No. 15-____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re GINA MCCARTHY

GINA MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency,

Defendant-Petitioner,

v.

MURRAY ENERGY CORPORATION; MURRAY AMERICAN ENERGY, INC.; THE AMERICAN COAL COMPANY; AMERICAN ENERGY CORPORATION; THE HARRISON COUNTY COAL COMPANY; KENAMERICAN RESOURCES, INC.; THE MARION COUNTY COAL COMPANY; THE MARSHALL COUNTY COAL COMPANY; THE MONONGALIA COUNTY COAL COMPANY; OHIOAMERICAN ENERGY INC.; THE OHIO COUNTY COAL COMPANY; and UTAHAMERICAN ENERGY, INC.,

Plaintiffs-Respondents.

On Petition for a Writ of Mandamus in Case No. 5:14-cv-00039-JPB (N.D.W. Va.)

PETITION FOR A WRIT OF MANDAMUS

RELIEF REQUESTED BY NOVEMBER 20, 2015

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INTRODUCTION AND SUMMARY OF ARGUMENT

The U.S. Environmental Protection Agency ("EPA") respectfully seeks a writ of mandamus to the U.S. District Court for the Northern District of West Virginia in *Murray Energy Corp. v. McCarthy*, No. 5:14-cv-00039-JPB, directing entry of a protective order precluding the deposition of EPA Administrator Gina McCarthy. In the event that this Court requires more time beyond November 20, 2015, to act on this petition, the EPA requests that her deposition be administratively stayed.

It is well settled that "top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions." *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985); *accord Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991). For that reason, this Court and other circuits have repeatedly issued writs of mandamus to prevent district courts from compelling these officials to testify. *See, e.g.*, *U.S. Bd. of Parole v. Merhige*, 487 F.2d 25, 29–30 (4th Cir. 1973) (Board of Parole members); *United States v. Hemphill*, 369 F.2d 539, 543 (4th Cir. 1966) (Secretary of Labor); *In re United States (Jackson)*, 624 F.3d 1368, 1372–77 (11th Cir. 2010) (EPA Administrator); *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008) (Vice President's Chief of Staff); *In re United States (Reno & Holder)*, 197 F.3d 310, 313–15 (8th Cir. 1999) (Attorney General and Deputy Attorney General); *In re FDIC*, 58 F.3d 1055, 1060–62 (5th Cir. 1995) (FDIC Board of Directors).

Plaintiffs Murray Energy Corporation et al. ("Murray") did not come close to identifying extraordinary circumstances that could justify compelling the deposition of Administrator McCarthy, a Cabinet-rank officer. It is utterly inconceivable that her testimony could be relevant (much less necessary) to Murray's straightforward nondiscretionary-duty claim. Furthermore, extensive discovery has already taken place—to the tune of more than 130,000 documents produced by the EPA, along with depositions of several mid-level agency officials—and Murray failed to show that the information it seeks cannot be obtained elsewhere. The court's refusal to shield Administrator McCarthy from being deposed under these circumstances is "a judicial 'usurpation of power'" and "clear abuse of discretion" warranting the exercise of this Court's supervisory mandamus authority. *Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367, 380 (2004) (citation omitted).

BACKGROUND

A. Early district court proceedings

Murray claims that the EPA violated Section 321(a) of the Clean Air Act, 42 U.S.C. § 7621(a), which provides that "[t]he Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of [the Act]." Congress made clear that evaluations under Section 321(a) do not "require or authorize the Administrator … to modify or withdraw any requirement imposed or proposed to be imposed under [the Act]."

Id. § 7621(d); *see also* H.R. Rep. 95-294, at 318 (1977) ("Nor should this section be construed to authorize or require the postponement, withdrawal, modification, or nonenforcement of any requirement or proposed regulation ...."). Murray is the first litigant ever to allege that the EPA has failed to comply with Section 321(a).

