treatment. This is like a third-world country that does not treat its waste and allows it to pollute the air and the water. We would never allow that quantity of human sewage to sit in an open pit without treatment for up to 12 months and then allow it to be dumped on farm fields without being treated, yet that is exactly what is happening with animal sewage.

As the Pew Commission on Industrial Farm Animal Production described it:

> Decomposing manure produces at least 160 different gases, of which hydrogen sulfide (H_2S), ammonia, carbon dioxide, methane, and carbon monoxide are the most pervasive. These gases may seep from pits under the building or they may be released by bacterial action in the urine and feces on the confinement house floor. Possibly the most dangerous gas common to industrial food animal production (IFAP) facilities is hydrogen sulfide. It can be released rapidly when the liquid manure slurry is agitated, an operation commonly performed to suspend solids so that pits can be emptied by pumping. During agitation, hydrogen sulfide levels can soar within seconds from the usual ambient levels of less than 5 ppm to lethal levels of over 500 ppm. Animals and workers have died or become seriously ill in swine industrial farm animal production (IFAP) facilities when hydrogen sulfide has risen from agitated manure in pits under the building. Hydrogen sulfide exposure is most hazardous when the manure pits are located beneath the houses, but an acutely toxic environment can result if gases from outside storage facilities backflow into a building (due to inadequate gas traps or other design faults) or if a worker enters a confined storage structure where gases have accumulated.

Pew Commission on Industrial Farm Animal Production, Putting Meat on the Table: Industrial Farm Animal Production in America (Washington, DC: Pew Charitable Trusts and Johns Hopkins Bloomberg School of Public Health, 2008), p. 23.

AFOs, especially those classified as CAFOs, have significantly increased in numbers in Iowa, and nationally, over the past 20 years. As set out in the Petitioners' Complaint filed in the district court, scientific studies

over the past several years have confirmed that emissions of pollutants from AFOs, such as ammonia, hydrogen sulfide, particulate matter, and volatile organic compounds, cause health effects on people near AFOs. Some of these studies have specifically studied AFOs in Iowa, and one study was even focused on North Winneshiek School, where the Petitioners work, attended school, or have children who attend school there.

In 2001, the Emission Standards Division of the Environmental Protection Agency issued a report documenting the nature and effects of air emissions from AFOs. In 2002, a team of scientists from Iowa State University and the University of Iowa completed a report on air emissions from AFOs. The authors of the report made a recommendation, based on their review of credible AFO emissions research, that EPA should regulate certain pollutants released from AFOs — namely ammonia, hydrogen sulfide, and odor — under the Clean Air Act.

Also, in 2002, the Ad Hoc Commission on Air Emissions From Animal Feeding Operations, issued a report documenting the health effects of air pollutants from CAFOs. This report was funded in part by a contract between the National Academy of Sciences and the Environmental Protection Agency.

In 2003, a report was released in Missouri reporting the results of an ammonia exposure investigation in a community near a large swine CAFO. Monitoring results from six houses showed ammonia levels above the minimal risk levels. In response, EPA issued a memo stating that "the conclusion could be drawn that a public health hazard did exist at the time the . . . data was acquired."

In 2006, results were published of a study of asthma in children at two elementary schools in Iowa. One of the schools was near a hog CAFO and the other school was at least 10 miles from the nearest CAFO. As it turns out, the school near the CAFO was North Winneshiek School. The study found a significantly higher rate of asthma among children in North Winneshiek School than in the other school.

In 2008, the Pew Commission on Industrial Farm Animal Production released a comprehensive report on the impacts of industrial livestock production. This report concluded that "EPA should develop a standardized approach for regulating air pollution" from AFOs under the Clean Air Act.

In 2009, researchers from the University of Georgia released the results of a study of ammonia concentrations in the ambient air near poultry houses. The study indicated that just one broiler (chicken) CAFO with fewer than

100,000 birds can cause ambient ammonia levels to exceed chronic and acute health exposure limits.

Pursuant to an agreement between EPA and the livestock industry in 2005, the industry funded a study of air emissions from AFOs. The results of this National Air Emissions Monitoring Study (NAEMS) were published in January of 2011. That data showed levels of ammonia, particulate matter, and hydrogen sulfide in excess of federal air quality standards.

