No. 17-478

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**

## BRIEF OF *AMICUS CURIAE* CAUSE OF ACTION INSTITUTE IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Does Section 321(a) of the Clean Air Act establish mandatory, non-discretionary duties for the Environmental Protection Agency?

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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus Curiae* Cause of Action Institute ("CoA Institute") is a 501(c)(3) nonpartisan, nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.[2] In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. CoA Institute also frequently represents third-party plaintiffs in actions against the federal government in an effort to scale back regulatory abuses and overreach. The Environmental Protection Agency's ("EPA") failure to conduct mandated job loss evaluations and investigations, in this case and others, is an abuse of the rule of law with serious economic consequences.

CoA Institute supports Petitioners in asking this Court to grant a writ of certiorari.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In Section 321(a) of the Clean Air Act, Congress imposed a mandatory duty on the EPA to continually evaluate the effect of its rules and regulations on employment. The EPA has, thus far, steadfastly refused to carry out this mandate. Tiring of the EPA's refusal to meet its duties, the United States District

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[1] Pursuant to Rule 37.2(a), notice of intent to file this *amicus* brief was received by counsel of record for all parties at least ten (10) days prior to its due date and all parties consented to its filing. This brief was solely authored by counsel for *amicus curiae* CoA Institute, which alone funded its preparation and submission.

[2] *See* Cause of Action Inst., *About*, www.causeofaction.org/about (last visited Nov. 1, 2017).

Court for the Northern District of West Virginia wisely set out strict guidelines for compliance and ordered the EPA to fulfill its statutory duties. The United States Court of Appeals for the Fourth Circuit, however, reversed the district court's decision, finding that the EPA's mandatory duties are, in fact, discretionary. But the plain language of the statute is clear: the EPA *shall* conduct continuing evaluations of employment impacts. That requirement is critical to keeping both the public and Congress informed of the effects of the EPA's administrative pronouncements. This Court should grant review, reverse the Fourth Circuit, and mandate that the EPA finally obey the clear, written orders of the Legislature.

## ARGUMENT

### I. The EPA must fulfill its mandatory duty under Section 321 of the Clean Air Act to evaluate the impact of its rules on employment.

#### A. Section 321(a) imposes a mandatory duty.

Section 321(a) of the Clean Air Act ("CAA") plainly establishes a non-discretionary duty for the EPA Administrator ("Administrator").

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

42 U.S.C. § 7621(a) (emphasis added).

As the District Court below properly recognized, this requirement is a mandatory one, regardless of the lack of date-certain deadlines. Pet. App. 76 ("While the EPA may have discretion as to the timing of such evaluations, it does not have the discretion to categorically refuse to conduct **any** such evaluations, which is the allegation of the plaintiffs."). The Fourth Circuit, however, erroneously ruled that the EPA has "considerable discretion" with whether to comply with Section 321(a)'s "open-ended" requirement. Pet. App. 14 ("Section 321(a) calls for evaluations without, for the most part, specifying guidelines and procedures relevant to those evaluations"). In so doing, the Fourth Circuit conflated discretion in *how* the EPA may carry out certain statutory requirements—such as continuing employment impact evaluations—with discretion in whether or not to *actually* meet those requirements. If the EPA had affirmatively set out to conduct the evaluations, but Petitioners disagreed with the method, then the Fourth Circuit's analysis would at least match the facts. Here, though, the EPA utterly failed to conduct *any* analysis at all, which required the District Court to step in.

The Fourth Circuit raised understandable concerns that a "court is ill-equipped to supervise this continuous, complex process." Pet. App. 15. While this may be true, there is no alternative to judicial recourse if an agency refuses to act. Allowing the Fourth Circuit's decision to stand would permit agencies to evade judicial review of their nonperformance of any "complex" mandates, thus rendering such duties effectively discretionary.

This Court likewise has recognized that the word "*shall*," especially when used in the same section as

the word "*may*," typically connotes a *mandatory* duty imposed by Congress.

> Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement. . . . When a statute distinguishes between 'may' and 'shall,' the latter generally *imposes a mandatory duty*.

*Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1971, 1977 (2016) (emphasis added); *see Lexecon Inc. v. Milberg Weiss Bershard Hynes & Leach*, 523 U.S. 26, 35 (1998) (A statute's use of the "mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion."); *Bennett v. Spear*, 520 U.S. 154, 175 (1997) ("[A]ny contention that the relevant [statutory] provision . . . is discretionary would fly in the face of its text, which uses the imperative 'shall.'"). Later in Section 321, Congress gave the EPA discretionary investigative authority, expressly stating that the "Administrator *may* issue subpoenas . . . and he *may* administer oaths." 42 U.S.C. § 7621(c) (emphasis added). It is thus clear that Congress intended some EPA duties—conducting evaluations of employment loss—to be mandatory and others to be discretionary.