Murray sued under the Act's citizen-suit provision, which waives sovereign immunity "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2). This citizen-suit provision "has been construed narrowly" to encompass only "'clear-cut,'" "'ministerial'" duties. *Monongahela Power Co. v. Reilly*, 980 F.2d 272, 276 n.3 (4th Cir. 1992) (citations omitted). The EPA moved to dismiss Murray's suit on the ground that any obligation to "conduct continuing evaluations" was not clear-cut or ministerial. 42 U.S.C. § 7621(a); *see also Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) (explaining that, to be covered by this citizen-suit provision, a statute "must 'categorically mandat[e]' that *all* specified action be taken by a date-certain deadline") (citation omitted). Relying on decisions that interpret materially different citizen-suit provisions, the district court concluded that Section 321(a) creates a nondiscretionary duty. Attach. 1, at 11–13.

The EPA then argued that Murray does not have standing to assert a violation of Section 321(a). The agency asserted that Murray's alleged economic harm is not traceable to a failure to conduct employment evaluations or redressable by an order

directing the agency to perform such evaluations. The EPA also disputed Murray's procedural-injury claim because Section 321(a) evaluations are never a prerequisite for substantive action. Lastly, the EPA contested Murray's "informational" injury because Section 321(a) does not provide employers with a legal right to information the deprivation of which confers standing.[1] But the district court held that Murray had standing. Attach. 2. It deemed Murray's allegation "that the actions of the EPA have had a coercive effect on the power generating industry" an injury-in-fact that "may also be fairly traceable to the failure of the EPA to conduct the evaluations." *Id.* at 11. The court also decided that Murray's professed injury was redressable because Section 321(a) evaluations "may have the effect of convincing the EPA, Congress, and/or the American public to relax or alter EPA's prior decisions." *Ibid.*

The EPA next moved for summary judgment and argued that it had complied with any nondiscretionary duty allegedly imposed by Section 321(a). The agency submitted a set of 53 documents to show performance under the statute, along with

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[1] Section 321 parrots a Clean Water Act provision, 33 U.S.C. § 1367(e), which was "designed to free *workers* from the fear that an employer or corporation may cite environmental standards and orders as a reason for threatening to close their plants or reduce employment" and "to protect environmental protection legislation from being rendered partially ineffective due to *misguided or self-serving threats by any employer or corporation*." 118 Cong. Rec. 10,766 (1972) (statement of Rep. William D. Ford, who sponsored this provision) (emphases added); *see also EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 82 (1980) ("This provision [of the Clean Water Act] had two purposes: to allow EPA constantly to monitor the economic effect on industry of pollution control rules and to undercut economic threats by industry that would create pressure to relax effluent limitation rules.").

an explanatory affidavit from an agency official. The EPA stipulated that none of those documents were prepared for the express purpose of complying with Section 321(a), and that the agency had not completed further evaluations at that time. The EPA asked the district court to enter summary judgment in its favor or, if the court were to conclude that the proffered documents did not demonstrate performance under Section 321(a), that the court enter summary judgment in Murray's favor. In response, Murray maintained that the proffered documents "would not entitle EPA to a judgment as a matter of law that [the EPA] has complied with Section 321(a)." Attach. 3, at 21. Nevertheless, Murray urged the court ***not*** to enter judgment in its favor without first allowing discovery. *Id.* at 21; *see also id.* at 20 ("Plaintiffs have not moved for summary judgment, and EPA cannot force the issue by fiat.").

B. Discovery

Murray propounded broad discovery on the EPA including interrogatories, requests for production, requests for admission, and a Fed. R. Civ. P. 30(b)(6) deposition notice served on the EPA. These requests "ask for everything under the sky," *Cheney*, 542 U.S. at 387, such as information about "actions [the EPA] ha[s] taken under the Clean Air Act or applicable implementation plans to affect capital markets"; documents "[c]oncerning the impact of [the EPA's] administration or enforcement of the Clean Air Act on the construction of new coal-fired power plants"; and documents "[c]oncerning legislation proposed by Congress at any

time from 2007 to the present that would require EPA to evaluate, estimate, or consider the employment impacts of its administration or enforcement of the Clean Air Act or applicable implementation plans." Attach. 4, at 6, 12.[2]

Murray also informally sought to depose several EPA officials other than Administrator McCarthy. After the EPA filed responses and objections to Murray's discovery requests, the company moved to compel discovery and hold the agency's summary judgment motion in abeyance pending completion of discovery. The EPA sought a protective order to halt discovery pending disposition of its motion.

