

No. 17-478

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**In the Supreme Court of the United States**



MURRAY ENERGY CORPORATION, ET AL.,

*Petitioners,*

v.

SCOTT PRUITT, ADMINISTRATOR, UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY,

*Respondent.*

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

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**BRIEF OF *AMICI CURIAE* STATES OF WEST  
VIRGINIA, AND 16 OTHER STATES IN SUPPORT  
OF PETITIONERS**

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## QUESTIONS PRESENTED

1. May a federal court decline jurisdiction to compel agency action where the statutory requirements of the 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?

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INTRODUCTION AND  
INTEREST OF *AMICI CURIAE*<sup>1</sup>

As Petitioner has demonstrated, the Administrator of the Environmental Protection Agency (“EPA”) has failed to comply with the EPA’s mandatory duty under Section 321 of the Clean Air Act (“CAA”), 42 U.S.C. § 7621(a), to evaluate the job losses resulting from the agency’s regulations. The plain terms of Section 321 and relevant legislative history foreclose the EPA’s contention that it may disregard its statutory duty under Section 321. See 42 U.S.C. § 7621(a) (“The Administrator *shall* conduct continuing evaluations of potential loss or shifts of employment . . . .” (emphasis added)); H.R. Rep. No. 95-294, at 317 (1977) (“the Administrator is mandated to undertake an ongoing evaluation of job losses . . .”). As Petitioner has also explained, the court below erred in construing the CAA’s citizen-suit provision to foreclose review of the EPA’s refusal to comply with this nondiscretionary requirement. Pet. 16–24. And as Petitioner has aptly shown, this Court’s review is warranted because of the importance of the issues presented. Pet. 27–30.<sup>2</sup>

*Amici curiae*—the States of West Virginia, Arizona, Arkansas, Georgia, Indiana, Kansas,

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<sup>1</sup> Pursuant to Supreme Court Rule 37.2(a), *amici* have timely notified counsel of record of their intent to file an *amicus* brief in support of Petitioner.

<sup>2</sup> On October 25, 2017, the EPA issued a report in which it acknowledged that it has not conducted Section 321 evaluations in the past but intends to do so in the future. U.S. Eenv’t Prot. Agency, “Final Report on Review of Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic

Louisiana, Michigan, Nebraska, Nevada, Ohio, Oklahoma, South Carolina, Texas, Utah, Wisconsin, and Wyoming—submit this brief to underscore the importance of this Court’s review because of the unique challenges that States face when the EPA unlawfully refuses to comply with Section 321—and, as here, the lower courts stand silent in the face of this blatant disregard for federal law. *Amici* States have an interest in this case because the EPA’s failure to comply with its statutory duty harms the States by denying them vital information that assists them in fulfilling their responsibility to protect and promote their residents’ economic prosperity. Section 321 job-loss information helps States to better plan and implement economic policy. The information can also assist States in annual budget preparation, allowing them to anticipate and account for tax revenue shortfalls resulting from declines in industries affected by EPA regulations. *Amici* States have a strong interest in ensuring that the EPA complies with its statutory mandate to analyze and provide this critical information.

## SUMMARY OF ARGUMENT

As Petitioner has argued, this Court’s review is warranted to ensure that the EPA complies with its mandatory duty to provide Section 321 job-loss

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Energy Resources Under Executive Order 13783, at 6 (Oct. 25, 2017). Although that statement highlights the importance of Section 321, the EPA has not yet established a plan for assessing and providing Section 321 information. Further, this statement does not alter the need for this Court’s review, particularly with respect to the jurisdictional bases of the decision below.

information. It is particularly important to the States that the EPA satisfy this statutory requirement because Section 321 data is an important tool for the States as they fulfil their sovereign role to protect the welfare of their citizens, in at least two ways.

*First*, Section 321 job-loss data assists States in promoting the economic welfare of their citizens—particularly where EPA regulations under the CAA may negatively affect state economies. Armed with information about expected job losses in industries affected by CAA regulations by the same agency that issued them, States will be better positioned to mitigate the economic fallout from new or revised regulation. For example, this information assists States in developing their overall economic goals, and in implementing specific policies such as job-retraining programs and other targeted economic relief measures.

