No. 17-478

In the Supreme Court of the United States

MURRAY ENERGY CORPORATION, ET AL., PETITIONERS

v.

SCOTT PRUITT, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The citizen-suit provision of the Clean Air Act (Act), 42 U.S.C. 7401 *et seq.*, entitles "any person" to file suit "against the Administrator [of the Environmental Protection Agency] where there is alleged a failure of the Administrator to perform any act or duty under [the Act] which is not discretionary." 42 U.S.C. 7604(a)(2). The question presented is as follows:

Whether an allegation that the Administrator has failed to "conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the [Act] and applicable implementation plans," 42 U.S.C. 7621(a), is subject to judicial review under 42 U.S.C. 7604(a)(2).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 861 F.3d 529.[1] A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 636 Fed. Appx. 142. The opinion of the district court (Pet. App. 23-53) is reported at 232 F. Supp. 3d 895. Prior opinions of the district court (Pet. App. 54-124, 125-144, 145-161) are unreported but are available at 2016 WL 6083946, 2015 WL 1438036, and 2014 WL 4656221, respectively.

[1] The opinion reproduced in the petition appendix has been amended to correct a typographical error. See 7/18/17 Order 3. At petition appendix 14, footnote 3, line 7, the word "direction" should read "discretion." *Ibid.*

JURISDICTION

The judgment of the court of appeals (Pet. App. 19-22) was entered on July 18, 2017. The petition for a writ of certiorari was filed on September 27, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The U.S. Environmental Protection Agency (EPA) administers and enforces the Clean Air Act (CAA or Act), 42 U.S.C. 7401 *et seq.* Congress enacted the CAA "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. 7401(b)(1).

In 1977, after employers, unions, and public-interest advocates debated whether and to what extent the CAA and other environmental laws affect employment, Congress amended the CAA to add "a mechanism for reviewing [employment] effects" of the Act. Pet. App. 6. The CAA now provides that "[t]he Administrator [of EPA] shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision[s] 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." 42 U.S.C. 7621(a). Those evaluations do not "require or authorize" EPA "to modify or withdraw any requirement imposed or proposed to be imposed under [the CAA]." 42 U.S.C. 7621(d).

This case concerns the scope of judicial review of alleged EPA inaction under Section 7621(a). The CAA in-

cludes a citizen-suit provision, 42 U.S.C. 7604. As relevant here, that provision confers jurisdiction on federal district courts to adjudicate claims by "any person" who alleges "a failure of the Administrator [of EPA] to perform any act or duty under [the CAA] which is not discretionary." 42 U.S.C. 7604(a)(2). The reviewing court may "order the Administrator to perform such act or duty." 42 U.S.C. 7604(a). It may also "compel * * * agency action unreasonably delayed." *Ibid.*

2. Petitioners operate several coal-mining businesses. In 2014, they sued EPA, alleging that the agency was not conducting the "continuing evaluations" described in Section 7621(a). Pet. App. 6-7. Petitioners sought an injunction that would have required EPA to continuously conduct evaluations and, in the interim, would have prohibited the agency from taking certain administrative and enforcement actions affecting the coal industry. *Id.* at 7.

a. EPA filed motions to dismiss petitioners' suit for failure to identify a nondiscretionary duty under the CAA and for lack of Article III standing. Pet. App. 7. The district court denied both motions to dismiss. *Ibid.* EPA then moved for summary judgment. *Ibid.*

In support of its summary-judgment motion, the agency proffered 53 recent "regulatory impact analyses, economic impact analyses, white papers, and other reports" that, in its view, constituted performance of the continuing evaluations required by Section 7621(a). Pet. App. 7. EPA asked that the district court grant summary judgment in its favor "or, in the alternative, that the court grant summary judgment in [petitioners'] favor if it were to conclude that the agency's proffer was insufficient." *Id.* at 8. Petitioners "opposed the motion, including EPA's proffer that [petitioners] be granted

summary judgment if the documents were found not to satisfy Section [7621](a)," on the ground that discovery was necessary to determine whether EPA had failed to act. 636 Fed. Appx. at 143.