On May 29, 2015, the district court summarily granted the motion to compel discovery, denied the motion for a protective order, and held the EPA's summary judgment motion in abeyance. Attach. 6. The court ordered the agency to "comply with all of [Murray's] pending discovery requests" and also "produce requested witnesses for deposition." *Id.* at 3. The court held the summary judgment motion in abeyance "until the filing of plaintiffs' opposition thereto," even though the motion had already been fully briefed. *Ibid.* The EPA petitioned for a writ of mandamus to quash discovery, but this Court denied the petition without comment. Attach. 7.

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[2] Several months later, Murray propounded further discovery requesting, for example, documents related to "the phrase 'war on coal,'" "Sierra Club's Beyond Coal campaign," "the requirements for a regulated utility to retire a power plant or switch fuels," "efforts by States since 2009 to encourage or cause coal-fired power plants in other States to shut down or switch fuels," and "planned enforcement initiatives that have the potential to reduce demand for coal." Attach. 5, at 6.

After the district court decided to permit this broad discovery, the EPA and the U.S. Department of Justice embarked on a massive response effort requiring the services of more than 120 federal employees, as well as roughly 90 contractors for which the EPA has obligated more than $1 million in agency funds. Attach. 8. As of early October 2015, the employees and contractors had devoted nearly 12,500 hours to collecting and reviewing roughly 400,000 documents for responsiveness and privilege, with more than 350,000 documents still remaining. Attach. 9, at 2. The EPA has produced over 130,000 documents on a rolling basis. Attach. 10, at 2.

Meanwhile, Murray formally noticed depositions of several agency officials: James DeMocker, Director of the Office of Air Policy and Program Support; Ronald Evans, Senior Staff Advisor; Ann Ferris, Economist; Jonathan Lubetsky, Environmental Protection Specialist; Al McGartland, Director of the National Center for Environmental Economics; and Darryl Weatherhead, Supervisory Environmental Protection Specialist. On October 7, 2015, without having deposed any of these six people, and without having deposed the EPA under Rule 30(b)(6), Murray noticed the Administrator's deposition for November 24, 2015.[3] Attach. 11.

On October 16, 2015, after Murray had refused to withdraw the notice, the EPA moved the district court for emergency relief requesting entry of a protective order under Fed. R. Civ. P. 26(c) to preclude the Administrator's deposition. The

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[3] As of November 10, 2015, when this petition was filed, Murray had taken the depositions of Mr. Evans, Ms. Ferris, Mr. McGartland, and Ms. Weatherhead.

EPA sought expedited briefing and a ruling by November 4, 2015, to afford the agency an opportunity for further review if necessary prior to the noticed deposition date. The motion was fully briefed on November 4, 2015, but the court still had not ruled as of November 10, 2015, causing the EPA to file this petition for a writ of mandamus in light of the urgency and importance of the issue to the United States.

STANDARD OF REVIEW

The All Writs Act, 28 U.S.C. § 1651(a) , grants this Court authority to issue a writ of mandamus. The petitioner seeking the writ must satisfy three requirements: (1) there must be no other adequate means to obtain the requested relief; (2) the petitioner's right to the writ must be clear and indisputable; and (3) the writ must be appropriate under the circumstances. *Cheney*, 542 U.S. at 380–81. This Court may issue a writ of mandamus to exercise supervisory authority over a district court to ensure "proper judicial administration in the federal system." *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259–60 (1957). "Judicial administration" includes the conduct of discovery. *In re Pruett*, 133 F.3d 275, 278 (4th Cir. 1997). This Court has issued the writ of mandamus "to prevent the enforcement of orders allowing … the excessive and improper taking of depositions" of top executive-branch officers like Administrator McCarthy, *Hemphill*, 369 F.2d at 543, in particular "where the complaint rests upon … a tenuous jurisdictional basis," *Merhige*, 487 F.2d at 29.