Section 321 was added to the CAA because of congressional concern with the "extent to which the [CAA] or other factors are responsible for plant shutdowns, decisions not to build new plants, and consequent losses of employment opportunities." H.R. Rep. No. 95-294, at 316 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1395. As the District Court correctly noted, "[w]ith specific statutory provisions like Section 321(a), Congress unmistakably intended to track and monitor the effects of the [CAA] and its implementing regulations on employment in order to improve the legislative and regulatory processes." Pet.

App. 96; *cf. Envtl. Prot. Agency v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 82 n.24 (1980) (discussing a similar provision in the Clean Water Act that would "allow Congress to get a close look at the effects on employment of legislation such as this, and will thus place [Congress] in a position to consider such remedial legislation as may be necessary to ameliorate those effects." (citation and quotation marks omitted)).

Despite the CAA's clear requirements, the EPA does not conduct ongoing Section 321(a) evaluations. While the EPA claimed in the courts below that it conducts the continuous evaluations mandated by Section 321(a) through the preparation of "regulatory . . . and economic impact analyses" and related materials—despite "repeated admissions" to the contrary—such materials fall short of the mark. Pet. App. 109. For example, former Administrator Gina McCarthy publicly stated that the agency does not, in fact, consider its duty under Section 321 to conduct evaluations as mandatory, but rather discretionary:

> EPA has not interpreted [Section 321] to require EPA to conduct employment investigations in taking regulatory actions. . . . EPA has found no records indicating that any Administration since 1977 has interpreted section 321 to require job impacts analysis for rulemaking actions.

Pet. App. 38 (citation omitted).

### B. The EPA recently conceded this duty and indicated willingness to comply.

On October 25, 2017, days before the instant brief was due, the EPA released a report, as required by Executive Order 13783, on the burden of existing regulations on domestic energy resources. *See* Envtl.

Prot. Agency, Final Report on Review of Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources Under Executive Order 13783 (Oct. 25, 2017), *available at* https://causeofaction.org/wp-content/uploads/2017/10/eo-13783-final-report-10-25-2017.pdf. In this report, the EPA specifically cites the requirements of Section 321(a), stating that, "[i]n the CAA, . . . Congress expressed its intent that EPA conduct continuing evaluations of potential losses or shifts of employment[.]" *Id*. at 6. The EPA even concedes that it has *failed to conduct these very studies*, *see id*. ("[T]he Agency historically has not conducted these assessments[.]"), and that it now "intends to conduct these evaluations consistent with the [CAA]." *Id*.

This report does not moot this case as the EPA stopped short of explicitly admitting that Section 321(a) imposes a mandatory duty. The agency also failed to indicate any willingness to conduct studies specifically germane to the instant controversy. In any event, Respondent should promptly clarify its position before this Court or face remand. *See, e.g., Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (holding that inconsistent agency positions can be construed as arbitrary and capricious).

### C. The EPA's failures rob Congress of potentially vital information.

The EPA's failures rob Congress and affected parties of potentially vital information that can be used to ameliorate negative effects of regulation. This is especially pertinent given Congress's renewed use of the Congressional Review Act ("CRA"), 5 U.S.C. §§ 801–08. The CRA allows Congress to review and reject regulations promulgated by various agencies. *Id*. Congress has sixty days from when an agency

reports a regulation to exercise its authority under the CRA to overturn an administrative action. *Id*.

Thus far, in 2017, Congress has successfully used the CRA fourteen times. *See 2017 CRA Tracker*, Senate Republican Policy Committee, http://bit.ly/2ihIzu6 (last visited Nov. 1, 2017). It is essential that agencies issue rulemaking reports under 5 U.S.C. § 801(a)(1)(A) in a timely and complete fashion. The EPA's failure to fulfill its statutory duties under Section 321 of the CAA indicates a faulty understanding of the effects of its rules, and this, in turn, can negatively impact the completeness of its reporting on regulatory actions under the CRA. This potentially deprives Congress of an important opportunity to conduct oversight and regulatory review.

## II. Section 321(a) and 321(b) delegate equally vital duties.

The Fourth Circuit held that "Section 321(a)'s poor fit for judicial review is underscored when read alongside other CAA provisions," such as Section 321(b). Pet. App. 15. Both provisions, however, delegate mandatory and vital duties. And it should come as no surprise that the EPA has also neglected its duties under Section 321(b).

