No. __

IN THE

Supreme Court of the United States

MURRAY ENERGY CORPORATION, et al.,

Petitioners,

v.

SCOTT PRUITT, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 321(a) of the Clean Air Act mandates the Administrator of the United States Environmental Protection Agency ("EPA") "shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement" of the Clean Air Act. EPA has repeatedly refused to comply with this statutory mandate. In concluding that EPA's refusal to comply is beyond the jurisdiction of the federal courts to correct, the Fourth Circuit has immunized EPA from evaluating the job losses suffered by the coal industry due to EPA's unprecedented efforts to curtail coal combustion. Absent action by this Court, this abdication of jurisdiction creates a substantial blind spot where EPA will be left to its own devices and raises fundamental questions about whether and how EPA can be required to meet its mandatory duties. This case therefore presents the following questions:

1. May a federal court decline jurisdiction to compel agency action where the statutory requirements for a claim have been satisfied?

2. Is EPA's refusal to comply with Section 321(a) of the Clean Air Act within the bounds of a federal court's authority to correct?

PARTIES TO THE PROCEEDING

The following were parties to the proceedings in the U.S. Court of Appeals for the Fourth Circuit:

1. Murray Energy Corporation, American Energy Corporation, KenAmerican Resources, Inc., Murray American Energy, Inc., OhioAmerican Energy, Inc., The American Coal Company, The Harrison County Coal Company, The Marion County Coal Company, The Marshall County Coal Company, The Monongalia County Coal Company, The Ohio County Coal Company, and UtahAmerican Energy, Inc., petitioners on review, were Plaintiff-Appellees below.

2. Scott Pruitt, Administrator, United States Environmental Protection Agency, in his official capacity, was Defendant-Appellant below.

In addition to the parties to the proceedings below, three nongovernmental organizations, Mon Valley Clean Air Coalition, Ohio Valley Environmental Coalition, and Keeper of the Mountains Foundation moved to intervene in the proceedings before the district court below. The motion was denied as moot and that decision was appealed to the Fourth Circuit, which dismissed the appeal as moot in the decision under review.

CORPORATE DISCLOSURE STATEMENT

Petitioners have the following parent corporations: Murray Energy Holdings, Company; Murray Energy Corporation; Murray American Energy, Inc.; Murray American Resources, Inc.; AmCoal Holdings, Inc.; Mill Creek Mining Company; Coal Resources, Inc.; Coal Resources Holdings Company; and Ohio Valley Resources, Inc., each of which is located at 46226 National Road, St. Clairsville, OH 43950.

No publicly held company owns 10% or more of any Petitioner's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners (collectively "Murray Energy"), seek a writ of certiorari for review of a judgment of the Court of Appeals for the Fourth Circuit. That court held that the federal district courts do not have subject matter jurisdiction to compel compliance with § 321(a) of the Clean Air Act, which requires EPA to conduct continuing evaluations of the potential loss or shifts in employment resulting from its administration and enforcement of the Clean Air Act. In doing so, the Fourth Circuit vacated an injunction that would have compelled the agency to not only evaluate job losses generally, but would have compelled the agency to specifically address the recent job losses suffered by the coal industry as a result of EPA's unprecedented utility strategy.

OPINIONS BELOW

The June 29, 2017 order and opinion of the United States Court of Appeals for the Fourth Circuit that is the subject of this petition is reported at 861 F.3d 529 (4th Cir. 2017) and reproduced in the Appendix hereto ("App.") at pages 1-18.

The district court's final order is reported at 232 F. Supp. 3d 895 and reproduced in the Appendix at pages 23-53.

The district court's orders denying the Administrator's motion for summary judgment and motions to dismiss are reported at 2016 WL 6083946 (summary judgment), 2015 WL 1438036 (second motion to dismiss), and 2014 WL 4656221 (first

motion to dismiss) and are reproduced in the Appendix at pages 54-124, 125-144, and 145-161 respectively.

JURISDICTION

The Court of Appeals issued its opinion on June 29, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The underlying action was brought by Petitioners to compel the Administrator to comply with § 321(a) of the Clean Air Act (42 U.S.C. § 7621):

§ 7621. Employment effects

(a) Continuous evaluation of potential loss or shifts of employment

The Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of this chapter and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement.

Jurisdiction for this claim is under 42 U.S.C. § 7604, which provides in pertinent part:

§ 7604. Citizen suits

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, 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 chapter which is not discretionary with the Administrator. . . .

The full text of 42 U.S.C. § 7621 is reproduced at App. 169-171. The full text of 42 U.S.C. § 7604 is reproduced at App. 162-168.

Article III, Section 1 of the U.S. Constitution provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

STATEMENT

A. Section 321(a) of the Clean Air Act Requires EPA to Conduct Continuing Evaluations of Potential Loss or Shifts in Employment.

