Nos. 16-2432(L), 17-1093, 17-1170

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MURRAY ENERGY CORPORATION et al.,
Plaintiffs-Appellees,

-v.-

ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant/Cross-Appellee,

MON VALLEY CLEAN AIR COALITION et al.,
Applicants-in-Intervention-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Case No. 5:14-cv-00039 (Hon. John Preston Bailey)

REPLY BRIEF OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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SUPPLEMENTAL STATEMENT OF JURISDICTION

The district court did not have jurisdiction over Murray's suit because Section 304(a)(2) of the CAA does not waive EPA's immunity to a claim that it failed to act under Section 321(a) of the Act. U.S. Br. 14–31. Murray asserts (Br. 1, 53) that two other statutes, the APA and 28 U.S.C. § 1361 (a mandamus statute), waive sovereign immunity to a nondiscretionary-duty claim filed under the CAA. That is incorrect.

The APA does not waive sovereign immunity "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. In other words, the APA waiver applies "only * * * when specific provisions establishing judicial review do not exist"; the APA "leave[s] untouched areas * * * in which judicial review was the subject of explicit legislation." *Sprecher v. Graber*, 716 F.2d 968, 974–75 (2d Cir. 1983); *see also Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286 n.22 (1983). Mandamus against the United States likewise cannot be used "when a statutory method has been prescribed" for judicial review. *Bartsch v. Clarke*, 293 F.2d 283, 285 (4th Cir. 1961). The CAA prescribes such a method.

Murray also hints (Br. 1) that this Court might lack jurisdiction to consider the district court's order awarding the company summary judgment and denying EPA summary judgment. Whether or not this Court could have reviewed that order upon

issuance, it clearly can do so now because the order merged into the final judgment. *See Benner v. Nationwide Mut. Ins. Co.*, 93 F.3d 1228, 1240 n.13 (4th Cir. 1996).

SUMMARY OF ARGUMENT

1. The district court lacked jurisdiction over this suit because Section 321(a) does not impose a duty enforceable under the nondiscretionary-duty clause of the CAA's citizen-suit provision. U.S. Br. 14–31. Judicial review of agency inaction is limited to duties that are not only legally required but also ***discrete***. Murray accepts this proposition, but it argues that EPA's "continuing" duty to conduct employment evaluations is actually discrete, such that the district court can compel EPA to adopt a new "program" to implement Section 321(a). That argument is just as implausible as it sounds. Equally implausible is Murray's position that a nondiscretionary-duty suit can proceed absent a ***date-certain deadline***. The courts' refusal to enforce duties without deadlines under Section 304(a)(2) is the reason that Congress created a new cause of action for unreasonable delay when it amended the CAA in 1990. Murray's belated attempt to invoke that new cause of action is unavailing.

2. The district court lacked jurisdiction in any event because Murray does not have Article III standing to challenge EPA's alleged nonperformance under Section 321(a). U.S. Br. 31–41. The company does not identify any particularized economic harm from EPA's purported failure to act under Section 321(a), much less any injury likely to be redressed by creation of new employment evaluations. Murray argues

that it suffered informational harm because it can file a request under the Freedom of Information Act ("FOIA") to get the results of any Section 321(a) evaluation that EPA might conduct. That argument falters because Murray sued under the CAA, not FOIA, and the company does not even contend that the CAA gives it a legally enforceable right to information in employment evaluations. Murray also alleges several other abstract harms, but this Court need not and should not consider those forfeited and meritless allegations.

3. Assuming the district court had jurisdiction to entertain Murray's claim, that claim should have been rejected. U.S. Br. 41–44. Murray's position that EPA must continually do retrospective and site-specific evaluations under Section 321(a)'s first clause runs headlong into the statutory language. The company's fallback position that EPA only partially performed its duty has no place in a failure-to-act suit. And this Court should give no credence to Murray's ahistorical account of the agency's past statements and practice under Section 321(a).

4. Finally, the district court exceeded its power under Section 304 of the CAA by ordering EPA to take action not required by law. U.S. Br. 44–48. Murray does not dispute that the court went well beyond the plain terms of the statute in crafting its relief, and the company offers no precedent to support the court's authority to do so.