REASONS FOR GRANTING THE WRIT

I. Mandamus is the only adequate means for the EPA to obtain relief.

This Court may issue a writ of mandamus because the EPA cannot otherwise obtain relief. The EPA sought emergency relief from the district court on October 16, 2015, but the court has not acted on that request and Administrator McCarthy's deposition is noticed for November 24, 2015, two weeks from the date this petition is being filed. Nor could the EPA obtain adequate relief if Ms. McCarthy refused to appear for her deposition. *Hemphill*, 369 F.2d at 543 ("To compel the Secretary [of Labor] to appear in the District Court in response to the order to show cause why he should not be held in contempt would not provide an adequate legal remedy."). Courts of appeals have long recognized that "there is a marked difference between requiring a private litigant to submit to a contempt order before seeking appellate relief and requiring executive agency officials to do so; the latter case raises the prospect of 'serious repercussions for the relationship between two coequal branches of government.'" *In re Sec. & Exch. Comm'n*, 374 F.3d 184, 188 (2d Cir. 2004) (citation omitted). Mandamus is thus the proper avenue for relief in this case.

II. The EPA's right to a writ of mandamus is clear and indisputable.

There are no "extraordinary circumstances" in this litigation that could justify compelling the deposition of Administrator McCarthy. *Franklin*, 922 F.2d at 211. To the contrary, testimony of the Administrator simply cannot be relevant (much

less essential) to Murray's claim that the EPA failed to perform a nondiscretionary duty, and the company's cursory allegation of agency misconduct is frivolous. Just as in numerous other cases involving compelled testimony of top executive-branch officers, the EPA's right to the writ of mandamus here is clear and indisputable.

A. Cabinet-rank officers sued in their official capacity cannot be forced to testify about their official duties absent exceptional circumstances.

"[T]op executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions." *Simplex*, 766 F.2d at 586; *accord Franklin*, 922 F.2d at 211. This Court and other courts of appeals use the writ of mandamus to preclude such testimony. *See, e.g.*, *Merhige*, 487 F.2d at 29–30 (Board of Parole members); *Hemphill*, 369 F.2d at 543 (Secretary of Labor); *In re United States (Jackson)*, 624 F.3d at 1372–77 (EPA Administrator); *In re Cheney*, 544 F.3d at 314 (Vice President's Chief of Staff); *In re United States (Reno & Holder)*, 197 F.3d at 313–15 (Attorney General and Deputy Attorney General); *In re FDIC*, 58 F.3d at 1060–62 (FDIC Board of Directors); ; *In re United States (Kessler)*, 985 F.2d 510 (11th Cir. 1993) (FDA Commissioner). These decisions recognize that compelling top executive branch officers to testify in their official capacities is "peculiarly disruptive of effective government," *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982), and thus demands "exceptional" justification from the party seeking to compel testimony, *Merhige*, 487 F.2d at 29. Murray has not come close to providing such a justification here.

B. Administrator McCarthy's testimony could not provide Murray with information relevant or necessary to prosecute its case.

In contrast to the present suit, which alleges that the EPA failed to perform a nondiscretionary duty, the typical suit against an administrative agency alleges that final agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (Administrative Procedure Act); 42 U.S.C. § 7607(d)(9)(A) (Clean Air Act). In a suit alleging that an agency acted arbitrarily or capriciously, "allowing litigants to depose agency officials about such matters would be warranted only in the rarest of cases." *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994) (opinion of Randolph, J.). But even where a Cabinet-rank officer's deposition could be permitted in a case involving arbitrary-and-capricious claims, there is no circumstance under which such a deposition would be proper in a nondiscretionary-duty suit like this one, where the court is limited to determining whether the agency performed the alleged duty, ***not*** whether that performance was arbitrary or capricious. *See supra* page 2; *Sierra Club*, 828 F.2d at 792 (rejecting "the convoluted notion that EPA is under a nondiscretionary duty … not to abuse its discretion"); *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1355 (9th Cir. 1978) (noting that the Clean Air Act's citizen-suit provision "'was not designed to permit review of the performance of [the EPA's] functions'" (citation omitted)). To prevail here, Murray must prove that the agency did not "conduct continuing evaluations of potential loss or shifts of employment" ***at all***. 42 U.S.C. § 7621(a).