Enacted in 1977, Clean Air Act § 321(a) requires the Administrator to "conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement" of the Clean Air Act. 42 U.S.C. § 7621(a).

The origins of this provision can be traced to Congressional concern that, while it was vesting EPA with considerable new powers to protect the environment in the 1970s, increased compliance obligations were also playing a role in plant shutdowns and worker dislocations, and that these individualized harms were not being adequately addressed.

In 1971, the Senate subcommittee on air and water pollution held hearings on "economic dislocation, plant shutdowns, and worker layoffs" arising from environmental control orders. Its Chairman, Senator Muskie, asked at the outset: "If people, workers, communities, [and] industrial plants are to be affected because we have resolved to protect the environment, how and by what means shall their interest, their personal health and welfare, also be protected?" CA App. 418.[1]

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[1] References to the "CA App." are to the joint Appendix in the circuit court (ECF 26-1 to 26-9).

The committee began by turning to prominent advocate Ralph Nader, who testified that enforcing pollution laws without addressing the problem of "environmental layoffs or closedowns" would be "too narrow a policy and a cruel one at that for workers." CA App. 423. He referenced efforts to study the macroeconomic costs and benefits of environmental regulations, but testified that this was not enough, since "macro-economic studies do not answer the question which a worker has about his or her family's macro-economy." *Id.* To address these individualized impacts, Mr. Nader proposed legislation that would require the Administrator to "investigate every plant closing or threat of plant closing involving 25 or more workers, which he has reason to believe results from an order or standard for the protection of environmental quality." *Id.* at 425. The evaluations would result in reports "detailing the causes of the dislocation, the ways in which it might be avoided and the effects on the community and the workforce." *Id.*

The following year, Congress amended the Clean Water Act to provide a program similar to Mr. Nader's proposal. It provides that "[t]he Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the issuance of any effluent limitation or order under this Act, including, where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such limitation or order." 33 U.S.C. § 1367(e).[2] Congress

[2] Other provisions in § 1367(e) of the Clean Water Act bear further similarities to recommendations Mr. Nader offered in

would go on to add similar provisions not only to the Clean Air Act (42 U.S.C. § 7621(a)), but also to the Toxic Substances Control Act ("TSCA") (15 U.S.C. § 2623), the Solid Waste Disposal Act ("SWDA") (42 U.S.C. § 6971(e), and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") (42 U.S.C. § 9610(e)).

As Judge Bailey recognized in his Final Order below, one of the distinguishing features of these requirements is that they focus the Administrator on the specific job losses resulting from EPA's actions. App. 31. While other provisions require EPA to evaluate costs and benefits generally, or on an industry-wide basis, nothing else imposes on EPA the mandate to specifically evaluate the actual and threatened job loss and shifts resulting from its decisions.

There is also no question that Congress intended these evaluations to be mandatory. The language of the act itself uses clear language of command: "the Administrator *shall* conduct continuing evaluations." 42 U.S.C. § 7621(a) (emphasis added). The House committee report states "[u]nder this provision, the Administrator *is mandated* to undertake an ongoing evaluation of job losses and employment shifts due to requirements of the Act." CA App. 578 (emphasis added). Both Judge Bailey and the Fourth Circuit likewise noted the mandatory nature of § 321(a). *See* App. 25 ("this Court continues to believe that

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his 1971 testimony, including a provision for conducting investigations at the request of an employee and protections for employees terminated due to an investigation.

congress intended to impose a mandatory duty upon the EPA."); App. 13 ("Section 321(a)—when read as a whole—imposes on the EPA a broad, open-ended statutory mandate."). On appeal, even EPA conceded the point, stating "[t]he United States does not contest before this Court that the first clause of Section 321(a) imposes a requirement on EPA to 'conduct continuing evaluations.'" Principal Brief of EPA, CA Doc. 25 at 38 (February 21, 2017).

B. Section 304 of the Clean Air Act Vests Jurisdiction in the District Courts to Compel the Administrator to Comply with Mandatory Duties Under the Clean Air Act.

Section 304(a)(2) of the Clean Air Act allows "any person" to "commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under the Act which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2). To reinforce the breadth of this jurisdictional grant, Congress provided that "[t]he district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, . . . to order the Administrator to perform such act or duty. . . ." *Id.* at § 7604(a).

This citizen suit provision serves as an important check on EPA's compliance with its statutory mandates. Since it provides for judicial oversight of often complex agency decisions, Congress also imposed several limits on its use. For example, damages are typically not recoverable. *See Middlesex County Sewerage Authority v. Nat'l. Sea*

Clammers Assn., 453 U.S. 1, 18, n. 27 (1981). Notice provisions also allow the Administrator to take action before a suit is filed, preempting or mooting many citizen suits. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 87 (1998). With respect to the subject matter jurisdiction of the federal courts, however, there is only one limitation: that there be alleged an "act or duty" that is "not discretionary with the Administrator."