ARGUMENT

Murray's response brief ends (Br. 42–61) where this Court must begin. "The requirement that jurisdiction be established as a threshold matter * * * is 'inflexible and without exception.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) (citation omitted). Because the district court lacked jurisdiction over this suit, this Court "ha[s] jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *United States v. Corrick*, 298 U.S. 435, 440 (1936). If this Court reaches the merits, the judgment still should be reversed because EPA's employment evaluations comport with the plain language of Section 321(a), whereas the district court's injunction does not.

I. Section 304(a)(2) of the CAA does not waive federal sovereign immunity to a claim that EPA failed to act under Section 321(a).

To be enforceable under Section 304(a)(2) of the CAA, an EPA duty must be (i) legally required, (ii) discrete, and (iii) subject to a date-certain deadline. Murray accepts the first criterion and does not argue that a court can compel EPA to conduct "appropriate" investigations under the second clause of Section 321(a). Murray also accepts the second criterion, but it contends that the "continuing" evaluations in the first clause of Section 321(a) are actually discrete. Murray rejects the third criterion outright; it argues that deadlines are not needed to invoke Section 304(a)(2). The company's positions on discreteness and deadlines do not withstand scrutiny.

A. A statutory directive to "conduct continuing evaluations" is not a discrete duty enforceable under the CAA's citizen-suit provision.

Murray admits (Br. 54) that a duty imposed by the CAA must be discrete to be enforced under the citizen-suit provision. And Section 321(a)'s "continuing" duty is the antithesis of a discrete action. U.S. Br. 27. Murray asserts (Br. 4) that "EPA must have a program to identify and evaluate [employment effects] on an ongoing basis," but the district court cannot order "programmatic improvements" to agency conduct. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (*NWF*). It is of no moment that Murray claims a failure to act—as opposed to inadequate action—under Section 321(a). A discrete statutory duty is an essential element of either claim. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) (*SUWA*) ("A 'failure to act' is properly understood to be limited, as are the other items in [the APA's definition of 'agency action'], to a *discrete* action.").

There are no "clear milestones" in Section 321(a) that could provide a locus for judicial review, *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 188 (4th Cir. 1999), *e.g.*, a duty to promulgate regulations and update them at fixed intervals. *See* Murray Br. 56 (citing cases involving such duties); 5 U.S.C. § 551(13) (listing a "rule" as a type of "agency action"). Without clear milestones, the district court was set adrift to inquire into EPA's "continuing (and thus constantly changing) operations," *NWF*, 497 U.S. at 890, and assess the agency's "[g]eneral deficiencies

in compliance" with Section 321(a). *SUWA*, 542 U.S. at 66. Congress did not permit this kind of "pervasive oversight" under the CAA's citizen-suit provision. *Id.* at 67.

Murray argues (Br. 55–56) that a continuing duty is reviewable if it is specific and not "general." But this Court squarely rejected that argument in *Village of Bald Head Island v. U.S. Army Corps of Engineers*, 714 F.3d 186 (4th Cir. 2013), when it dismissed claims challenging the Corps of Engineers' continuing implementation of "a *specific* dredging project at a *specific* coastal site." *Id.* at 194. Like Murray here, the plaintiff there argued that "specific projects" are discrete agency actions, unlike the "broad" programs that the Supreme Court deemed unreviewable in *SUWA* and *NWF*. Appellant Br. 22, 4th Cir. No. 11-2366(L), 2012 WL 1155885 (Apr. 9, 2012). This Court disagreed with the plaintiff and held that a duty's specificity does not matter as much as its continuing nature. *Bald Head Island*, 714 F.3d at 194 ("By challenging the Corps' ongoing * * * actions, even at a localized level, the Village is essentially demanding a general judicial review of the Corps' day-to-day operations * * *, the type of review the Supreme Court has explicitly held the APA does not authorize." (brackets, citation, and internal quotation marks omitted)).

Murray observes (Br. 55) that, in *SUWA*, the Supreme Court declined to hear a challenge to the "continuing implementation of a monitoring program," not due to lack of discreteness, but because the program was not legally required. 542 U.S. at 67–72. The Court had no occasion to decide whether *that* program was discrete. *Id.*

at 72 n.5. Discreteness was front and center, however, in the Court's rejection of a separate claim based on the "continu[ing]" duty of the Department of the Interior to manage certain lands. 43 U.S.C. § 1782(c). The Court held that, while "mandatory," that duty was not a discrete action enforceable under the APA. 542 U.S. at 64–67. Murray is simply wrong to suggest (Br. 55) that the Court's analysis turned on the lack of "final" agency action, not the lack of *any* agency action. Like the APA, the CAA cannot be used to compel any agency action that is not discrete. U.S. Br. 18.