*Second*, Section 321 information would assist States in creating their state budgets. Most States are required, by statute or by their state constitution, to have a balanced budget each year. It is particularly important when creating these budgets that States have access to timely and accurate revenue estimates. Many States have faced challenging economic times in recent years in part because of actions by EPA that affect the energy industry, which has led to significant, unexpected revenue shortfalls. These declines in the energy industry have forced States to make difficult budgeting decisions under time pressure. Section 321 information could play a key role in helping the States mitigate these budget

challenges by helping to forecast the implications of job losses for state revenue-collection—before States reach a point of crisis.

## REASONS FOR GRANTING THE PETITION

### I. Section 321 Job-Loss Information Is Critical For Developing State Economic Policy.

In our federal system, States “retain a significant measure of sovereign authority.” *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985). While the Constitution grants few defined powers to the federal government, it “reserv[es] a generalized police power to the States. . . .” *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000) (quotation marks omitted); see also *Farley v. Graney*, 119 S.E.2d 833, 843 (W. Va. 1960) (“[T]he police power is an inherent attribute of sovereignty. . . .”).

Included in the States’ police power is the authority and responsibility “to provide for the protection of the safety, health, morals and general welfare of the public. . . .” See, e.g., *City of Princeton v. Stamper*, 466 S.E.2d 536, 538 (W. Va. 1995). This power extends beyond the physical well-being of a State’s residents, to their economic prosperity as well. As this Court has emphasized, “a state has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982); see also, e.g., *New York v. Microsoft Corp.*, 209 F. Supp. 2d 132, 150 (D.D.C. 2002) (“A state’s concern for the ‘continuing prosperity of [its] economy’ falls within the ‘recognized category of

quasi-sovereign interests.” (quoting *Com. v. Kleppe*, 533 F.2d 668, 674 (D.C. Cir. 1976))).

In order to advance “the public interest and promote[] the general welfare,” *amici* States have made promoting economic growth and development an explicit priority. See, e.g., W. Va. Code § 11-13C-2 (“In order to encourage capital investment in businesses in this state and thereby increase employment and economic development, there is hereby provided a business investment and jobs expansion tax credit.”); Ohio Rev. Code Ann. § 166.02 (“[I]t is declared to be the public policy of the state . . . to assist in and facilitate the establishment or development of eligible [economic development] projects or assist and cooperate with any governmental agency in achieving such purpose.”); *Munn v. Horvitz Co.*, 196 N.E.2d 764, 768 (Ohio 1964) (recognizing the State’s interest in “foster[ing] economic growth and development”).

One example of how States fulfill this role is the West Virginia Development Office, which the West Virginia Legislature created in 1992. This Office’s purpose is to create “a comprehensive economic development strategy for West Virginia.” W. Va. Code § 5B-2-3. Its development strategy has the following goals: formation of “strategies and activities designed to continue, diversify or expand the economic base of the state as a whole; create jobs; develop a highly skilled workforce; facilitate business access to capital, including venture capital; . . . [and] improve the business climate generally. . . .” *Ibid.* West Virginia has committed “public financing support” to this Office “to attract new business, commerce and

industry to th[e] state, to retain existing business and industry providing the citizens of th[e] state with economic security and to advance the business prosperity of th[e] state and the economic welfare of the citizens of th[e] state.” *Id.* § 29-22-18a(e).

As another example, Kentucky’s Center for Economic Development serves as “the primary industrial and commercial development agency of the Commonwealth of Kentucky in matters relating to the private sector of the state’s economy.” Ky. Rev. Stat. Ann. § 154.12-210(3). The Center implements “programs relating to industrial and commercial development, research and planning, community and industrial services, marketing development, small and minority business enterprise, international trade and reverse investment, and other programs.” *Ibid.*

Federal regulation, including Clean Air Act regulation, can have both direct and indirect impacts on these programs and state economic policies more generally. When the EPA considers whether to promulgate emission limits under the CAA that will dramatically reduce the consumption of coal, for example, the effects on a State that procures coal can be far-reaching. Such regulations affect not only coal miners and their families, but also the jobs and communities that rely on the coal mining business—including doctors, educators, retail establishments, realtors, and residential-service providers. They also affect utilities that are regulated by the States and the jobs associated with those utilities, and have

consequences for the availability of reliable and affordable energy for the States' citizens.