As initially proposed, even this limitation was not present. *See* Sen. Rep. 91-1196, 91st Cong., 2d Sess., at 39 (1970). Upon objection that this would allow citizen suits to compel agency enforcement actions, the limitation was added to restrict citizen suits against the Administrator to the "alleged failure to perform mandatory functions." H.R. Conf. Rep. 91-1783, 91st Cong. 2d Sess., Leg. Hist. at 56; *see also* House Consideration of the Report of the Conference Committee, December 18, 1970, Leg. Hist. at 112 ("Citizen suits against the Administrator will be limited to those duties which are mandatory under the legislation and the suits will not extend to those areas of enforcement with regard to which the Administrator has discretion.").

This citizen suit provision has served as a model for provisions in other major environmental statutes, including the Clean Water Act (33 U.S.C. § 1365(a)), CERCLA (42 U.S.C. § 9659(a)), the Emergency Planning and Community Right to Know Act ("EPCRA") (42 U.S.C. § 11046(a)(1)); the Resource Conservation and Recovery Act ("RCRA") (42 U.S.C. § 6972); the Safe Drinking Water Act ("SDWA") (42 U.S.C. § 300j-8); and TSCA (15 U.S.C. § 2619). *See,*

e.g., *Middlesex*, 453 U.S. at 18, n. 27 ("the citizen-suit provision of the [Clean Water Act] was expressly modeled on the parallel provision of the Clean Air Act"). As a result, interpretations of one citizen suit provision have far-reaching impacts on how other citizen suit provisions are interpreted.

C. Plaintiffs File Suit to Compel EPA to Evaluate the Numerous Coal Jobs that Are Being Lost Because of EPA's Actions.

After his election in 2008, former President Barack Obama announced "a sustained, all-hands-on-deck effort" to pursue "a new energy economy." CA App. 985. In furtherance of these efforts, EPA developed a comprehensive strategy to reduce the national consumption of coal, particularly by the power sector.[3] Over the next eight years, EPA used its authority under the Clean Air Act to: encourage numerous facilities to switch from coal to other fuels; impose costly regulations on facilities that burn coal, incentivizing them to shut down or switch fuels; implement an enforcement strategy that discouraged the repair and continued operation of existing coal-fired facilities; and develop regulations and guidelines that would make it difficult for existing coal-fired facilities to predict future operating costs and all but impossible for new coal-fired facilities to be built. *See* Plaintiffs' Resp. in Opp. to EPA's New

[3] The power sector comprises approximately 93% of the market for domestic coal. *See* https://www.eia.gov/outlooks/steo/report/coal.cfm (last visited September 26, 2017).

Mot. for Sum. Judg., Doc. 256, at 11-16 (August 19, 2016).

As EPA set forth early in the Obama Administration, this utility strategy was to include not only a substantial increase in regulatory costs but extensive public outreach, both to advise utilities of the risk of investing in coal and to emphasize the job-creating potential of the Administration's vision for the economy. *See* CA App. 991, 997-99.

While EPA was publicizing the role it could play in job creation, the agency's attempt to rework the utility sector was contributing to devastating job losses, particularly in the coal industry. By 2015, coal consumption from electric utilities had fallen 29% from 2008 levels. CA App. 358. Through enforcement actions alone, EPA had obtained consent decrees requiring the retirement, repowering, or retrofit of numerous electric generating units, and from 2010 to 2014 alone, an estimated 330 coal-fired electric generating units were set to retire or convert to other fuels. Rapid decreases in coal consumption mirrored similar decreases in coal production. From 2008 to 2015, coal production in the United States fell approximately 24 percent, with a sharp acceleration in 2015 directly attributable to EPA's regulatory policies. App. 87. In central Appalachia, production fell approximately 43% from 2008 to 2014. Severe job losses in communities dependent on coal soon followed. By 2014, national coal mine employment had dropped nearly 20% from two years prior. According to the State of West Virginia's chief economist, EPA's policies resulted in a roughly 65%

reduction in coal employment in Boone County, West Virginia alone, and a 27% reduction in local employment overall. *Id.*

Section 321(a) required EPA to evaluate continuously these effects and to make public the actual and threatened plant closings and job losses associated with its unprecedented expansion of Clean Air Act authority. Indeed, members of Congress repeatedly asked the Administrator for just this information. On no fewer than seven occasions between 2009 and 2013, Senators and Representatives asked EPA for its evaluations or for an explanation why EPA was not complying with § 321(a). *See* App. 35-39. As recent as the current Administrator's confirmation hearing earlier this year, Senator Capito of West Virginia asked specifically about EPA's compliance with § 321(a).[4] The U.S. Chamber of Commerce similarly submitted a Freedom of Information Act request to try to obtain EPA's § 321(a) evaluations. Sixteen states have also filed amicus briefs in the proceedings below emphasizing the importance of EPA's compliance with § 321(a) to their interest in protecting the economic wellbeing of their citizens. *See, e.g.* Brief of Amici Curiae the State of West Virginia and 15 Other States Supporting Plaintiffs-Appellees, CA Doc. 61-1.[5]

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[4] *See* https://www.c-span.org/video/?c4648530/sen-capito-questions (last visited September 26, 2017).