The EPA initially proffered a batch of documents as evidence of performance under Section 321(a), and the agency has since produced more than 130,000 other documents in response to Murray's propounded discovery. The EPA also has not moved for protective orders with respect to any of the lower-level agency officials whose depositions the company has noticed. If those officials' depositions and the voluminous documentary evidence now in Murray's possession show that the EPA "conduct[ed] continuing evaluations of potential loss or shifts of employment," 42 U.S.C. § 7621(a), Administrator McCarthy's deposition testimony could not show, as a matter of law, that the EPA failed to conduct those evaluations. Conversely, if the available evidence is not sufficient to demonstrate the EPA's performance, then Murray will not need the Administrator's deposition testimony to support its case. *See Hemphill*, 369 F.2d at 542 (issuing a writ of mandamus to vacate a discovery order that "call[ed] for irrelevant information wholly unnecessary to the defense").

Murray argues that Administrator McCarthy's deposition is necessary "to not only establish EPA's liability but also [the company's] entitlement to injunctive relief to protect Plaintiffs from further harm and to preserve the status quo pending the Administrator's compliance." Attach. 12, at 21. As a matter of law, however, the only permissible relief if Murray prevails in this citizen suit is an "order [to] the Administrator to perform [the] act or duty." 42 U.S.C. § 7604(a); *see also Sierra Club v. Whitman*, 285 F.3d 63, 68 (D.C. Cir. 2002). "It is an elemental canon of

statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14–15 (1981). All the more so here, where Congress chose not to authorize the EPA to take or withhold action based on a Section 321(a) evaluation. 42 U.S.C. § 7621(d). Moreover, the district court cannot enjoin or nullify EPA actions reviewable only in the courts of appeals, like the rulemakings that Murray is trying to derail through this suit. *Id.* § 7607(b)(1); *Palumbo v. Waste Techs. Indus.*, 989 F.2d 156, 161 (4th Cir. 1993).

The Clean Air Act does allow a court to "order the Administrator to perform [the] act or duty," 42 U.S.C. § 7604(a), but such an order cannot go beyond the text of the statute, *cf. T-Mobile South, LLC v. City of Roswell*, 135 S. Ct. 808, 815–18 (2015) (refusing to dictate the format of a decision in the face of statutory silence); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (holding that if a court finds that agency action has been "unlawfully withheld" under the Administrative Procedure Act, it cannot specify the manner of the agency's performance). Section 321(a) does not instruct the EPA to memorialize performance or publish evaluation results,[4] and the court cannot independently devise or impose such a requirement.

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[4] By contrast, Section 321(b) requires the EPA to "investigate" allegations from an "employee … whose employment is … adversely affected or threatened to be adversely affected because of the alleged results of any requirement imposed or proposed to be imposed under [the Clean Air Act] …." 42 U.S.C. § 7621(b). The agency's investigation culminates in a written notice explaining why a hearing will

Murray argued to the district court that "the depositions and discovery to date have not provided an adequate substitute for a deposition of the Administrator with regard to several key topics," Attach. 12, at 11, but the company's proffered topics "bear[ ] little, if any, relation to the questions of law" at issue here. *Merhige*, 487 F.2d at 29. For example, Murray seeks "an adequate response to the basic question of *how* the EPA is continually evaluating job loss and shifts." Attach. 12, at 12 (emphasis added); *see also id.* at 13 ("[T]he Plaintiffs could ask the Administrator about … prior statements that the Administrator has made about *the extent to which* employment impacts can be evaluated prospectively." (emphasis added)). But the issue in this case is *whether*, not *how*, the EPA performed; the district court cannot evaluate how the EPA performed under Section 321(a), let alone dictate the agency's manner of performance. *See supra* page 10. And if the court cannot decide those issues, then the Administrator should not be compelled to testify on them.

Murray also seeks "an opportunity to impeach the Administrator on apparent inconsistencies in her previous statements and discovery responses" with respect to the EPA's legal position. Attach. 12, at 12. Administrator McCarthy has been sued in her official capacity, and the agency has not designated her as a trial witness. To the extent that any party could be "impeached," it would be the EPA, via the Rule

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not be held, or alternatively, a written report accompanied by the Administrator's findings and recommendations. *Ibid.*; *see also id.* § 7621(c) (granting subpoena authority for Section 321(b) investigations). The plaintiffs here are not employees, nor have they alleged that the EPA failed to comply with Section 321(b).