In 2011, a study was conducted in 40 homes in the Yakima Valley in Washington State where 61 dairy CAFOs operate. Airborne contaminants were found in significantly greater levels at homes near dairy CAFOs. The study concluded that dairy operations increase community exposure to pollutants with known human health effects.

The Petitioners attached to their Complaint, as Exhibit 1, a more complete list of studies and articles relating to pollution from AFOs. These resources are publicly available and would have been available to the EPA. Many of these studies were funded by and/or submitted to EPA. EPA has therefore known about these studies for years, but the agency has taken no action to regulate these pollutants from AFOs.

The purpose of the Clean Air Act is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). It is EPA's duty to fulfill this purpose. If EPA simply refuses to regulate air pollution from AFO's in spite of all the evidence, it is failing to carry out its duty.

At present, the protection of the public from air pollution from AFOs is woefully inadequate. A recent study from Johns Hopkins University documents what the study describes as "substantial gaps" in the regulatory framework to protect public health. Jillian P. Fry, et al., Investigating the Role of State Permitting and Agricultural Agencies in Addressing Public Health Concerns Related to Industrial Food Animal Production, 2014, available at http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0089870. The study cites the 2,400% increase in the size of hog operations from 1987 to 2007, the 613% increase in the size of dairy operations and a 127% increase in chicken operations during that same period.

The study then refers to a wide range of research documenting the adverse health impacts of AFOs. But the study concludes, "Despite health risks posed by these operations, regulation of IFAP [industrial food animal

production] is limited . . . .” One state regulator reported to the study’s investigators, “There are no state/federal regulations over air emissions.” The study therefore concludes that one of the barriers identified that prevent adequate regulation of AFOs is “narrow or inadequate regulations.” The study further concludes:

> Given the near absence of explicit public health protections in current IFAP regulations, and the findings about responses from government agencies when issues are brought to their attention, there is a clear need for a more comprehensive public health response to IFAP. . . . The public health implications of IFAP are increasingly clear, and regulations should ensure proper monitoring, oversight, and response by government agencies to protect public health.

The Johns Hopkins study demonstrates dramatically why EPA must take the action requested by the Petitioners for the protection of public health and why EPA’s inaction cannot be justified.

REASONS FOR GRANTING THIS PETITION

As described above, animal feeding operations are a serious health hazard. It is clear that Sections 108 and 111 of the Clean Air Act require the EPA to list in a timely manner pollutants and sources of pollution that “may reasonably be anticipated to endanger public health and welfare.” It is also clear that the citizen suit provision of the Clean Air Act is designed to allow citizens to force

EPA to take action when it has refused to do so. EPA should not be allowed to take the position that it never has to comply with the mandates of Sections 108 and 111.

I. THE DECISION BELOW CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT THAT A STATUTE MUST BE INTERPRETED IN ITS ENTIRETY, BASED ON THE STRUCTURE AND INTENT OF THE STATUTE.

A. This Court's Prior Decisions Have Held that a Statute Must be Interpreted and Applied Based on Its Structure and Intent.

This Court has often been called upon to engage in statutory interpretation and construction. Most recently, in *King v. Burwell*, 135 S.Ct. 2480 (2015), the Court interpreted a provision of the Patient Protection and Affordable Care Act. In *King* the Court said:

> But oftentimes the "meaning — or ambiguity — of certain words or phrases may only become evident when placed in context." *Brown & Williamson*, 529 U.S. at 132, 120 S.Ct. 1291, 146 L.Ed.2d 121. So when deciding whether the language is plain, we must read the words "in their context and with a view to their place in the overall statutory scheme." *Id.* at 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (internal quotation marks omitted). Our duty, after all, is "to construe statutes, not isolated provisions." *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290, 130 S.Ct. 1396, 176 L.Ed.2d 225 (2010).

Id. at 2489.

Later, in *King*, the Court further explained:

> "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav.*

> *Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988).

Id. at 2492.