The district court agreed with petitioners and ordered EPA to comply with their discovery requests. Pet. App. 8. EPA petitioned the court of appeals for a writ of mandamus to halt discovery, but the petition was denied. *Id.* at 58. Petitioners subsequently noticed the deposition of the EPA Administrator, and the district court refused to preclude her deposition. *Id.* at 8 n.1. EPA then filed a second petition for a writ of mandamus to preclude the deposition, which the court of appeals granted. *Id.* at 58; see 636 Fed. Appx. at 145. The court explained that it saw no "contradiction in EPA's positions that would support the district court's finding of an extraordinary circumstance," and it was "similarly unpersuaded that there is no alternative to deposing" the Administrator. 636 Fed. Appx. at 144. The court of appeals declined to consider whether the district court had jurisdiction over petitioners' suit. See *id.* at 145 n.4.

b. Following discovery, EPA renewed its motion for summary judgment. Pet. App. 59. The agency proffered the same 53 documents to demonstrate its performance under Section 7621(a), as well as nine other documents that it had created since the first motion was filed, "[i]n light of the continuous nature of the EPA's duty." *Id.* at 8. Petitioners again opposed entry of summary judgment (even in their favor) and requested a trial, but the district court granted them summary judgment over their objection. *Id.* at 119-120.

The district court reaffirmed its prior decision that EPA's duty to "conduct continuing evaluations" under Section 7621(a) is an "act or duty * * * which is not

discretionary with the Administrator," 42 U.S.C. 7604(a)(2). See Pet. App. 25. The court had previously reasoned that the word "shall" in Section 7621(a), by signaling that EPA's evaluations are "mandatory," indicates that questions concerning the agency's performance are subject to judicial review. *Id.* at 71; see *id.* at 74. Although it acknowledged that "EPA may have discretion as to the timing of such evaluations," the court concluded that the agency had a nondiscretionary duty to conduct the evaluations. *Id.* at 76.

On the merits, the district court held that the summary-judgment record demonstrated that the agency had not fulfilled its statutory duty. See Pet. App. 41-46. The court concluded that, because EPA had not evaluated "actual, site-specific employment effects of CAA implementation," *id.* at 9, the agency had failed to evaluate "potential loss or shifts of employment," as Section 7621(a) commands, see *id.* at 42-43.

The district court ordered EPA to file within six months an "evaluation of the coal industry and other entities affected by the rules and regulations affecting the coal mining and power generating industries." Pet. App. 51. It specified that the evaluation must identify, *inter alia*, facilities "at risk of closure or reductions in employment" and "the impacts of the potential loss and shifts in employment," including on communities, families, and industries. *Ibid.* The court also ordered EPA to adopt "measures to continuously evaluate the loss and shifts in employment" in the future. *Id.* at 52. The district court denied petitioners' further request to stay the effective date of any pending CAA regulations and

to enjoin EPA from proposing or finalizing new regulations. *Id.* at 52-53.[2]

3. The court of appeals reversed. Pet. App. 1-18. The court held that the citizen-suit authorization in Section 7604(a)(2) does not encompass petitioners' contention that EPA had failed to perform its "continuous duty" under Section 7621(a). *Id.* at 6. The court further held that, in the absence of an applicable waiver of sovereign immunity, the suit should be dismissed for lack of jurisdiction. *Id.* at 11, 15 n.4.

The court of appeals first explained that only "legally required acts or duties of a specific and discrete nature" may be compelled under Section 7604(a)(2). Pet. App. 12. The court noted that both the Fourth Circuit and its sister circuits had "construed Section [7604](a)(2) narrowly." *Ibid.* (citation and internal quotation marks omitted). A narrow construction, the court explained, gives Section 7604(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 [10(e)] of the Administrative Procedure Act (APA), 5 U.S.C. § 706(1)." *Ibid.* (citing *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004)). The court also cited legislative history indicating that Congress did not intend Section 7604(a)(2) to cause any "judicial disruption of complex agency processes." *Ibid.*

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[2] During the remedy proceedings, three environmental groups moved for leave to intervene as defendants. Pet. App. 9. The district court denied their motion as moot, *id.* at 10-11, and the Fourth Circuit likewise dismissed as moot their appeal from the denial of intervention, *id.* at 16-18.