B. Because Section 321(a) does not prescribe date-certain deadlines, it is not a proper subject of a CAA nondiscretionary-duty suit.

Section 304(a)(2) also limits jurisdiction to claims alleging that EPA failed to act by a date-certain deadline. U.S. Br. 19–25. Murray attacks (Br. 56–60) a straw-man argument that a *calendar* deadline is a prerequisite to bring suit under Section 304(a)(2). EPA is not advocating such a restrictive reading of the nondiscretionary-duty clause. A date-certain deadline need not be a numerical date. For example, a mandatory condition precedent to an agency action can impose a nondiscretionary duty that must be satisfied by the date on which that action occurs. The deadline for the condition precedent may not be express, but it is "readily[ ] ascertainable from the statute." *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) (*Thomas*).

Bennett v. Spear, 520 U.S. 154 (1997), is illustrative. The statute at issue there required the Fish and Wildlife Service ("Service") to "tak[e] into consideration the economic impact" of "designatin[g] critical habitat" for endangered species *before*

making its designation. 16 U.S.C. § 1533(b)(2). The Service's "deadline" to consider economic impact was, naturally, the date upon which it designated the habitat. *See ibid.* ("The [Service] shall designate critical habitat *after* taking into consideration economic impact." (emphasis added)). The plaintiffs claimed that the Service failed to consider economic impact before allegedly designating critical habitat for certain fish. 520 U.S. at 160. The Court ruled that the Service had a nondiscretionary duty not to ignore "required procedures of decisionmaking" before making the "ultimate decision" to designate the habitat. *Id.* at 172. That ruling is entirely consistent with EPA's position that a duty is "not discretionary" only if there is a deadline for action. And Murray has all but conceded now that Section 321(a) does not impose the sort of "procedural" duty that *Bennett* classified as nondiscretionary. *See infra*, page 14.

Murray is wrong to suggest (Br. 57) that this Court's decision in *Monongahela Power Co. v. Reilly*, 980 F.2d 272 (4th Cir. 1992), casts doubt on the requirement of a date-certain deadline. In that case, an electric utility had filed an application with EPA to extend the utility's deadline to comply with emissions limitations imposed by the CAA. The parties agreed that the CAA gave EPA a deadline to begin processing extension applications, but they disagreed about what that deadline was. The utility argued that EPA's duty attached "immediately" on the date its application was filed, but this Court accepted EPA's reasonable view that the duty did not attach until the

date that EPA issued regulations implementing the emissions program. *Id.* at 278–79. Nothing in that opinion calls into question the date-certain deadline requirement.[1]

Murray also mischaracterizes (Br. 57–58) the claim and holding in *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987). The plaintiff in that case *did* "contend that EPA had a mandatory duty to issue a decision" finalizing a proposed rulemaking to regulate strip mines. Murray Br. 57. Although the CAA did not give EPA a deadline to act, as a basic precept of administrative law, EPA could not unreasonably delay in "conclud[ing] a matter presented to it." 5 U.S.C. § 555(b). EPA was legally required to act within a reasonable time, and the plaintiff sought to enforce that requirement.

Murray fails to recognize that unreasonable-delay suits, like nondiscretionary-duty suits, are used to compel *mandatory* actions. "[D]elay cannot be unreasonable with respect to action that is not required." *SUWA*, 542 U.S. at 63 n.1. The difference between the two suits is that, in the case of a nondiscretionary duty, Congress goes beyond its general prohibition on dilatory action and "categorically mandate[s] that all specified action be taken by a date-certain deadline." *Thomas*, 828 F.2d at 791 (brackets altered and emphasis, quotation marks, and citation omitted).

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[1] The same holds for the pair of Ninth Circuit cases on which Murray relies (Br. 57). *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981 (9th Cir. 1994) (enforcing a "thirty day" deadline in 33 U.S.C. § 1313(d)(2)); *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1355 (9th Cir. 1978) (alluding to "12 month" deadline in 42 U.S.C. § 7410(k)(2)). Murray's reference (Br. 56) to *Air Line Pilots Ass'n v. U.S. Airways Group, Inc.*, 609 F.3d 338 (4th Cir. 2010), is not on point; that case merely held that the word "shall" signaled a legal requirement. *Id.* at 341–42.