[5] The sixteen states in the court of appeals were West Virginia, Arizona, Arkansas, Georgia, Kansas, Louisiana, Michigan, Nebraska, Nevada, Ohio, Oklahoma, South Carolina, Texas, Utah, Wisconsin, and Wyoming.

In response to these repeated inquiries, Congress was told that EPA had no duty to comply and that compliance would have limited utility, the U.S. Chamber of Commerce was told that EPA had no evaluations, and when Plaintiffs served the Administrator with a notice letter advising her that they would file suit to compel the agency to comply if EPA did not respond, the agency stood mute. Consequently, Plaintiffs filed suit in the Northern District of West Virginia to compel EPA to comply with its statutory duty.

D. The District Court Compels EPA to Comply with Section 321(a).

In the district court, EPA filed *seriatim* motions to dismiss and for summary judgment. First, EPA argued it had no duty to comply with § 321(a). The district court disagreed. *See* App. 145-161 (denying motion to dismiss). Second, after losing a motion to "clarify" the district court's decision (CA App.69–70) and a motion to reconsider (CA App. 117–18), EPA filed a second motion to dismiss, this time on standing grounds. Again, the district court denied the motion, finding multiple grounds for Plaintiffs' standing. App. 125-144. Then, after yet another motion to reconsider (*see* CA App. 160–69), EPA moved for summary judgment.

In its motion for summary judgment, EPA again challenged Plaintiffs' standing, which the district court again rejected. App. 77-95. On the merits, EPA took the unusual step of conceding that, if a set of documents it identified did not satisfy the duty imposed by § 321(a), then summary judgment should

be entered *against* it, stating: "[i]f this Court concludes that the documents upon which EPA relies do not constitute performance of the evaluations described in Section 321(a), then the Court should enter judgment for Plaintiffs and order EPA to perform the duty." App. 119-120. Weighing the evidence from over two years of discovery, the district court found that EPA's documents did not constitute performance of the evaluations required by § 321(a) and entered summary judgment for Plaintiffs. *Id.*

The district court did not immediately issue an order for EPA to comply with § 321(a). Rather, the court ordered EPA to provide a plan and schedule for compliance. App. 123. EPA did not comply. Instead, EPA submitted at the deadline a document asserting that the district court's opinion was wrong, that EPA would not be complying with § 321(a) in the absence of a court order, that the time frame for submitting a plan and schedule for compliance was too short (though EPA never requested an extension), and asserting that it would take "around two years to come up with a methodology to use in an effort to begin to comply with § 321(a)." App. 24-25. The district court found this response "wholly insufficient, unacceptable, and unnecessary," and evidence of the "continued hostility on the part of the EPA to acceptance of the mission established by Congress." App. 25.

Finding that "[t]he record in this case demonstrates hostility on the part of the EPA to doing what is ordered by § 321(a)," App. 45, Judge Bailey ruled that EPA's "clear reticence to comply

coupled with 8 years of refusal to comply—even in the face of Congressional and public pressure—with the Clean Air Act justifies an injunction detailed enough to ensure compliance." App. 46-47. The district court therefore ordered EPA to "fully comply with the requirements of § 321(a)" and, "due to the importance, widespread effects, and the claims of the coal industry," to specifically evaluate "the effects of its regulations on the coal industry and other entities affected by the rules and regulations affecting the power generating industry." App. 50-51.

The district court gave EPA nearly six months (until July 1, 2017), to evaluate the job loss and shifts it had contributed to because of its power sector regulations. App. 51. The district court then gave EPA nearly one full year to show "that EPA has adopted measures to continuously evaluate the loss and shifts in employment which may result from its administration and enforcement of the Clean Air Act, including such rulemakings, guidance documents, and internal policies as necessary to demonstrate that EPA has begun to comply with § 321(a) and will continue to do so going forward." App. 52.

E. The Fourth Circuit Finds No Jurisdiction to Compel EPA to Comply with Section 321(a).

EPA sought reversal of the district court's summary judgment and final order in the Fourth Circuit. EPA did not seek a stay of the district court's injunction but the agency requested expedited appellate review. Just two days before its job loss evaluation of the coal industry was due, on June 29, 2017, the Fourth Circuit vacated the district court's

judgments insofar as they impacted EPA and remanded with instructions to have Murray Energy's suit dismissed "for want of jurisdiction," holding that "Section 304(a)(2) does not authorize the instant suit by Murray against EPA, and . . . the district court thus lacked jurisdiction over the suit." App. 15-16. In light of this ruling, the Fourth Circuit left unaddressed any challenges to the district court's standing, merits, and remedial rulings. *Id.* at 16.