The court of appeals next held that EPA's duty to "conduct continuing evaluations," 42 U.S.C. 7621(a), although mandatory, is not a specific and discrete duty enforceable under Section 7604(a)(2), Pet. App. 13-15. Rather, the court explained, Section 7621(a) "imposes on the EPA a broad, open-ended statutory mandate." *Id.* at 13. The court reasoned that EPA's employment "evaluations are not confined to a discrete time period, but instead are to be conducted on a *continuing* basis," with "no start-dates, deadlines, or any other time-related instructions." *Id.* at 14. EPA has "considerable discretion," the court continued, "to decide how to collect a broad set of * * * data, how to judge and examine this extensive data, and how to manage these tasks on an ongoing basis." *Id.* at 14-15.

The court of appeals also contrasted Section 7621(a) with two other information-gathering provisions in the CAA "that offer discrete directives accompanied by specific guidance on matters of content, procedure, and timing." Pet. App. 15. The court explained that Section 7621(b), "the very next provision," gives EPA "clear instructions" for conducting site-specific investigations at the behest of affected employees. *Ibid.* The court noted that those instructions "could serve as a solid basis for judicial review." *Ibid.* The court of appeals likewise observed that the CAA requires EPA to consider "specific factors" when preparing "economic impact assessments for enumerated agency actions" by fixed "deadlines." *Ibid.*; see 42 U.S.C. 7617. The court determined that the text of Section 7621(a) does not impose that sort of "clear-cut duty" with manageable standards for judicial review. Pet. App. 16 n.4.

In light of its jurisdictional holding, the court of appeals "decline[d] to address the EPA's challenges to the

district court's standing, merits, and remedial rulings." Pet. App. 16. Petitioners also argued under Section 7604(a) that EPA had unreasonably delayed in conducting evaluations under Section 7621(a). *Id.* at 16 n.5. The court declined to consider that contention because petitioners had "failed to plead it in [their] complaint." *Ibid.*

ARGUMENT

The court of appeals correctly applied traditional tools of statutory construction to resolve a question "of first impression" in the federal courts, 636 Fed. Appx. at 143: whether EPA's responsibility to "conduct continuing evaluations" of the employment effects of the CAA, 42 U.S.C. 7621(a), is an "act or duty * * * which is not discretionary with the Administrator," 42 U.S.C. 7604(a)(2). The court correctly held that judicial review under Section 7604(a)(2) is not available here, and its decision does not conflict with any decision of this Court or of another court of appeals. This case presents a poor vehicle for considering the question presented, moreover, because petitioners lack Article III standing. The petition for a writ of certiorari should be denied.

1. Petitioners contend (Pet. 16-23) that every legal requirement that the CAA imposes on EPA is an act or duty that may be compelled under Section 7604(a)(2). That is incorrect. As the court of appeals explained, an act or duty must be "specific and discrete" to be enforceable under that provision. Pet. App. 12.

a. As a waiver of federal sovereign immunity, the citizen-suit provision of the CAA must be "strictly construed, in terms of its scope, in favor of the sovereign." *Lane* v. *Pena*, 518 U.S. 187, 192 (1996). Although the CAA does not define the phrase "act or duty" in Section 7604(a)(2), the common law of judicial review of administrative inaction teaches that only particular kinds of

actions are amenable to judicial challenge. See *Samantar* v. *Yousuf*, 560 U.S. 305, 320 n.13 (2010) ("[W]hen a statute covers an issue previously governed by the common law, we interpret the statute with the presumption that Congress intended to retain the substance of the common law.").

At common law, the principal means to compel government action was the writ of mandamus, by which a court could order "a precise, definite act . . . about which [an official] had no discretion whatever." *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) (citation and internal quotation marks omitted; brackets in original). But mandamus did not lie to correct "[g]eneral deficiencies in compliance" with a "broad statutory mandate." *Id.* at 66. That is because empowering a court to order "compliance with broad statutory mandates" would "necessarily" also empower it "to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management." *Id.* at 66-67. To avoid the "mischief" that would result from that type of judicial oversight, *Decatur* v. *Paulding*, 39 U.S. (14 Pet.) 497, 516 (1840), courts have declined to interfere with "the continuing (and thus constantly changing) operations" of administrative agencies, *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 890 (1990). And they have reserved the mandamus remedy for circumstances in which the government has a clear-cut obligation to take a specific and "*discrete* agency action." *Norton*, 542 U.S. at 66.