After *Thomas* was decided, Congress chose to leave Section 304(a)(2) alone while overhauling the remainder of the CAA's citizen-suit provision. U.S. Br. 21–24. Murray notes (Br. 59) that Congress did not "intend[ ] to narrow the scope of Section 304(a)(2)" by adding a new remedy for unreasonable delay. Quite true, but neither did Congress *broaden* the scope of Section 304(a)(2) beyond the limits that *Thomas* had imposed. Despite being asked to do away with those limits, Congress reenacted Section 304(a)(2) without change.

Murray does not quarrel with most of the legislative history cited by EPA on this point. The company asserts (Br. 60) that Congress had other reasons to specify that EPA's duty to prepare economic-impact assessments was nondiscretionary and enforceable under Section 304(a)(2). *See* 42 U.S.C. § 7617(f). Perhaps so, but that does not explain why Congress also added the same express language elsewhere in the CAA. *See* 42 U.S.C. § 7521(i)(D) (providing that certain studies and rulemakings can be compelled under Section 304(a)(2)); H.R. Rep. 101-490 part 1, 301 (1990) (stating that this provision ensures EPA action "within the applicable timeframe").

To be sure, when reenacting Section 304(a)(2) in 1990, the legislators did not "address the possibility of 'continuing' being a part of that specified deadline on a nondiscretionary duty." Murray Br. 59. That possibility likely did not occur to them because a "continuing" duty applies *every day*, thus rendering the idea of a deadline nonsensical. *Cf. Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) (rejecting

the "strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute"). In any case, legislative history just confirms what the structure of the CAA and the caselaw make clear: Section 304(a)(2) only waives EPA's immunity to a claim that the agency failed to perform a discrete duty by a date-certain deadline.

Murray does not try to defend the district court's holding that Section 321(a) imposes a date-certain deadline. Instead, in a revealing effort to salvage jurisdiction, Murray asks this Court to pretend (Br. 60–61) that it pleaded an unreasonable-delay claim. But "parties cannot amend their complaints through briefing" on appeal. *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013). Regardless, Murray did not comply with the statutory notice requirement for an unreasonable-delay claim. U.S. Br. 30. "Citizen suit notice requirements are 'mandatory conditions precedent to commencing suit' and may not be avoided by employing a 'flexible or pragmatic' construction." *Monongahela*, 980 F.2d at 275 n.2. Whether or not the CAA's notice provision is "jurisdictional," it is unquestionably mandatory and fatal to Murray's illusory unreasonable-delay claim.

II. Murray failed to establish Article III standing to challenge EPA's alleged nonperformance of Section 321(a) evaluations.

If sovereign immunity does not bar Murray's claim, then Article III does. The company did not prove particularized or redressable economic injury, and it cannot claim "informational" injury based on an alleged violation of a statute that does not

confer a legal right to any information. Murray has not preserved its other standing arguments, which are meritless in any event.

A. Murray's alleged economic injury is not particularized, traceable to inaction under Section 321(a), or redressable by the district court.

EPA's opening brief (Br. 32–35) outlined the problems with Murray's claim of economic injury: It is not "particularized" to the plaintiffs, fairly traceable to EPA's purported failure to perform Section 321(a) evaluations, or redressable by an order directing the agency to conduct more employment evaluations. Murray responds (Br. 51–52) by doubling down on the district court's flawed analysis of economic injury.

Murray admits (Br. 52) that it has not identified any "*specific plant closures or layoffs* caused by EPA's regulations." That admission is striking because Murray's complaint alleged that some plaintiffs laid off workers due to EPA's implementation of the CAA. App. 45–46. The agency is not to blame for Murray's inability to back up its "mere allegations" with "specific facts." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *see also Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 n.5 (2013) (stating that "plaintiffs bear the burden of pleading *and proving* concrete facts" to establish standing (emphasis added)). A mere suggestion of "future risks," Murray Br. 51, is "too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'" *Clapper*, 133 S. Ct. at 1143.

With no particularized injury in sight, Murray falls back (Br. 51) on a general allegation of "economic harm from a reduced market for coal." But the Article III

inquiry is plaintiff-specific; "the law of averages is not a substitute for standing." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1984). If there is "a reduced market for coal" that adversely affected *Murray*, the company ought to have concrete and specific evidence of that fact. Yet the "reams" of evidence to which it alludes (Br. 52) are simply not there.