The circuit court found that § 321(a) "when read as a whole—imposes on the EPA a broad, open-ended statutory mandate." App. 13. But the Fourth Circuit concluded that, based on its prior precedent, it must construe its citizen suit jurisdiction "narrowly," to "confin[e] its scope to the enforcement of legally required acts or duties of a specific and discrete nature that precludes broad agency discretion." App 12-13. Relying on this "narrow" interpretation of the federal courts' citizen suit jurisdiction, the Fourth Circuit ruled that § 321(a)'s mandate "does not impose on the EPA a specific and discrete duty amenable to Section 304(a)(2) review." App. 13.

The circuit court also did not set out any alternative basis on which a party could seek to compel compliance with § 304(a)(2). In one footnote, the Fourth Circuit rejected both the APA and mandamus as grounds for jurisdiction. App. 15, n.4. In another footnote, the circuit court declined to address whether Murray Energy's claim could proceed as a claim for "agency action unreasonably delayed" under § 304(a). App. 16, n.5.

REASONS FOR GRANTING THE PETITION

In shielding from judicial review EPA's open refusal to comply with a direct statutory mandate to evaluate the job losses arising from its own conduct, despite repeated requests from Congress, Plaintiffs, and third parties, the Fourth Circuit has created a gap in the protections Congress afforded in enacting environmental citizen suit provisions.

For the beleaguered coal industry in particular, the result is the denial of a detailed job loss evaluation that EPA was days from submitting to the district court and which would have shed valuable light on the true cost of EPA's recent energy policies.

Given the problems the Fourth Circuit's opinion will create for future judicial review, the ramifications on dozens of other programs, and the job loss information at stake, certiorari is warranted.

I. CERTIORARI IS WARRANTED TO CLARIFY THE BOUNDS OF THE FEDERAL COURTS' SUBJECT MATTER JURISDICTION IN CITIZEN SUITS.

As the Fourth Circuit recognized, this case addresses the important question of the "bounds of a federal court's authority under the Clean Air Act (CAA) to correct an alleged failure by the U.S. Environmental Protecting Agency (EPA) to perform a non-discretionary, CAA-based act or duty." App. 6.

In relying on its own policy judgment to decline jurisdiction expressly vested by Congress in the

federal courts, the Fourth Circuit established bounds that violate Article III of the Constitution and create a dangerous precedent for avoiding judicial review on jurisdictional grounds that is contrary to this Court's repeated holding that, once the statutory requirements for a claim have been satisfied, the courts cannot decline jurisdiction.

The Clean Air Act grants the district courts subject matter jurisdiction to compel compliance with "any act or duty" that is "not discretionary with the Administrator." 42 U.S.C. § 7604(a). Both the district court and the court of appeals recognized that § 321(a) of the Clean Air Act imposes a mandatory duty on the Administrator. App. 13, 25. This should have been the end of the circuit court's inquiry into subject matter jurisdiction. Preferring instead to avoid the "vice" of judicial disruption of "complex agency processes," the Fourth Circuit concluded it must construe its jurisdiction "'narrowly' by confining its scope to the enforcement of legally required acts or duties of a specific and discrete nature," thereby precluding review of even mandatory duties as long as they involve the exercise of "broad agency discretion." App. 12 (quoting *Monongahela Power Co. v. Reilly*, 980 F.2d 272, 276, n.3 (4th Cir. 1992)).

This approach violates the express statutory language of the Clean Air Act and this Court's repeated admonitions that, where Congress vests the federal courts with authority to hear a claim within the scope of Article III, the courts cannot decline jurisdiction for prudential reasons. *See Lexmark Intern. v. Static Control*, ___ U.S. ___, 134 S. Ct.

1377, 1387-88 (2014) ("We do not ask whether in our judgment Congress *should* have authorized [the plaintiff's] suit, but whether Congress in fact did so," because "[j]ust as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, . . . it cannot limit a cause of action that Congress has created merely because 'prudence' dictates.") (*citing Alexander v. Sandoval*, 532 U.S. 275, 286-287, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001)) (emphasis in original); *see also Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) ("the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'") (*quoting Cohens v. Virginia*, 19 U.S. 264, 404, 6 Wheat. 264, 404 (1821)); *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922) (Congress "may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution."). [6]

The result of the Fourth Circuit's decision is a broad yet ill-defined blind spot in the courts' ability