30(b)(6) deposition Murray has yet to conduct. Regardless, statutory interpretation is not an appropriate topic for a fact witness. *See* Fed. R. Evid. 701.

Murray's other proposed discussion topics likewise fall wide of the mark. Attach. 12, at 14–15. In short, there is no way that the deposition of Administrator McCarthy could materially advance the company's position in this litigation.

C. Murray's bare allegation that the Administrator did not comply with Section 321(a) does not constitute a "clear showing of misconduct" that could justify compelling her deposition testimony.

It is well-settled that an administrative decisionmaker ordinarily "will not be compelled to testify about his mental processes in reaching a decision." *Franklin*, 922 F.2d at 211 (relying on *United States v. Morgan*, 313 U.S. 409 (1941)). An exception may be made where "a clear showing of misconduct or wrongdoing," *ibid.*, rebuts the strong "presumption of regularity [that] attaches to administrative actions," *Cent. Elec. Power Co-op., Inc. v. Southeastern Power Admin.*, 338 F.3d 333, 337 (4th Cir. 2003); *see, e.g.*, *Singer Sewing Machine Co. v. NLRB*, 329 F.2d 200, 208 (4th Cir. 1964) (allowing the deposition of an agency official because it was the only way for the plaintiff to probe "the actual basis on which the [decision] rests"). It is far from clear whether or how this exception would apply in a case like this one, where Murray alleges that the EPA *did not* "reach[ ] a decision." *Franklin*, 922 F.2d at 211. This Court need not dally on this issue, however, because any misconduct exception surely does not stretch as far as Murray proposes.

The company contends that "the Administrator's failure to perform her duty pursuant to Section 321(a)—or even acknowledge that this duty exists—constitutes misconduct." Attach. 12, at 17. In other words, Murray believes that it should be allowed to depose Administrator McCarthy because it has made "a clear showing" that it will prevail on the merits of its claim. *Franklin*, 922 F.2d at 211. Murray's logic is circular and would allow any plaintiff to depose a top executive-branch official based on unresolved allegations. To the extent that Murray's argument is premised on the EPA's view that Section 321(a) does not impose a nondiscretionary duty, that reasoning would lead to the absurd conclusion that Murray is entitled to depose the Administrator merely because the EPA contested the district court's jurisdiction. Lastly, even if it were true that Murray could make "a clear showing" of success on the merits (which it cannot), then the company would be entitled to a judgment in its favor rather than a gratuitous deposition of the Administrator.

D. Murray has not shown that the evidence it seeks cannot be obtained from another source.

Even assuming that the evidence Murray seeks from Administrator McCarthy was essential to the company's nondiscretionary-duty claim, the district court still could not compel her deposition because Murray failed to show that the evidence is not available from any other source. *See In re Cheney*, 544 F.3d at 314 ("The duties of high-ranking executive officers should not be interrupted by judicial demands for information that could be obtained elsewhere."); *In re United States*

(Reno & Holder), 197 F.3d at 314 (holding that the litigant seeking to depose "high government officials" "must … establish at a minimum …. both that the discovery sought is relevant and necessary and that it cannot otherwise be obtained").

The Administrator's status as the nominal defendant in her official capacity does not relax this requirement; otherwise, the Administrator could be compelled to testify in every case brought under the Clean Air Act and the other statutes that the EPA administers. *See* 42 U.S.C. § 7601(a) (delegating regulatory responsibility to "[t]he Administrator"). That Congress provided the Administrator with authority to act under Section 321(a) does not mean that she possesses unique knowledge or evidence that is essential to Murray's case. Administration of the Clean Air Act is a monumental task accomplished by the EPA as a whole, with the aid of numerous deputies, directors, and staff, several of whom Murray has deposed or will depose.