In another case, *Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427 (2014), this Court again engaged in statutory interpretation, specifically with reference to a provision of the Clean Air Act. The Court reaffirmed:

> [T]he "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 S.Ct. 1291, 146 L.Ed.2d 121 (2000). As we reiterated the same day we decided *Massachusetts*, the presumption of consistent usage "readily yields" to context, and a statutory term — even one defined in the statute — "may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Duke Energy*, supra, at 574, 127 S.Ct 1423, 167 L.Ed.2d 295.

Id. at 2441. In other words, even if the meaning of a term seems clear in isolation, it must be interpreted in the context of the statute as a whole.

The Court, in *Utility Air Regulatory Group,* went on to state:

> [W]e next consider the Agency's alternative position that its interpretation was justified as an exercise of its "discretion" to adopt "a reasonable construction of the statute." . . . We conclude that EPA's interpretation is not permissible.
>
> Even under *Chevron's* deferential framework, agencies must operate "within the bounds of reasonable interpretation." *Arlington*, 569 U.S. at ___, 133 S.Ct.

> 1863, 185 L.Ed.2d 941, 951. And reasonable statutory interpretation must account for both "the specific context in which . . . language is used" and "the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). A statutory "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988). Thus, an agency interpretation that is "inconsisten[t] with the design and structure of the statute as a whole," *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. ___, ___, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013), does not merit deference.
>
> *Id.* at 2442.

Or, as this Court said in *Michigan v. EPA*, 135 S.Ct. 2699 (2015), referring to *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778 (1984), "*Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not."

These cases, and the cases cited therein, show this Court's consistent position that words or phrases in a statute must be interpreted in the context of the entire structure and intent of the statute.

B. Sections 108 and 109 of the Clean Air Act Are Mandatory in Structure and Intent.

Section 108 of the Clean Air Act, 42 U.S.C. § 7408, clearly says that EPA "shall" list pollutants that may reasonably be anticipated to endanger public health or welfare and § 111 of the Clean Air Act, 42 U.S.C. § 7411, clearly says that EPA "shall" list stationary sources of air pollution that may reasonably be anticipated to endanger public health or welfare. The law is firmly established that use of the word "shall" creates a mandatory duty. See, *Bennett v. Spear*, 520 U.S. 154, 175, 117 S.Ct. 1154 (1997).

Petitioners brought this action as a citizen suit pursuant to 42 U.S.C. § 7604. Section 7604(a)(2) authorizes any person to bring a civil action against the EPA for failure to perform any non-discretionary act or duty under the Clean Air Act, including action unreasonably delayed. The language of the statute is clear that it is not limited to violation of a time-certain deadline. Indeed, as the district court in this case found, and the court below apparently acknowledged, that statute covers either a failure to meet a deadline or unreasonable delay in carrying out a duty (Appendix A, App. p.).

The EPA's argument to the courts below boils down to the allegation that the endangerment finding "in [the Administrator's] judgment" that precedes the requirement to

revise the listing of criteria pollutants and stationary sources under the Clean Air Act is a discretionary act that cannot be challenged by a citizen suit under 42 U.S.C. § 7604. The implication of EPA's argument is that it never has to list pollutants and stationary sources if it chooses not to make an endangerment finding. EPA's position brings to mind the New Yorker Magazine cartoon in which a businessman is on the phone, looking at his appointment calendar. He says, "No, Thursday's out. How about never — is never good for you?" In this case, never is not good for the Petitioners nor for public health and welfare.

But §§ 108 and 111 clearly state that EPA "shall" "from time to time" revise the lists of pollutants and stationary sources. As noted previously, "shall" is a mandatory term. And the phrase "from time to time" has been held to create a meaningful standard on which to judge unreasonable delay. *Am. Lung Ass'n. v. Reilly*, 962 F.2d 258 (2d Cir. 1992). So, in order for the mandatory directive of the statutes to list pollutants and stationary sources from time to time, EPA has to make endangerment findings from time to time. Therefore, EPA has a non-discretionary duty to make endangerment findings from time to time. Any other interpretation would render the statute a nullity.

Language identical to that at issue here was addressed by two district court cases, interpreting § 231 of the Clean Air Act. Although ultimately reaching different results, the two cases analyzed the important issues in the same way.