[6] In holding that it must construe its jurisdiction "narrowly," the Fourth Circuit also departed from this Court's "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action." *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 498-99 (1991); *see also Cuozzo Speed Techs., LLC v. Lee*, __ U.S. __, 136 S. Ct. 2131, 2140 (2016) ("We recognize the 'strong presumption' in favor of judicial review that we apply when we interpret statutes, including statutes that may limit or preclude review."); Cf. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967) ("a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.").

to oversee EPA compliance with its statutory duties. Duties to review state implementation plans, develop federal implementation plans, evaluate and report on issues important to the administration and enforcement of the Clean Air Act, promulgate guidelines and guidance, review and approve designations, review and update existing emission standards, and take a host of other steps required by the Clean Air Act are all implicated. Under the Fourth Circuit's ruling, each is now subject to a case-by-case review to determine whether the "act or duty" at issue is sufficiently "specific" and "discrete" to be judicially reviewable.

Shielding EPA's noncompliance from citizen suit review can have serious repercussions. The Clean Air Act, like other comprehensive environmental statutes, contains numerous provisions designed to ensure that Congress and the public have adequate information to oversee EPA's administration and enforcement policies. In allowing EPA to avoid creating this information, the Fourth Circuit's decision allows EPA to short circuit the protections Congress put in place to correct regulation gone awry.

The problem will also not be limited to Clean Air Act citizen suits. Given the similar nature of the citizen suit provisions under most major environmental statutes, holdings as to one are often applied quickly to others as well. Already, the Fourth Circuit's opinion is being used by EPA to seek the dismissal of at least two citizen suits brought under the Clean Water Act. *See Ohio Valley Environmental Coalition, Inc., et al. v. Pruitt*, Case

No. 17-1430, Doc. 25, at 35 (July 17, 2017); *Blue Water Baltimore, Inc., et al. v. Pruitt*, Case No. 17-01253, Doc. 13-1, at 10 (July 17, 2017).

To support a narrower construction of its citizen suit jurisdiction, the Fourth Circuit relied on two arguments that further exacerbate the problem. First, the circuit court relied on legislative history to justify narrowing the scope of judicial review beyond what Congress enacted. Reasoning that Congress "recognized the potential for disruption of the administrative process inherent in a broad grant of jurisdiction, and inserted the non-discretionary requirement into the statute in order to minimize such disruption," App. 12, the Fourth Circuit found that it could add conditions to citizen suit review that also further that goal. This proves too much. Congress not only identified the risk of judicial interference, it presented its solution as well, restricting citizen suits to duties "which are not discretionary with the Administrator." As initially proposed, the provision would have extended even to enforcement decisions,[7] a subject "generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Upon concern being raised that this would interfere with the agency's ability to manage enforcement priorities, the final statute limits judicial review to non-discretionary duties, which the Conference Report equates to mandatory duties under the Act. *See* Conf. Rep. 91-1783, 91st Cong. 2d Sess., at 56 (1970) ("Suits against the Administrator [are] limited to alleged failure to perform mandatory functions to

[7] *See* Sen. Rep. 91-1196, 91st Cong., 2d Sess., at 39 (1970).

be performed by him."); House Consideration of the Report of the Conference Committee, December 18, 1970, Leg. Hist. at 112 ("Citizen suits against the Administrator will be limited to those duties which are mandatory under the legislation and the suits will not extend to those areas of enforcement with regard to which the Administrator has discretion."). Neither the text nor the legislative history supports the additional "specific" and "discrete" conditions imposed by the Fourth Circuit, and the Fourth Circuit did not have the authority to add them on its own.

Second, the Fourth Circuit reasoned that its "narrow construction" would give "Section 304(a)(2) a scope similar to that of both the traditional mechanism for judicial review of agency operations, the writ of mandamus, and the modern mechanism for judicial review of many types of agency inaction, Section 706(1) of the Administrative Procedure Act (APA)," App. 12, implying that the scope of APA and mandamus review should now play a role in interpreting grants of jurisdiction under other statutes. While this Court has held that judicial review under the APA is limited to "specific" and "discrete" agency actions, this was not based on a prudential need to limit APA jurisdiction. It was based on the language of the APA itself, which restricts judicial review to certain specific "agency actions." *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) ("When . . . review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be

"final agency action."); *Norton v. So. Utah Wilderness Alliance*, 542 U.S. 55, 61-63 (2004) (relying on the language of 5 U.S.C. §§ 702, 704, and 706 to limit the scope of agency inactions judicially reviewable under the APA to specific and discrete duties). Nothing in this Court's precedent countenances equating "any act or duty" under the Clean Air Act with "final agency action" under the APA, and doing so would offer no judicial review for acts or duties that were not already reviewable under the APA, rendering Congress' choice of the phrase "any act or duty" odd indeed.