In recent years, the EPA has promulgated several rules with precisely these effects. For example, the EPA promulgated the Mercury Air Toxics Rule, see 77 Fed. Reg. 9,363 (Feb. 16, 2012) (“MATS Rule”), under CAA Section 112, 42 U.S.C. § 7411, which has already forced coal-fired power plants to spend significant sums to remain open. EPA has targeted new coal-fired power plants under Section 111(b) by requiring the installation of control technology that makes it effectively impossible to build new plants. Env'tl Prot. Agency, “Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units,” 80 Fed. Reg. 64,510 (Oct. 23, 2015). And under Section 111(d) of the Clean Air Act, EPA has issued its so-called “Clean Power Plan,” which aims to shift electricity generation away from existing fossil-fired power plants to sources like wind or solar. See Environment Protection Agency, “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,” 80 Fed. Reg. 64,662 (Oct. 23, 2015).<sup>3</sup> These are a few examples that relate to regulation of fossil-fuel-fired power plants, but other CAA rules, to which Section 321 also applies, likewise have direct and indirect economic impacts on States.

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<sup>3</sup> Implementation of the Clean Power Plan rule has been stayed by order of this Court pending disposition of the petitions for review in the United States Court of Appeals for the District of Columbia Circuit and any petition for writ of certiorari if sought. *West Virginia v. EPA*, 136 S. Ct. 1000 (2016).

In fact, the Office of Management and Budget has estimated that the total annual cost of EPA regulations from October 1, 2004 through September 30, 2014 are between \$37.6 and \$45.4 billion.<sup>4</sup>

These rules illustrate the importance of ensuring that the EPA conducts Section 321 job-loss evaluations for future regulations that may similarly impact the States. With respect to the Clean Power Plan, for example, the EPA has proposed to withdraw the rule, see Env'tl Prot. Agency, "Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 82 Fed. Reg. 48,035 (Oct. 16, 2017), but has also stated that it is considering replacement rule. *Id.* at 48,036. It is important to ensure that the EPA complies with its mandatory duty to provide Section 321 information for any such replacement rule—as well as other future CAA rule revisions or new regulations.

Section 321 job-loss information can be critical for State affected by these rules. As Congress explained when it enacted Section 321, "all of us need more information on why plants are shut down" and "the public needs better access to this information." *Economic Dislocation Resulting from Environmental Controls Hearing*, 92d Cong. 1, 281 (1971). States can use this information, in conjunction with their own data and analyses, to determine how best to shape economic policy in response to new or revised

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<sup>4</sup> U.S. Env'tl Prot. Agency, "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).

regulations. To illustrate, when States understand the scope of the anticipated economic impact of regulations, they are better able to plan economic relief measures and introduce job-retraining programs.

Beyond the value to the States of the information itself, the very source of Section 321 information—the EPA—makes it a particularly useful marker when setting state economic policy. Congress required the same entity responsible for the regulations that may cause job loss and economic dislocation to analyze these potential consequences. And because the EPA has an incentive not to overstate the negative economic effects of new regulations, States can trust that EPA projections provide a reliable baseline for assessing future economic harm.