The court in *Center for Biological Diversity v. EPA*, 794 F.Supp.2d 151 (D.D.C. 2011), in holding that the endangerment finding did not preclude a citizen suit, stated:

> Congress' use of the word "shall" throughout [the statute] suggests that it intended to mandate a certain outcome – the regulation of [air pollution]. . . . That purpose would be defeated by allowing EPA to avoid triggering its obligation to regulate in the first place. Indeed, EPA offers no explanation why Congress might have mandated the second step [listing pollutants and sources] in a two-step regulatory process while leaving the first step [the endangerment finding] to the discretion of the agency; after all, if step one is discretionary, the "shall" that appears to require step two becomes largely nugatory.

794 F.Supp.2d at 160.

In a footnote, the court further explained:

> The Court does not suggest that Congress could never have a reason to create a regulatory structure in which a discretionary first step triggers a mandatory second step; but where, as here, the first step is a factual determination that does not turn on policy questions . . . – the Court sees no basis to infer that Congress intended to allow EPA to avoid the effect of mandatory statutory language merely by declining to make that determination in the first place.

Id., n. 4.

In other words, because the endangerment finding is part of the mandatory nature and intent of §§ 108 and 111 and is a factual determination, not a policy determination, EPA does not have discretion as to when or if, or never, to make the determination. The Petitioners respectfully believe the court below misapprehended the distinction between a factual judgment and a policy judgment.

In the other district court case, *Friends of the Earth v. EPA,* 934 F.Supp.2d 40 (D.D.C. 2013), the court also rejected EPA's argument that the phrase "in his judgment" gave EPA the discretion it claims to have. The court said:

> While the use of "in his judgment" reveals that Congress sought to assign the agency the responsibility to judge or determine which pollutants belong to the category the agency is required to regulate, it does not signal that Congress necessarily gave the agency complete discretion over whether and when to make that determination. The provision states that the Administrator shall issue standards applicable to the emission of "any air pollutant . . . which in his judgment causes . . . ." The decision committed to agency expertise is the substance of the determination — whether an air pollutant meets the criteria — and the word "judgment" appears to be simply a synonym for decision or determination. Thus, the sentence has the same meaning as if it said "which he finds" or "which he determines." So, the text of the statute alone does not clearly indicate that making the determination is only a discretionary duty.

934 F.Supp.2d. at 49.

And, as clearly stated by this Court in *Massachusetts v. EPA*, 549 U.S. 497, 533, 127 S.Ct. 1438, 1462 (2007):

> While the statute does condition the exercise of EPA's authority on its formation of a "judgment," 42 U.S.C. § 7521(a)(1), that judgment must 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," *ibid.* Put another way, the use of the word "judgment" is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits.

That holding by this Court restates the Petitioners' argument in this case perfectly.

Furthermore, if Congress had meant §§ 108 and 111 to be discretionary it would have used the word "may," not "shall." Congress has shown that it can do that. 42 U.S.C. § 7545(c)(1) states:

> The Administrator *may* . . . control or prohibit the manufacture . . . of any fuel or fuel additive . . . if in the judgment of the Administrator any emission product of such fuel or fuel additive causes, or contributes, to air pollution which may reasonably be anticipated to endanger the public health or welfare . . . . (emphasis added).

So, if Congress had intended EPA to have the discretion in §§ 108 and 111 that it claims to have, those sections would use the word "may," rather than "shall," as was done with respect to fuels and fuel additives.

Statutory interpretation also requires a review of legislative history, along with the language of the statute. *Chevron*, supra, 467 U.S. at 851-53, 104 S.Ct. 2778. The 1977 amendments to the Clean Air Act pertaining

to the endangerment finding were a response to the decision in *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976), where the court said that the Clean Air Act "and common sense . . . demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable," as quoted in *Massachusetts v. EPA*, 549 U.S. 497, 506, n. 7, 127 S.Ct. 1438 (2007). So, the 1977 amendments were designed to make it clear that the Clean Air Act "demand[s] regulatory action." A "demand" for regulatory action indicates that Congress intended a mandatory duty.