When it enacted the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, in 1946, Congress codified

the "traditional limitations upon mandamus." *Norton*, 542 U.S. at 66. The APA accordingly authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. 706(1), only with respect to "*discrete* agency action that [the agency] is *required to take*," *Norton*, 542 U.S. at 64. In *Norton*, for example, the Court declined to enforce the Secretary of the Interior's statutory duty to "continue to manage" roadless areas of public lands "so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. 1782(c). Although the statute required the Secretary to manage roadless areas in that manner, the Court deemed the mandate unenforceable under the APA because Congress had not required the Secretary to take any specific and discrete action. See *Norton*, 542 U.S. at 66.

The parallel judicial-review provisions of the APA and the CAA should be interpreted *in pari materia*. See *Wachovia Bank* v. *Schmidt*, 546 U.S. 303, 316 (2006) ("[S]tatutes addressing the same subject matter generally should be read as if they were one law.") (citations and internal quotation marks omitted). This Court has construed the term "action"—as part of the term "agency action"—to "bear[] the same meaning" in both the APA and the CAA. *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 478 (2001) (equating "final agency action" under 5 U.S.C. 704 with "final action" under 42 U.S.C. 7607(b)); see also 42 U.S.C. 7604(a) (cross-referencing "agency action referred to in [42 U.S.C.] 7607(b)"). And there is no difference between an "action" and an "act." See 5 U.S.C. 551(13) ("'[A]gency action' includes * * * failure to act."); *Webster's New International Dictionary* 25-26 (2d ed. 1948) (defining "act" as "action," and vice-versa). An "act" under Section 7604(a)(2) therefore

is a "*discrete* agency action that [EPA] is *required to take*." *Norton*, 542 U.S. at 64.[3]

b. Petitioners assert (Pet. 16-18) that the court of appeals' ruling conflicts with decisions of this Court holding that courts may not decline jurisdiction on policy grounds. See, *e.g.*, *Lexmark Int'l, Inc.* v. *Static Control Components*, 134 S. Ct. 1377, 1387-1388 (2014). Contrary to petitioners' assertion (Pet. 16), however, the court of appeals did not "rely[] on its own policy judgment" to hold that Section 7604(a)(2) does not authorize petitioners' suit. Rather, the court arrived at that result using "traditional tools of statutory construction and considerations of *stare decisis*." *Richlin Sec. Serv. Co.* v. *Chertoff*, 553 U.S. 571, 590 (2008). The court began with the text of Section 7604(a)(2) and, after also considering its legislative history, construed the statute in harmony with comparable common-law and statutory remedies. Pet. App. 11-13. The court did not bring its own policy judgment to bear; rather, it respected the evident policy judgment of Congress to minimize "judicial disruption of complex agency processes." *Id.* at 12.

c. Under petitioners' reading of the statute (Pet. 17-20), every obligation that the CAA imposes on EPA would be judicially enforceable under Section 7604(a)(2).

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[3] The fact that the CAA permits a citizen plaintiff to challenge EPA's failure to perform a nondiscretionary "act *or duty*," 42 U.S.C. 7604(a)(2) (emphasis added), does not change the analysis. The doublet "act or duty" has traditionally been used to denominate the set of official actions that are enforceable by the writ of mandamus. See, *e.g.*, *Bath Cnty.* v. *Amy*, 80 U.S. (13 Wall.) 244, 248 (1872); James L. High, *A Treatise on Extraordinary Legal Remedies, Embracing Mandamus, Quo Warranto and Prohibition* § 33, at 42-43 (3d ed. 1896).

Petitioners contend (Pet. 20) that the term "discretionary" in Section 7604(a)(2) refers only to EPA's enforcement discretion, meaning that the citizen-suit provision covers any sort of action that is required. That expansive interpretation of Section 7604(a)(2) departs from the well-settled common-law limitations on judicial review.[4] It also would nullify a separate cause of action within Section 7604(a). The CAA provides a remedy for "agency action unreasonably delayed," 42 U.S.C. 7604(a), which can be used to compel actions required by law, see *Norton*, 542 U.S. at 63 n.1 ("[A] delay cannot be unreasonable with respect to action that is not required."). If, as petitioners suggest, a plaintiff can use Section 7604(a)(2) to compel any action required by law, then every unreasonable-delay suit also could be filed as a nondiscretionary-duty suit. That would render superfluous the remedy for unreasonable agency delay and would undermine Congress's intent to give EPA additional time to act before an unreasonable-delay suit can be filed. Compare 42 U.S.C. 7604(a) (requiring plaintiff to notify EPA 180 days before filing unreasonable-delay suit), with 42 U.S.C. 7604(b)(2) (requiring 60 days' notice for nondiscretionary-duty suit).[5]

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[4] The "presumption of judicial review" on which petitioners rely (Pet. 18 n.6) is "embodie[d]" in the APA waiver of sovereign immunity contained in 5 U.S.C. 702, see *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 140 (1967), a statute that petitioners acknowledge (Pet. 21) "is limited to 'specific' and 'discrete' agency actions."