On the other hand, as a prerogative writ, the bounds of mandamus jurisdiction are not determined by statutory language at all, but by "the courts exercise [of] sound, legal discretion, in awarding it."[8] This allows for consideration of factors that are beyond the scope of the "traditional principles of statutory interpretation" this Court has stated should be used to determine the bounds of causes of action created by statute. *Lexmark*, 134 S. Ct. at 1388.

Finally, this case presents an excellent vehicle for defining the bounds of subject matter jurisdiction. While the Fourth Circuit cites a line of circuit court cases for support, none of these prior decisions squarely presented the holding at issue here. Two

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[8] *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 607 (1838); *see also Cheney v. United States Dist. Court for the District of Columbia*, 542 U.S. 367, 391 (2004) ("issuance of the writ is a matter vested in the discretion of the court to which the petition is made").

cases, *Envtl. Def. Fund v. Thomas*, 870 F.2d 892 (2d. Cir. 1989) and *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349 (9th Cir. 1978) do not state the proposition cited, merely holding that to be judicially reviewable, the duty alleged must be mandatory. The other two cases, *Monongahela Power Co. v. Reilly*, 980 F.2d 272, 276, n.3 (4th Cir. 1992) and *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 766 (10th Cir. 1980) mention the scope of citizen suit jurisdiction in *dicta.*

The Fourth Circuit's opinion in this case, on the other hand, presents a case in which Plaintiffs seek an order to compel compliance with a duty that EPA concedes is mandatory and which the district court and court of appeals properly found mandates that EPA conduct continuing evaluations of loss and shifts in employment. The Fourth Circuit's rejection of subject matter jurisdiction therefore depends entirely on the circuit court's ability to add restrictions on federal subject matter jurisdiction beyond those in the Clean Air Act itself. As this fundamentally violates the separation of powers reflected in Article III of the Constitution and this Court's repeated admonitions for a strict adherence to the principal that the courts must accept the judicial power vested by Congress, certiorari is appropriate.

II. CERTIORARI IS WARRANTED TO CLARIFY THAT EPA'S REFUSAL TO COMPLY WITH SECTION 321(a) IS JUDICIALLY REVIEWABLE

Even if the Court were to hold that some limitations beyond those set forth in the statute must be applied to limit the jurisdiction of the federal courts to compel compliance with nondiscretionary duties under the Clean Air Act, this Court's precedent makes clear that the discretion given to EPA in conducting the evaluations mandated by § 321(a) is not one of them. EPA may have discretion in how it evaluates potential loss and shifts in employment, but the courts can still redress EPA's decision to avoid its duty entirely. As a result, the Fourth Circuit's decision violates another line of this Court's precedent when it relies on the nature of the evaluations themselves to determine whether the agency has jurisdiction to compel EPA to evaluate job loss at all. Throughout its opinion, the Fourth Circuit contends that the district court should base its subject matter jurisdiction on the nature of the duty required by § 321(a), ignoring the fact that this case is not about *how* the Administrator complies with § 321(a), but whether the Administrator will comply at all.

As this Court has held, "[i]t is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Bennett v. Spear*, 520 U.S. 154, 172 (1997). In *Bennett*, for example, this Court held that a statute providing that "[t]he Secretary shall

designate critical habitat, and make revisions thereto, . . . on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat," was not "discretionary with the Secretary" under the Endangered Species Act because "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical requirement that, in arriving at his decision, he 'tak[e] into consideration the economic impact, and any other relevant impact,' and use 'the best scientific data available.'" *Id.*

For the same reason, this Court found in *Mach Mining, LLC v. EEOC*, ___ U.S. ___, 135 S. Ct. 1645 (2015) that the EEOC's statutory duty to "endeavor" to eliminate alleged unlawful employment practices "by informal methods of conference conciliation, and persuasion," was judicially reviewable. In reaching this holding, this Court recognized that the statute "smacks of flexibility," requiring only that the EEOC "endeavor" to conciliate a claim without specifying "any specific steps or measures" to comply. *Id.* at 1654. The Court nonetheless found a mandatory duty to endeavor to informally conciliate claims. *Id.* at 1651. This was because Congress had "not left everything to the Commission." *Id.* at 1652. If the Commission declined "to make any attempt to conciliate a claim," the statute "would offer a perfectly serviceable standard for judicial review." *Id.* at 1652. As this Court succinctly put it, "[w]ithout any 'endeavor' at all, the EEOC would have failed to satisfy a necessary condition of

litigation." *Id*; *see also Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (holding that, despite the broad discretion afforded the agency in distributing grant money, the agency still had to allocate funds).

Just as in *Mach Mining*, regardless of the discretion EPA may exercise in determining how to evaluate loss and shifts in employment, without any "evaluation" at all, EPA has failed to satisfy a mandatory duty, and the district courts have jurisdiction to correct this violation under the Clean Air Act's citizen suit provision. The Fourth Circuit ignored this principle, and in so doing established a basis for avoiding judicial review not just of EPA's discretionary actions but of any mandatory duty to exercise discretion.