Plus, Murray's deposition notice for Administrator McCarthy was necessarily premature because it was served before the company had deposed any of the other agency employees whose depositions the company had noticed and before Murray had deposed the agency itself under Rule 30(b)(6). *Cf. Nicholas v. Wyndham Int'l, Inc.*, 373 F.3d 537, 543 (4th Cir. 2004) (upholding a protective order where a party had the opportunity to depose other individuals and obtain relevant documents). In particular, much (if not all) of the evidence that Murray is trying to obtain from the Administrator is more properly sought under Rule 30(b)(6). The 54 topics in the

company's Rule 30(b)(6) deposition notice plough the same ground as the topics that it proposes for the Administrator's deposition, such as the EPA's "past and current interpretations of Section 321(a)," its "past and current compliance with Section 321(a)," and "[t]he role of the Administrator in complying with Section 321(a)." Attach. 13, at A-1. Furthermore, Murray failed to show that it could not obtain this information from the tens of thousands of documents that the EPA has produced in response to the company's discovery requests.

For all the foregoing reasons, the EPA's entitlement to a writ of mandamus is "'clear and indisputable.'" *Cheney*, 542 U.S. at 381 (citation omitted).

III. Issuance of a writ of mandamus is appropriate under the circumstances.

"The writ [of mandamus] is a tool used to keep the courts functioning within the constitutional and congressional design." *Litman v. Mass. Mut. Life Ins. Co.*, 825 F.2d 1506, 1509 (11th Cir. 1987). By declining to issue a protective order in this instance, the district court transgressed both constitutional and congressional boundaries. The Supreme Court has stressed "that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government," *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977) (citation omitted), and Part II explains at length why the deposition of Administrator McCarthy represents an unwarranted intrusion into the workings of the executive branch.

More broadly, by allowing unhampered discovery in this nondiscretionary-duty suit, the district court has strayed well beyond the narrow limits imposed by Congress. The manner in which Murray has proceeded in this case illustrates why this Court and other circuits properly cabin Clean Air Act citizen suits to clear-cut, ministerial duties, just as Congress intended. *See supra* page 2. The existence of a nondiscretionary duty is a jurisdictional issue, and the "tenuous jurisdictional basis" of Murray's complaint is further reason for this Court to issue a writ of mandamus barring Administrator McCarthy's deposition. *Merhige*, 487 F.2d at 29; *cf. Miner v. Atlass*, 363 U.S. 641 (1960) (affirming the issuance of a writ of mandamus where the district court lacked authority to compel a deposition).

The federal government has now devoted well in excess of 10,000 hours and more than $1 million responding to Murray's discovery requests that, in theory, are designed to answer the simple question whether the EPA took an action. In reality, the deposition notice served on Administrator McCarthy is just the latest and most ambitious leg of Murray's fishing expedition. After resisting entry of judgment in its favor, the company appears to be seeking evidence to "embarrass or harass the person from whom [it] seeks discovery" or "for use in proceedings other than the pending suit." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 n.17 (1978). The district court has clearly abused its discretion by effectively compelling the deposition of a Cabinet-rank officer under these circumstances.

IV. This Court should stay the Administrator's deposition if it requires additional time beyond November 20, 2015, to consider this petition.

Administrator McCarthy's deposition is noticed for November 24, 2015. In the event the deposition goes forward, the Administrator will need time to prepare. The EPA requests that this Court grant relief no later than November 20, 2015, by granting this petition or, if the Court requires more time to consider the petition, by administratively staying her deposition pending review of the petition. A stay will relieve the Administrator and the EPA from a potentially unnecessary diversion of resources. *See In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995) (noting that "[h]igh-ranking government officials have greater duties and time constraints than other witnesses"). Murray would not be substantially prejudiced by a stay because, if this petition is ultimately denied, the only adverse consequence for the company will be a modest delay of Administrator McCarthy's deposition date in a case where fact discovery is not scheduled to close until January 31, 2016.[5]

CONCLUSION

For the foregoing reasons, this Court should grant the EPA's petition for a writ of mandamus directing the district court to enter a protective order precluding the deposition of EPA Administrator Gina McCarthy. If the Court requires more

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[5] If this Court administratively stays Administrator McCarthy's deposition but ultimately denies this petition (which the Court should not do), it should direct the parties to meet and confer on a new deposition date.

time to consider this petition beyond November 20, 2015, the Court should stay the deposition pending resolution of the petition.

Respectfully submitted,

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