Of course, even if Murray had produced evidence of economic injury and tied that injury to affirmative EPA *actions* under the CAA, it still would lack standing to seek review of EPA's alleged *inaction* under Section 321(a). A plaintiff "must show that it is likely, not just speculative, that a favorable decision will provide the redress it seeks." *K.C. ex rel. Africa H. v. Shipman*, 716 F.3d 107, 116 (4th Cir. 2013). But ordering EPA to conduct Section 321(a) evaluations is not "likely" to lift economic burdens allegedly traceable to the CAA. Murray recognizes (Br. 18) that EPA cannot "modify or withdraw any requirement" due to Section 321(a). 42 U.S.C. § 7621(d). Murray posits (Br. 18), however, that EPA might use a Section 321(a) evaluation to "adopt[ ] a job-saving alternative approach to regulation." Even assuming *arguendo* that EPA could do so in its policymaking discretion, the "courts may not assume a particular exercise of this * * * discretion in establishing standing." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006). Finally, there is no authority whatsoever for premising standing on the prospect of *legislative* action. Therefore, Murray has not established standing on the basis of economic injury.

B. Congress did not grant Murray a "procedural right" to compel EPA to conduct employment evaluations under Section 321(a).

The district court found that EPA's alleged failure to act under Section 321(a) caused Murray two types of procedural harm: (1) injury due to the agency's failure to follow (unnamed) procedures in the course of failing to act under Section 321(a); and (2) injury due to the deprivation of information that would be generated if EPA performed more Section 321(a) evaluations. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (describing informational injury as "the violation of a procedural right"). Murray does not mount a persuasive defense of these "procedural" theories.

1. Murray barely defends (Br. 51) the district court's first theory of procedural harm. The company cites no failure-to-act case that recognizes a procedural injury, nor does Murray contend that Section 321(a) evaluations are procedural steps on the road to substantive EPA actions. Moreover, the lack of particularized economic harm discussed above is also fatal to Murray's procedural-injury claim. U.S. Br. 36–37.

2. On appeal, Murray puts most of its eggs (Br. 44–51) in the informational-injury basket. It argues that deprivation of information (*i.e.*, results of evaluations that it alleges EPA unlawfully failed to conduct) by itself constitutes an Article III injury. That argument fails because the CAA—the only basis for Murray's suit—does not confer a legal right to information in EPA's evaluations. U.S. Br. 37–40.

It is true that Article III injury "may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth v. Seldin*, 422 U.S. 490,

500 (1975) (citation omitted). But "the standing question in such cases is whether the constitutional or statutory provision *on which the claim rests* properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Ibid.* (emphasis added); *see Am. Soc'y for Prevention of Cruelty to Animals v. Feld Enter., Inc.*, 659 F.3d 13, 23–24 (D.C. Cir. 2011) (*ASPCA*) (refusing to base standing on right to information conferred by different statute). Murray's claim here rests on an alleged violation of Section 321(a) of the CAA. App. 52–53. Thus, the question is whether the CAA lets Murray sue for the information in Section 321(a) evaluations.

Section 321(a) does not confer a legal right to information disclosure. U.S. Br. 38–39. Murray tacitly admits as much (Br. 46–48) by relying on FOIA as the basis of its informational-injury theory. This is not a FOIA suit, and the company cannot bootstrap its Article III standing to plead a CAA claim to a hypothetical injury under FOIA. The difference between Section 321(a), which has no disclosure requirement, and provisions like Section 321(b), which *do* include such a requirement, is not that the latter provisions make information "*more easily accessible*." Murray Br. 47. It is that the latter provisions (at least arguably) grant a right to information disclosure that can be vindicated in a suit alleging that *those specific provisions* were violated. If Murray would have to rely on FOIA to get results of a Section 321(a) evaluation, then it must sue under FOIA to claim an informational injury.

Any FOIA suit would be premature until EPA did the particular evaluations that Murray wants, but that only underscores why the company has not suffered a cognizable injury to date. *See ASPCA*, 659 F.3d at 23–24. Murray cannot ask the courts to compel an agency to create information simply because, once created, the information could be disclosed under FOIA. To hold otherwise would all but vitiate the injury requirement in failure-to-act suits against federal agencies because there is a "strong presumption in favor of disclosure under FOIA," *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 237 (1978), and any harm from agency inaction can almost always "be clothed by ingenious argument in the garb of decreased data flow." *Houchins v. KQED, Inc.*, 438 U.S. 1, 12 (1978) (citation omitted).