[5] Courts of appeals have harmonized these two causes of action by construing the term "discretionary" in Section 7604(a)(2) to refer only to *the timing* of the act or duty. See *Sierra Club* v. *Thomas*, 828 F.2d 783, 791-792 (D.C. Cir. 1987). Thus, where EPA must act by a deadline, the timing of its action is "not discretionary," 42 U.S.C. 7604(a)(2), and a nondiscretionary-duty suit is appropriate. By contrast, where the CAA does not set a deadline for action, EPA need

Petitioners assert (Pet. 22) that the court of appeals rendered Section 7604(a)(2) duplicative of the APA remedy for "agency action unlawfully withheld," 5 U.S.C. 706(1). Petitioners are correct that Section 7604(a)(2) supplants the APA by creating another "adequate remedy in a court," 5 U.S.C. 704, for EPA's failure to perform a nondiscretionary duty under the CAA. See *Bennett* v. *Spear*, 520 U.S. 154, 161-162 (1997). But the two causes of action are not coextensive. Whereas the APA authorizes suits only by persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. 702, "any person" with Article III standing may file suit under the CAA, 42 U.S.C. 7604(a); see *Bennett*, 520 U.S. at 165. At the same time, a citizen suit under the CAA requires advance notice to the defendant, see 42 U.S.C. 7604(b), which is not required under the APA. Suits filed under the CAA are also governed by special procedural rules that do not apply to APA suits. See, *e.g.*, 42 U.S.C. 7604(d) (fee-shifting provision). In light of those various distinctions, there is nothing "odd" (Pet. 22) about interpreting the CAA's citizen-suit provision to provide the exclusive remedy for unlawful EPA inaction that otherwise could have been challenged in a suit filed under the APA.

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only comply with the general APA requirement "to conclude matters 'within a reasonable time,'" *General Motors Corp.* v. *United States*, 496 U.S. 530, 539 (1990) (quoting 5 U.S.C. 555(b)), and a violation of that requirement is actionable only for unreasonable delay, see *American Lung Ass'n* v. *Reilly*, 962 F.2d 258, 263 (2d Cir. 1992) ("Only when a statute requires agency action at indefinite intervals, such as 'from time to time,' can 'unreasonable delay' be a meaningful standard for judicial review."). Because petitioners did not plead an unreasonable-delay claim, the court of appeals did not decide whether such a claim would be viable here. Pet. App. 16 n.5.

d. Petitioners also raise two practical objections. First, they contend (Pet. 19) that courts will be forced to engage in a "case-by-case review" to determine whether a given statutory mandate is judicially enforceable. But federal courts are accustomed to that inquiry under the ubiquitous APA cause of action, and there is no reason to think that the same inquiry under the CAA will be more cumbersome. Indeed, the alternative would be far more disruptive. Adopting petitioners' reading of Section 7604(a)(2) would frustrate judicial efficiency by "injecting the judge into day-to-day agency management" of "the manner and pace of agency compliance" with broad, often abstract, statutory directives. *Norton*, 542 U.S. at 67.

Second, petitioners speculate (Pet. 18) that the decision below will preclude judicial enforcement of a "broad" class of statutory directives. That fear is unfounded. Congress spoke with sufficient precision to enable meaningful judicial review in the several circumstances that petitioners mention. Thus, EPA's "[d]uties to review state implementation plans, develop federal implementation plans," "review and approve [air-quality] designations," and "review and update existing emissions standards" (Pet. 19) almost invariably culminate in specific and discrete "action[s] of the Administrator," 42 U.S.C. 7607(b)(1), that may be compelled in a suit filed under Section 7604(a). See, *e.g.*, 42 U.S.C. 7410(a)(3)(B) (Administrator "shall approve or disapprove any revision [to a state implementation plan] no later than three months after its submission"); 42 U.S.C. 7410(c)(1) (Administrator shall promulgate a federal implementation plan "within [two] years after" a State fails to file a plan or files a deficient plan). The