Based on the foregoing, the decision of the court below conflicts with relevant decisions of this court concerning statutory interpretation and construction.

II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

As was presented to this Court in *Massachusetts v. EPA*, supra, this is a case where EPA is taking the position that it has the discretion not to act. This is a recurring theme on the part of EPA. In addition to its argument in *Massachusetts*, EPA asserted in *Center for Biological Diversity* and *Friends of the Earth*, supra, that it had the absolute discretion not to take any action as required by the statute in question.

In *Environmental Defense Fund v. Thomas*, 870 F.2d 892 (2d Cir. 1989), as another example, plaintiffs sought to compel EPA to revise the NAAQS for sulfur dioxides under Section 109(d) of the Clean Air Act. That section provided that "the Administrator shall complete a thorough review of the criteria published under Section 108 . . . and promulgate such new standards as may be appropriate." *Id.* at 895 (emphasis added). In that case, much as it does here, EPA argued that the phrase "as may be appropriate" gave it discretion "simply not to address the issue with a formal public opinion." *Id.* at 898. The Court of Appeals for the Second Circuit rejected that argument, holding that "[t]he words 'as may be appropriate' clearly suggest that the Administrator must exercise judgment and the presence of 'shall' in the section implies only that the district court has jurisdiction to order the Administrator to make some formal decision whether to revise the NAAQS, the content of that decision being within the Administrator's discretion." *Id.* at 898-899.

Also, in *NRDC v. Train*, 545 F.2d 320 (2d Cir. 1976), EPA took a similar position on a provision of the Clean Air Act that contained somewhat different language. In *Train*, the EPA argued that it did not have to list lead as a criteria pollutant under the Clean Air Act because § 108(C)

mandates listing for any pollutant "for which [the Administrator] plans to issue air quality criteria." The EPA's argument was that since the EPA did not intend to issue air quality criteria for lead, it did not have to list lead as a criteria pollutant. In other words, the EPA argued that it had the discretion not to list lead as a pollutant.

The *Train* court held that the EPA's interpretation of the statute was "contrary to the structure of the Act as a whole, and that if accepted, it would vitiate the public policy underlying the enactment of the 1970 Amendments as set forth in the Act and in its legislative history." *Id.* at 324. The *Train* court went on:

> Section 108(a)(1) contains mandatory language. It provides that "the Administrator shall . . . publish . . . a list . . . ." (Emphasis added). 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. at 324-325. This analysis applies equally to the requirement for the endangerment finding at issue in this case.

The phrase "in his [her] [the Administrator's] judgment" appears frequently in provisions of the Clean Air Act. See, e.g., 42 U.S.C. § 7408(a)(1)(A)(listing criteria

pollutants); 42 U.S.C. § 7409(b)(1)-(2)(setting NAAQS); 42 U.S.C. § 7411(b)(1)(A)(stationary sources); 42 U.S.C. § 7411(h)(1)(setting NSPS); 42 U.S.C. § 7412(h)(1)(hazardous air pollutants); 42 U.S.C. § 7521(a)(1)(motor vehicles); 42 U.S.C. § 7545(c)(1)(fuels and fuel additives); 42 U.S.C. § 7547(a)(3)-(4)(nonroad engines and vehicles); 42 U.S.C. § 7571(a)(1)(aircraft engines); 42 U.S.C. § 7671n (ozone depleting substances). Thus, EPA's assertion that the phrase gives the agency the discretion to never act is an important and troubling issue. EPA's attitude could eviscerate the entire Clean Air Act.

That was surely not Congress' intent in passing all of the above-cited sections of the Clean Air Act. On the contrary, Congress made it clear that the basic aim of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b). The key to EPA performing this duty is the endangerment clause. EPA's attitude of treating the endangerment clause as something to be ignored at its whim is completely at odds with the intent of Congress in passing the Clean Air Act.

Because of the ubiquitous presence of the "in his judgment" phrase in sections of the Clean Air Act, and

because EPA consistently takes the position that that phrase gives it the discretion not to act, the question presented in this Petition is an important and recurring issue this Court should address in order to establish a clear precedent to provide guidance to lower courts.