The Supreme Court's decision in *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), does not help Murray. In that case, "a group of voters" sued under the Federal Election Campaign Act ("FECA") to enforce "extensive recordkeeping and disclosure requirements" that FECA imposes on "political committee[s]." *Id.* at 13–14; *see* 2 U.S.C. § 434 (1994). The voters alleged that the decision of the Federal Election Commission ("FEC") not to classify a particular organization as a political committee deprived them of information that this organization otherwise would have to report to the FEC, which in turn would have a legal duty to make the information available to the public. 524 U.S. at 16; *see* 2 U.S.C. § 438(a)(4) (1994) ("The [FEC] shall, within 48 hours after * * * the receipt * * * of reports and statements filed

with it, make them available for public inspection."). These voters suffered an injury under FECA, "a statute which * * * does seek to protect [voters] from * * * failing to receive particular information about campaign-related activities." 524 U.S. at 22.

The obvious difference between this case and *Akins* is the text of the relevant statute.[2] Section 321(a) does not have a disclosure requirement like that in FECA, so there is in this case no "statute[ ] creating legal rights, the invasion of which creates standing." *Warth*, 422 U.S. at 500. Plaintiffs argue (Br. 43–46) that there is a closer connection here than in *Akins* between the *judicial relief* they seek and the creation of the information they want. (In *Akins*, the FEC retained discretion not to classify the organization as a political committee, so a favorable judgment would not ensure that any information would be created, whereas here, if Murray succeeds, EPA will have to create new information.) That connection matters for *redressability* but not for injury-in-fact. What matters for purposes of informational injury is whether the statute requires the defendant to disclose information to the plaintiff. Here, unlike in *Akins*, the relevant statute does not require EPA to disclose information. Therefore, Murray cannot have suffered an informational injury cognizable in this suit.

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[2] The Supreme Court also observed that the information the *Akins* petitioners sought was "directly related to voting, the most basic of political rights." 524 U.S. at 24–25. Unlike Murray's abstract interests in "regulatory advocacy," "business decisions," and "employee relations," Br. 45, the "[e]lectoral interests" at stake in *Akins* "are among the abstract interests that support standing in a wide variety of settings." C. Wright et al., 13A Fed. Prac. & Proc. Juris. § 3531.4 (3d ed. 2009).

C. Murray did not preserve its other allegations of injury in the district court, and those allegations are meritless in any event.

Perhaps recognizing the flaws in the standing arguments that the district court credited, Murray proposes (Br. 42) three other interests: "conduct[ing] regulatory advocacy, inform[ing] * * * business planning and forecasting, and maintain[ing] positive and productive relationships with * * * workers." This Court should not entertain arguments related to these interests because Murray did not develop those arguments in its response to EPA's summary-judgment motion. *See Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993) (refusing to consider jurisdictional theory not presented to district court); *Huron v. Cobert*, 809 F.3d 1274, 1280 & n.4 (D.C. Cir. 2016) (same for standing). *See generally Belk, Inc. v. Meyer Corp.*, 679 F.3d 146, 152 n.4 (4th Cir. 2012) (finding that plaintiffs had waived undeveloped arguments).

If this Court chooses to consider Murray's other standing arguments, it should reject them. "[E]xpenditure of resources on advocacy is not a cognizable Article III injury." *Turlock Irrigation Dist. v. F.E.R.C.*, 786 F.3d 18, 24 (D.C. Cir. 2015); *see also Valley Forge*, 454 U.S. at 486 ("[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy."). Murray invokes (Br. 45) a line of cases addressing associational standing (not at issue here) to allege injury from heightened "operational costs * * * to review, challenge, and educate the public" about EPA's actions. Murray's sole support for that claim is a few lines of testimony with no specific facts proving increased costs. But even if the company could prove

higher costs, it "cannot manufacture standing merely by inflicting harm on [itself]" by spending money to lobby or litigate against EPA. *Clapper*, 133 S. Ct. at 1151. Lastly, Murray has offered no evidence to support its abstract "business planning and employee relations" injury allegations. Murray Br. 50 (citing only App. 1297–98, a deposition excerpt that does not even mention these topics).

At bottom, Murray's new alleged injuries are derivative of its old arguments. They turn on whether the company has established a particularized economic harm or a right to information in Section 321(a) evaluations that is enforceable under the CAA. Murray has done neither, so its claim must be dismissed for lack of standing.