same is true of many EPA duties to "promulgate guidelines and guidance" (Pet. 19). See, *e.g.*, 42 U.S.C. 7512a(c)(3) ("Within [six] months after November 15, 1990, the Administrator shall issue guidelines for and rules determining whether stationary sources contribute significantly to carbon monoxide levels in an area."). Even certain of EPA's "evaluat[ions] and report[s]" (Pet. 19) may qualify as specific and discrete actions. See, *e.g.*, Pet. App. 15 (discussing "economic impact assessments" prepared under 42 U.S.C. 7617). Accordingly, the court of appeals' construction of Section 7604(a)(2) is unlikely to "have serious repercussions" (Pet. 19)—other than to relieve district courts of a managerial role for which they are "ill-equipped," Pet. App. 15.

2. Petitioners further contend (Pet. 24-27) that, even if Section 7602(a)(2) authorizes suit only for an agency's violation of specific, discrete duties, Section 7621(a) imposes such a duty on EPA. Petitioners are mistaken. Section 7621(a) establishes a "continuing (and thus constantly changing)" program of employment evaluations, *Lujan*, 497 U.S. at 890, but it does not mandate any "circumscribed, discrete agency actions," *Norton*, 542 U.S. at 62. Congress did not "specify[] guidelines and procedures relevant to those evaluations," nor did it dictate "start-dates, deadlines, or other time-related instructions" for performing evaluations. Pet. App. 14. Section 7621(a) does not even require EPA to memorialize evaluations, let alone to memorialize them in any particular form. In short, the provision is a "broad, open-ended statutory mandate" that "demands the exercise of agency judgment." *Id.* at 13. It lacks "the clarity necessary to support judicial action." *Norton*, 542 U.S. at 66.

Petitioners respond (Pet. 24) that, although EPA may have discretion when it conducts evaluations

described in Section 7621(a), Section 7604(a)(2) authorizes judicial intervention if the agency is "avoid[ing] its duty entirely." Petitioners thus contend that Section 7604(a)(2) authorizes a remedy for a failure to perform a duty that is not specific and discrete, so long as the failure is complete. This Court rejected substantially the same argument in *Norton*:

> If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.

542 U.S. at 66-67. The Court thus recognized that it would be pointless for a court to order performance of a broad, general statutory mandate unless the court is prepared to assess the adequacy of the agency's subsequent performance. Because courts are ill-equipped to perform that task, they should treat as judicially unenforceable a statutory mandate to perform actions that are neither specific nor discrete, even at the behest of a plaintiff who alleges that the agency has made no effort to perform at all.

The course of this litigation illustrates the flaws in petitioners' theory. The district court struggled to decide whether EPA was fulfilling its obligations under Section 7621(a) because it could not determine precisely what the statute required. See 636 Fed. Appx. at 144 (observing that "no court, including the district court here, has ever explicated what Section [7621](a) requires") As a result, the court and the parties spent

years engaging in a wide-ranging review of EPA's historical and ongoing evaluations of the employment effects of the CAA. See Pet. App. 8. At the end of that lengthy discovery period, the court ordered systemic changes to EPA operations, see *id.* at 51-52, and the court retained jurisdiction to "continue to supervise the implementation and enforcement of its injunction," *id.* at 11. The suit thus resulted in the reviewing court, rather than the agency, ordering a "wholesale correction" of alleged "flaws in the entire 'program,'" *Lujan*, 497 U.S. at 893, without specific guidance from Congress.

In arguing to the contrary, petitioners rely (Pet. 24-26) on this Court's decisions in *Bennett* and in *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645 (2015). Neither decision supports their argument. In *Bennett*, the Court explained "that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." 520 U.S. at 172. Unlike the statute at issue in *Bennett*, however, Section 7621(a) does not mandate any particular procedures for EPA's evaluations. This Court's decision in *Mach Mining* is inapposite for the same reason. In that case, the Court held that an agency's decision to file an enforcement action could be set aside because the agency had failed "to attempt conciliation before filing suit," as required by statute. *Id.* at 1649. But the statute at issue there—again, unlike Section 7621(a)—prescribes particular procedures for an agency to follow in its decisionmaking. See *ibid.* ("Title VII of the Civil Rights Act of 1964 sets out a detailed, multi-step procedure through which the [Equal Employment Opportunity] Commission enforces the statute's prohibition on employment discrimination.") (citation omitted).