Section 321(b) establishes that any employee who is discharged or laid off, threatened with discharge or layoff, or whose employment is adversely affected by CAA requirements or proposed requirements "may request the Administrator to conduct a full investigation of the matter." 42 U.S.C. § 7621(b). "The Administrator shall thereupon investigate the matter and, at the request of any party, shall hold public hearings on not less than five days' notice." *Id.*

Despite the EPA's professed claims regarding the importance of Section 321(b) procedures in the CAA's overall statutory scheme—which the Fourth Circuit relied upon in its opinion—the agency has never seen fit to promulgate *any* regulations regarding the process and standards by which it should conduct investigations and hearings under Section 321(b).[3]

Concerned by these omissions, on September 14, 2016, CoA Institute petitioned the EPA to initiate a rulemaking to implement procedures for investigations and hearings under Section 321(b). *See* Letter from CoA Inst. to Gina McCarthy, Adm'r, Envtl. Prot. Agency (Sept. 14, 2016), *available at* https://causeofaction.org/wp-content/uploads/2017/04/2016.09.14-Petition-for-Rulemaking-EPA-4813-6531-0776-v.1.pdf. In the absence of such standards, potential requestors are left without any guidance as to how to proceed under Section 321(b), thus rendering hollow the EPA's protestations regarding the centrality and importance of these provisions.[4] The EPA has yet to

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[3] CoA Institute could find only one reported example of an investigation conducted under Section 321(b), which occurred in 1981, a few years after passage of the CAA amendments. After the announcement of two plant closures operated by Anaconda Copper Company, which would affect approximately 1,500 individuals, employees who worked at the facilities asked the EPA to conduct an investigation under Section 321(b) to determine the reasons for the closures. A regional EPA office conducted an investigation and issued a report concluding that the two plants at issue would have been closed even if the CAA never came into existence and declining to conduct a public hearing. *See* Envtl. Prot. Agency, Region VIII, Role of Clean Air Act Requirements in Anaconda Copper Company's Closure of Its Montana Smelter and Refinery, (June 24, 1981), *available at* http://bit.ly/2nofjmJ.

[4] The EPA has promulgated such regulations for a similar provision of the Clean Water Act. 40 C.F.R. § 108.3; *see also* 33 U.S.C. § 1367(e). No sound reason exists for why such regulations

initiate any rulemaking in response to CoA Institute's petition.

## III. The failure to engage in employment evaluations mandated by a number of statutes reveals systemic problems with the EPA.

Most of the major environmental statutes administered by the EPA have provisions similar to Section 321 of the CAA. Yet, to the best of CoA Institute's knowledge, the EPA has similarly failed to conduct evaluations required by those laws—although, as noted, the EPA has issued regulations under the CWA for employee requests for investigation. These failures illustrate systemic problems at the EPA regarding its compliance with congressional mandates and lack of concern regarding the employment effects of its activities.

### A. Section 507(e) of the Clean Water Act, 33 U.S.C. § 1367(e)

Section 507(e) of the Clean Water Act ("CWA") requires the EPA to evaluate potential loss or shifts of employment resulting from the issuance of any effluent limitation or order by the EPA and, if requested, to investigate specific allegations related to adverse effects of CWA limitations or orders. As noted by the U.S. Chamber of Commerce, the EPA has *never* conducted an employment study under Section 507(e):

> After extensive research the Chamber cannot identify even one instance under the Clean Water Act in which the Administrator made any effort to conduct an evaluation of its

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are in place for hearings related to the Clean Water Act but entirely absent for hearings related to the CAA.

> actions on the potential loss or shifts in employment as a result of its actions. Congress imposed this mandate on the Administrator of EPA on October 18, 1972.

*EPA's Expanded Interpretation of its Permit Veto Authority Under the Clean Water Act: Hearing Before the H. Comm. on Transp. & Infrastructure, Subcomm. on Water Resources & Env't* (July 15, 2014) (statement of William Kovacs, Vice President for Envt., Tech. & Regulatory Affairs, U.S. Chamber of Commerce at 8), *available at* http://uscham.com/2obUWfx.

### B. Section 7001(e) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6971(e)

Section 7001(e) of the Resource Conservation and Recovery Act ("RCRA") is virtually identical to CWA Section 507(e). It requires the EPA to evaluate potential loss or shifts of employment due to EPA action under the RCRA and, if requested, to investigate specific allegations that administration or enforcement of the RCRA is having adverse effects on employment. CoA Institute could locate no evidence that the EPA has ever conducted an employment evaluation under Section 7001(e)**.**

### C. Section 110(e) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9610(e)

Section 110(e) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") requires the President to evaluate potential loss or shifts of employment resulting from the administration or enforcement of the CERCLA's provisions and, if requested, to investigate specific employee allegations related to adverse effects of CERCLA administration

or enforcement. The President, in turn, has delegated this power to the Administrator. Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987), *as reprinted at* 42 U.S.C. § 9615. CoA Institute could locate no evidence that the EPA has ever conducted an employment evaluation under Section 110(e).

The agency must be held accountable for these systemic failures. A grant of certiorari in this case can begin to ameliorate a decades-long pattern and practice by the EPA of willfully and contumaciously avoiding similar duties across many statutes and areas within its jurisdiction.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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