III. EPA should have been granted summary judgment because it conducted the "continuing evaluations" described in Section 321(a).[3]

The documents that EPA proffered to the district court evince performance of the agency's obligation under the first clause of Section 321(a). U.S. Br. 41–44. In arguing that those documents are inadequate, Murray perpetuates two errors in the district court's analysis. First, the plain text of Section 321(a) does not order EPA to "assess employment losses from the time they are threatened through when they actually occur." Murray Br. 34. The statute only requires "evaluations of **potential** loss or shifts of employment." 42 U.S.C. § 7621(a) (emphasis added). The company

[3] If this Court reaches the merits, it must draw inferences in EPA's favor in order to affirm the grant of summary judgment to Murray, but it must draw inferences in Murray's favor to reverse the denial of summary judgment to EPA. Because there are no disputed material facts, this Court should resolve the merits without a remand.

takes precisely the wrong lesson (Br. 34) from the requirement in the following subsection that EPA conduct formal investigations at the behest of employees who already have been "discharged or laid off." 42 U.S.C. § 7621(b). Congress' decision to omit similar past-tense language from subsection (a) speaks volumes. U.S. Br. 47.

Murray's other critique of EPA's proffered evaluations (Br. 29–32) is that they do not address site-specific employment effects. Here again, the company flouts the text of Section 321(a), whose overtly discretionary *second clause* envisions specific "investigations" but whose mandatory *first clause* refers generally to "evaluations" without indicating how specific they must be. If, as Murray contends, the only way for EPA to comply with the first clause is by conducting site-specific inquiries, then Congress had an odd way of saying it. Because EPA's evaluations need "**includ[e]**" site-specific investigations only "**where appropriate**," 42 U.S.C. § 7621(a), the statute makes plain that there are other types of permissible evaluations. *See West v. Gibson*, 527 U.S. 212, 218 (1999) (discussing the meaning of "including").

Relatedly, the company faults (Br. 29–30) EPA's proffered evaluations for not analyzing the site-specific "significance" of employment losses and shifts. Murray plucks "significance" out of a disjunctive dictionary definition of "evaluation" and contends, without any textual support, that EPA must evaluate employment effects "based on the workers, facilities, and communities involved." But, whether or not

EPA could or should do so, such a duty is not "clear-cut" on the face of the statute, *Monongahela*, 980 F.2d at 276 n.3 (citation omitted), which is all that matters here.

Murray is left to argue in the alternative (Br. 33) that EPA did not perform *all* the evaluations required by Section 321(a). But the very idea of partial performance is foreign to a failure-to-act claim. *See Sierra Club v. Peterson*, 228 F.3d 559, 568 (5th Cir. 2000) (en banc). Section 304(a)(2) was designed to remedy a failure to act, not to permit review of the adequacy of EPA's performance. *See Thomas*, 828 F.2d at 792. If EPA fell short in its performance under Section 321(a), Murray's remedy (to the extent that one existed) would be to challenge that performance as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Murray concedes (Br. 38 n.5) that EPA's liability does not depend on "whether agency officials believe or assert that they are complying with Section 321(a)." Yet Murray nevertheless trots out (Br. 37–38) snippets from statements by EPA officials that it alleges are inconsistent with the agency's position in this case. None of them state that the first clause of Section 321(a) requires EPA to perform site-specific or retrospective employment evaluations. Moreover, as this Court has already found, it is "not contradictory"—indeed, it is "eminently reasonable"—for EPA to argue that it conducted the evaluations described in Section 321(a) without doing so "explicitly for that purpose." *In re McCarthy*, 636 Fed. App'x 142, 144 (4th Cir. 2015).

Finally, although immaterial to the question at hand, EPA is obliged to correct Murray's statements (Br. 36–38) concerning the Economic Dislocation Early Warning System ("EDEWS"). The Department of Labor and EPA initiated EDEWS voluntarily in 1971, six years before Section 321 existed, to open "a routine flow of information" between them and "facilitate optimal adjustment of workers affected by pollution control enforcement." EPA, Legal Compilation 3461 (1973) (Memorandum of Understanding), *available at* https://go.usa.gov/xXC7h (click on "Next Search Term"). EPA prepared periodic reports for the Department of Labor reviewing the possible effects of all EPA activities on employment at the level of individual plants. EDEWS was "only a small part * * * of a larger effort" by EPA "to assess[ ] the economic effects of its regulations," an effort involving some of the same tools employed in the documents that EPA proffered to the district court, *e.g.*, "economic and energy impact assessment[s] as part of the development of each major standard." App. 681. EDEWS ended in the mid-1980s.