3. The decision below does not conflict with any decision of another court of appeals.

a. Like the Fourth Circuit here, several courts of appeals have adopted a narrow view of the CAA's citizen-suit provision. In *Sierra Club* v. *Thomas*, 828 F.2d 783 (1987), the D.C. Circuit held that Section 7604(a)(2) "permit[s] citizen enforcement of clear-cut * * * defaults by the Administrator where the only required judicial role would be to make a clear-cut factual determination of whether a violation did or did not occur." *Id.* at 791 (footnote and internal quotation marks omitted); see *Natural Res. Def. Council, Inc.* v. *Train*, 510 F.2d 692, 700 (D.C. Cir. 1975) ("Congress restricted citizen suits to actions seeking to enforce specific requirements of the [CAA]."). The First and Second Circuits have followed the same approach. See *Natural Res. Def. Council, Inc.* v. *Thomas*, 885 F.2d 1067, 1073 (2d Cir. 1989); *Maine* v. *Thomas*, 874 F.2d 883, 888 (1st Cir. 1989). The Tenth Circuit has likewise observed that Section 7604(a)(2) "restrict[s] citizens' suits to actions seeking to enforce specific non-discretionary clear-cut requirements of the [CAA]." *Mountain States Legal Found.* v. *Costle*, 630 F.2d 754, 766 (1980), cert. denied, 450 U.S. 1050 (1981). And the Fifth and Ninth Circuits have interpreted Section 7604(a)(2) "to limit the number of citizen suits which could be brought against the Administrator and to lessen the disruption of the [CAA's] complex administrative process." *Kennecott Copper Corp.* v. *Costle*, 572 F.2d 1349, 1353 (9th Cir. 1978); see *City of Seabrook* v. *Costle*, 659 F.2d 1371, 1374 (5th Cir. 1981). No court of appeals has allowed a suit under Section 7604(a)(2) where the plaintiff did not allege that EPA had failed to perform a specific and discrete action.

In holding that petitioners' challenge was not judicially cognizable, the Fourth Circuit observed that its reading of Section 7604(a)(2) comports with that of other courts of appeals. See Pet. App. 12. Although petitioners assert (Pet. 26-27) that the court's ruling is in tension with two of the decisions that it cited, both of those cases involved specific, discrete agency actions. In *Environmental Defense Fund* v. *Thomas*, 870 F.2d 892, cert. denied, 493 U.S. 991 (1989), the Second Circuit held that EPA had a nondiscretionary duty to decide whether to "promulgate * * * new [air-quality] standards" after completing "thorough review[s]" of existing standards at mandatory five-year intervals, 42 U.S.C. 7409(d)(1). *Thomas*, 870 F.2d at 901. And in *Kennecott Copper*, the Ninth Circuit noted that EPA had a nondiscretionary duty to approve or disapprove a revision to a state implementation plan for air-quality standards "within four months after the date required for submission of a plan," 42 U.S.C. 1857c-5(a)(2) (1970). 572 F.2d at 1354. The CAA provisions at issue in those cases therefore required EPA to decide whether to take a specific and discrete action, in contrast to the "open-ended" instruction in Section 7621(a) that EPA conduct evaluations "on a *continuing* basis." Pet. App. 13-14.

b. There is likewise no division among the circuits with respect to the justiciability of a claim that EPA has failed to comply with Section 7621(a). In the 40 years since Section 7621(a) was enacted, this appears to be the first case in which any court has been asked to consider its meaning. See 636 Fed. Appx. at 144.

The dearth of disputes concerning this provision may be attributable to the fact that Congress has provided a ready tool to compel EPA to conduct the site-specific investigations of employment effects that petitioners

desire. As the court of appeals observed, Pet. App. 15, Section 7621(b)—the next statutory subsection—requires EPA "to conduct a full investigation" at the request of "[a]ny employee * * * who is discharged or laid off, threatened with discharge or layoff, or * * * otherwise adversely affected or threatened to be adversely affected because of the alleged results of any [CAA] requirement imposed or proposed to be imposed." 42 U.S.C. 7621(b). At the close of its investigation, the agency must make "available to the public" the record from any public hearing; the agency's own "findings of fact as to the effect of [CAA] requirements on employment and on the alleged actual or potential * * * adverse effect on employment"; and any "recommendations as [EPA] deems appropriate." *Ibid.* A failure to perform the specific and discrete action that Section 7621(b) requires may be challenged in citizen suits filed by employees, "the individuals most directly impacted" (Pet. 29) by threatened and actual employment loss or shifts due to administration and enforcement of the CAA.