III. THE CITIZEN SUIT PROVISION OF THE CLEAN AIR ACT WAS DESIGNED TO ADDRESS THE EPA'S FAILURE TO ACT.

An underlying theme of EPA's argument and the decisions of the courts below was that the citizen suit statute in the Clean Air Act, 42 U.S.C. § 7604, was not designed to address a claim like the one presented by the Petitioners in this case. The conclusion was that the Petitioners were limited to filing a petition for rulemaking and waiting for EPA to take no action and then request judicial review of that inaction under the Administrative Procedure Act.

It is clear that there is absolutely nothing in § 7604 that requires a petition for rulemaking, or any other prerequisite in order for a plaintiff to have a citizen suit claim for unreasonable delay. EPA's attempt to force Petitioners to undertake a rulemaking proceeding also ignores the history of the citizen suit statute.

The clause in § 7604 that authorizes unreasonable delay claims in the district courts was added as part of

the 1990 amendments to the Clean Air Act, which amended the citizen suit provision to "encompass the *full range of inaction* covered by the Administrative Procedure Act." (emphasis added). S. Rep. No. 101-228, at 374 (1989). Before the 1990 amendments, unreasonable delay claims alleging a failure to timely satisfy a required duty, without a date-certain deadline, would lie in the United States Court of Appeals for the District of Columbia Circuit. See, *Sierra Club v. Thomas*, 828 F.2d 783, 792-93 (D.C. Cir. 1987). The above-quoted language clearly states the Congressional intent to amend § 7604 so as to be an alternative to, or perhaps even a substitute for, an action under the Administrative Procedure Act.

When Congress passed the 1990 amendment to § 7604, allowing unreasonable delay cases under the Clean Air Act to be initiated pursuant to the citizen suit provision, it demonstrated its intent that plaintiffs not be restricted to filing petitions for rulemaking and being subject to the deferential standard of review that would entail. The amendment was a response to the decision of the First Circuit in *Maine v. Thomas*, 874 F.2d 883 (1st Cir. 1989). See, Robert J. Martineau, The Clean Air Handbook (2nd Ed.) 2004, n. 42-46.

In *Maine* the EPA adopted preliminary regulations in 1980 to address the problem of regional haze, promising to adopt final regulations at a later unspecified date. But the agency took no further action. The plaintiffs in that case brought a citizen suit in district court. The appellate court said that a suit for unreasonable delay could only be brought in the court of appeals and not by a citizen suit. The facts in *Maine* present a situation similar to that facing the Petitioners in this case. It is clear, therefore, that when Congress amended the citizen suit statute in response to the *Maine* decision, it was intended that a case like the case before this Court could be brought as a citizen suit for unreasonable delay. If Congress had intended that plaintiffs be restricted to a petition for rulemaking, the citizen suit statute would not have been amended to allow for unreasonable delay cases.

CONCLUSION

In this case EPA argues that it has the discretion to never comply with the congressional mandate to periodically revise the list of air pollutants and emission sources subject to the Clean Air Act. As shown by the cases discussed above, EPA habitually grasps words and phrases from various statutes that it claims grant it discretion to do as it pleases. But the overall context and structure of

the statutes in question in this case, as well as the legislative history, make it clear that EPA does not have the discretion it claims to have. EPA simply wants the power to disobey the will of Congress and to fail to protect people like the Petitioners who are subject to the well-documented air pollution from animal feeding operations.

This is not a case where the agency has initiated rulemaking and is just taking too long to complete the task. In this case a rule listing ammonia and hydrogen sulfide as criteria pollutants and listing AFOs as stationary sources is not even a glimmer in the agency's eye. EPA's inaction is stark in light of the studies and data regarding the health impacts of AFO air pollution going back to the 1990's, as confirmed by the references in Petitioners' complaint and Exhibit 1 attached thereto.

It is also significant that throughout this litigation EPA has never explained why it has not, should not, or cannot undertake the listings requested by the Petitioners. Nor has EPA contended that it does not have the authority to make the listings. To the contrary, the facts show that EPA has a nondiscretionary duty to make the listings.

For all of the reasons stated herein the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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