There is no support for Murray's contention (Br. 37–38) that Congress meant to codify EDEWS through enactment of Section 321(a) of the CAA. The company cites a committee report mentioning EDEWS in connection with an uncodified part of the CAA Amendments of 1977, which ordered the Department of Labor to submit a study to Congress "of potential dislocation of employees due to implementation of laws administered by [EPA]." Pub. L. No. 95-95, § 403(e), 91 Stat. 793 (Aug. 7,

1977). Yet the same committee report discusses Section 321 at length without once mentioning EDEWS. H.R. Rep. 95-294, at 316–18 (1977). EPA has never construed Section 321(a) to endorse or require continuation of EDEWS. Even Murray's chief witness, an ex-EPA employee charged with implementing the EDEWS program for two years beginning in the month of Section 321's enactment, App. 2049, testified that she did not even "look at" Section 321(a) to try to "understand what it meant" until 33 years after she left the agency, App. 1762, nor did she recall discussing the statute with her EPA colleagues, App. 1763.

The bottom line is that, even if the EDEWS program would be sufficient to constitute performance under Section 321(a), the CAA does not *require* its revival. EPA's preparation of the documents that it proffered to the district court constitutes a permissible method of performance under Section 321(a)'s first clause, and that ends the merits inquiry.

IV. The district court exceeded its authority by prescribing the manner of EPA's compliance with Section 321(a) and ordering the agency to conduct evaluations not required by law.

The district court's injunction against EPA far exceeded the remedial authority granted by the CAA's citizen-suit provision. U.S. Br. 45–46. Because that provision waives sovereign immunity, and because it prescribes only one remedy for agency inaction (an order "to perform [the] act or duty" withheld, 42 U.S.C. § 7604(a)), the court did not have "broad latitude in fashioning equitable relief." Murray Br. 39.

Murray argues to the contrary based on *Alaska Center for the Environment v. Browner*, 20 F.3d 981 (9th Cir. 1994), a Clean Water Act case whose discussion of citizen-suit remedies has since been called into question. *See, e.g.*, *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 487–88 (1996) (unanimously reversing Ninth Circuit and rejecting argument that courts entertaining citizen suits have inherent equitable power to fashion remedies other than those prescribed by statute). Even if *Browner* controlled this case, it would not help Murray because, unlike the district court here, the Ninth Circuit left "the substance" of EPA's statutory compliance to the agency's discretion. 20 F.3d at 986. Likewise, contrary to Murray's assertion (Br. 40–41), the requirements imposed on the defendant in *T-Mobile South, LLC v. City of Roswell*, 135 S. Ct. 808 (2015), were explicit in, or necessarily implied by, the statutory text. *Id.* at 814–16. The requirements that the district court imposed on EPA were not.

CONCLUSION

For the foregoing reasons, and the reasons set forth in EPA's principal brief, this Court should reverse the judgment of the district court and direct that court to (i) dismiss the complaint for lack of jurisdiction, (ii) enter summary judgment for EPA, or (iii) enter an injunction that tracks the text of Section 321(a) of the CAA.[4]

[4] After EPA filed its principal brief, the district court reset EPA's "deadline to provide the comprehensive filing detailing the actions [it] is taking to comply with Section 321(a) and th[e] Court's orders." Supplemental Appendix at 2. EPA's new deadline for that filing is May 13, 2017. *Ibid.* If this Court remands for a modified

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injunction, the only tasks left for the district court would be to enter that injunction and to resolve Murray's request for attorney fees. *See* U.S. Br. 10.

CERTIFICATE OF COMPLIANCE

This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f), this brief contains 6,333 words. This brief complies with the typeface and type style requirements because it has been prepared in 14-point Times New Roman, a proportionally spaced typeface, using Microsoft Word 2013.

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CERTIFICATE OF SERVICE

On April 14, 2017, I served a copy of the foregoing brief on the United States Court of Appeals for the Fourth Circuit using the Appellate CM/ECF System. All parties to these consolidated cases are represented by registered users and will be served by the CM/ECF System.

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