Additional disputes over Section 7621(a) are unlikely to arise in the future. The agency recently reiterated its "inten[t] to conduct these evaluations consistent with the statute[]." U.S. EPA, *Final Report on Review of Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources Under Executive Order 13783*, at 6 (Oct. 25, 2017), https://www.epa.gov/sites/production/files/2017-10/documents/eo-13783-final-report-10-25-2017.pdf (Report).[6]

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[6] The Report states that EPA "historically has not conducted these assessments," which, read in context, means that the agency has not assessed "the cumulative effects of its regulations" for the express purpose of complying with Section 7621(a). Report 6. As the court of appeals explained, "the claim that the EPA ha[s] not

And as petitioners note (Pet. 14), "Congressional and public pressure" on EPA to conduct a variety of evaluations under Section 7621(a) has intensified in recent years. But petitioners "cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the [agency] or the halls of Congress, where programmatic improvements are normally made." *Lujan*, 497 U.S. at 891.

4. Even if the question presented warranted the Court's review, this case would be an unsuitable vehicle for addressing it because petitioners lack Article III standing. The court of appeals did not reach the standing question because it rejected petitioners' suit on a different threshold ground. See Pet. App. 16. But petitioners have not pleaded an injury that is fairly traceable to EPA's asserted failure to act under Section 7621(a) and that would likely be redressed by such agency action. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

Petitioners allege an economic harm from EPA's failure to "document the threatened business closures and consequent unemployment" that have resulted from the agency's actions. Pet. App. 79. But the only remedy available in this nondiscretionary-duty suit is an "order [to] the Administrator to perform" the evaluations described in Section 7621(a). 42 U.S.C. 7604(a). Such an order would be unlikely to mitigate any economic harm from other EPA actions under the CAA, because "courts are unable to evaluate with any assurance

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prepared documents with the *intent* of Section [7621](a) compliance [i]s not in conflict with the claim that the agency ha[s] nonetheless prepared documents with the *effect* of Section [7621](a) compliance, as nothing in Section [7621](a) conditions compliance on intent." Pet. App. 8 n.1.

the 'likelihood' that decisions will be made a certain way by policymaking officials acting within their broad and legitimate discretion." *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989) (plurality opinion). That likelihood is especially low in this context, as the statute forbids EPA from using Section 7621(a) evaluations "to modify or withdraw any requirement imposed or proposed to be imposed under [the CAA]." 42 U.S.C. 7621(d). Although petitioners could turn to Congress for relief from any economic injury that additional EPA evaluations might reveal, see Pet. App. 79, that relief is more "speculative" than "likely," *Lujan*, 504 U.S. at 561 (citation omitted); see *Utah* v. *Evans*, 536 U.S. 452, 513 (2002) (Scalia, J., dissenting) ("The Court no doubt realizes that it is not even conceivable that [plaintiffs] could have standing if redress of their injuries hinged on action by Congress.").

Petitioners also allege that they have suffered "procedural" harm by virtue of EPA's failure to act under Section 7621(a). Pet. App. 89. As discussed above, p. 17, *supra*, however, petitioners have not identified any procedural requirement that the agency violated. Nor do petitioners contend that Section 7621(a) evaluations are procedural prerequisites to some other actions that allegedly harm them. If that were petitioners' argument, their recourse (if any) would lie in a suit to challenge EPA's "final action[s]" on procedural grounds. 42 U.S.C. 7607(b)(1); see 42 U.S.C. 7607(d)(8).

Finally, petitioners allege that they have suffered an "informational injury" by being deprived of information that the evaluations described in Section 7621(a) might generate. Pet. App. 89. By its terms, though, Section 7621(a) does not grant every member of the public a legal right to information in EPA's evaluations. Cf.

42 U.S.C. 7621(b) (providing that "report[s], findings, and recommendations" that EPA makes in formal investigations *requested by employees* "shall be available to the public"). Indeed, Section 7621(a) does not even direct EPA to memorialize its evaluations. Because Section 7621(a) does not create legal rights to information, petitioners cannot demonstrate that "the invasion of" such rights "creates standing." *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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