The Fourth Circuit expressed concern that the "considerable discretion" EPA is given in "managing its Section 321(a) duty" would make it difficult for courts to "supervise this continuous, complex process." App. 14-15. But the courts' ability to manage how EPA evaluates job losses is no more relevant to the question of whether EPA must evaluate job losses at all than the Court's ability to manage the designation of critical habitats would have been in *Bennett*, or the ability to oversee claim conciliation would have been in *Mach Mining*.

This Court's guidance is needed to prevent courts of appeals from continuing to take disparate views on the breadth of their jurisdiction. Indeed, even two of the circuit courts relied upon by the Fourth Circuit drew the distinction that the Fourth Circuit now declines to make. In *Envtl. Def. Fund v. Thomas*,

870 F.2d 892, 899-900 (2d. Cir. 1989), the Second Circuit clearly drew the distinction between requiring EPA to exercise its judgment and managing how EPA did so, holding that "[a]lthough the district court does not have jurisdiction to order the Administrator to make a particular revision, we cannot agree with appellees that the Administrator may simply make no formal decision to revise or not to revise, leaving the matter in a bureaucratic limbo. . . ." Similarly, the Ninth Circuit in *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1354 (9th Cir. 1978) held that, while "[t]he Administrator . . . retains a good deal of discretion as to the content" in its decision whether to approve a state revision to its implementation plan under the Clean Air Act, "[i]t is clear that the Administrator has a non-discretionary duty to make a decision regarding the state revision." The Fourth Circuit's holding that the discretionary nature of EPA's compliance with § 321(a) prevents the courts from compelling EPA to comply with § 321(a) at all conflicts with this well-established principle and justifies certiorari.

III. CERTIORARI IS WARRANTED TO COMPEL EPA TO PUBLICLY EVALUATE THE JOB LOSSES IT IS CAUSING

This case presents a lengthy and troubling saga of an agency entrusted with protecting the health and welfare of the nation ignoring and even suppressing the damaging effects its policies are having on jobs.

The agency's impulse to avoid at all cost a frank discussion of the actual plant closings, workers who have lost their jobs, and communities that are losing

their tax base because of EPA's actions has proven to be so strong that the district court concluded, after three years of litigation, that EPA had not only failed to comply with its statutory duty to evaluate and make public the job losses it was causing, the agency was *hostile* to compliance. App. 45 ("The record in this case demonstrates hostility on the part of the EPA to doing what is ordered by § 321(a).") It is plain on the facts of this case that, absent a court order, EPA will not comply. Rather, it will continue to look to bury the true risks of its policies to families and local communities.

There is also no practical barrier to EPA's compliance. As the district court found, EPA has the tools and resources to comply. App. 49. When the Fourth Circuit issued its opinion, EPA was mere days from publishing its six-month evaluation of job losses in the coal industry. Since the Fourth Circuit's opinion, no version of this evaluation, draft or final, has been made public.

In the meantime, EPA actions have weakened, and continue to wreak havoc on, the coal industry. The past nine years have seen a rapid expansion of EPA's authority over areas of the economy not traditionally regulated by the agency. The result has been catastrophic for the large portion of this Country dependent on coal for its chief source of energy, income, or taxes. The new Administration must now deal with the consequences of these policies.

As the U.S. Chamber of Commerce noted below, compliance with § 321(a) will help "EPA to regulate

better" and "to take into account the economic costs" of achieving future environmental benefits. U.S. Chamber Amicus Brief, ECF No. 275, at 11. Moreover, as this Court noted in the context of the similar statutory mandate in the Clean Water Act, continuing evaluations of loss and shifts in employment will also "allow the Congress to get a close look at the effects on employment of legislation such as this, and will thus place [it] in a position to consider such remedial legislation as may be necessary to ameliorate those effects." *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 83, n.24 (1980) (quoting Representative Fraser from the legislative record).

EPA, Congress, and the States must now grapple with the consequences of the past Administration's unprecedented actions under the Clean Air Act. An evaluation of the job losses that have occurred and those jobs that remain under threat because of EPA's decisions will be a powerful tool in helping EPA, Congress, the States, and Plaintiffs address and correct a policy that, up until now, has been far "too narrow a policy and a cruel one at that for workers" in the coal industry. CA App. 423.

Because this case will decide whether the individuals most directly impacted by EPA's policies will become an integral part of EPA's evaluations of its administration and enforcement of the Clean Air Act going forward, as Congress intended, or whether EPA will be able to continue to marginalize the individual impacts of the actions it takes in the name of the general public and the national welfare, certiorari is warranted.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit and review its decision in this case.

Respectfully submitted,

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