## **II. Section 321 Job-Loss Information Is A Vital Tool For State Budget Projections.**

Section 321 data can also be invaluable to States as they prepare their budgets. Nearly every State is required by law to have a balanced budget.<sup>5</sup> The process of creating a balanced budget requires accurate and timely information—accurate tax-revenue forecasts and assessments of the States' workforces are key data points in this process. Accordingly, States have established policies and

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<sup>5</sup> See Nat'l Conference of State Legislatures, *State Constitutional and Statutory Requirements for Balanced Budgets*, <http://www.ncsl.org/research/fiscal-policy/state-balanced-budget-requirements.aspx>; see also, *e.g.*, W. Va. Const. art. 6, § 51; Ky. Const. § 171; Ohio Const. art. 12, § 4.

procedures to ensure that policymakers receive this information for budget-setting purposes. See, *e.g.*, W. Va. Code § 11B-2-11; Ohio Rev. Code Ann. § 126.02; Ky. Rev. Stat. Ann. § 48.120.

For example, in Kentucky, the Office of the State Budget Director must provide each branch of government a “budget planning report” every other year that includes, among other things, “projections of economic conditions and outlook” and “[p]rojections of personal income, employment, and economic indicators that reflect economic conditions.” Ky. Rev. Stat. Ann. § 48.120. Similarly, the West Virginia secretary of revenue “shall estimate the revenue to be collected month by month by each classification of tax for that fiscal year” and “certify th[at] estimate to the governor and the legislative auditor and the West Virginia investment board by the first day of July for that fiscal year.” W. Va. Code § 11B-2-11. And in Ohio, the director of budget and management must “prepare and submit to the governor, biennially, not later than the first day of January preceding the convening of the general assembly, state budget estimates of revenues and expenditures for each state fund and budget estimates for each state agency.” Ohio Rev. Code Ann. § 126.02. Section 321 assessments are precisely the kind of information needed for these purposes.

Apart from providing information that can help every State throughout every annual budget-planning process, Section 321 data is particularly useful where it can pinpoint potential budget challenges where new EPA regulations may lead to unexpected revenue

shortfalls for the States. As discussed above, States in recent years have faced a more difficult fiscal landscape due in part to the EPA's CAA regulations—which makes accurate state budgeting even more difficult. In particular, those States that rely on the energy industry have seen sudden declines in revenue. As fewer workers are employed, state and local governments collect less income and sales tax revenue because income and sales tax collections, among others, are likely to be negatively affected by significant economic dislocation and job loss. This decrease in revenue leaves policymakers to face difficult, unanticipated decisions about how best to prioritize competing public interests. With Section 321 job-loss information, however, States could have advance notice of anticipated unemployment spikes that can foster more accurate revenue projections—and help States make important budgeting decisions *before* a crisis looms.

West Virginia's recent experience provides an example of a situation in which Section 321 data might have helped lawmakers mitigate the harm from a revenue shortfall. A few months into fiscal year 2015, then-Governor Earl Ray Tomblin imposed an immediate 4-percent funding cut for most state agencies—including the Department of Health and Human Services, the Department of Commerce, and the Department of Transportation. The cut was necessary because of an “*unforeseen* drop in West Virginia's coal and natural gas tax collections.” Matt Maccaro, *Tomblin announces 4% budget cut for most agencies*, MetroNews (Oct. 5, 2015) (emphasis

added).<sup>6</sup> The Governor noted late in 2015 that “the state’s finances have not been this bad since the 1980s.” Hopy Kercheval, *Coal slowdown hits state budget hard*, MetroNews (Oct. 7, 2015).<sup>7</sup> And the problems continued into late 2015 when the State Revenue Secretary Bob Kiss explained that “the state’s budget problems are going to continue to grow following another month of missing the mark on revenue collections.”

In January 2016, the revenue shortfall transformed into an immediate fiscal crisis because the operating budget was running a \$353 million deficit. See Jeff Jenkins, *State budget hole grows deeper; revenue shortfall to top \$350 million*, MetroNews (Jan. 6, 2016).<sup>8</sup> After months of negotiations between the Governor and Legislature, including during extended regular and extraordinary budget sessions, the fiscal hole was finally patched for fiscal year 2015 and a balanced budget was enacted for the fiscal year 2016 beginning on July 1.

Though there are certainly many reasons for West Virginia’s budget crisis, Section 321 job-loss evaluations may have helped to anticipate—and mitigate—the harm. The EPA’s information may

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<sup>6</sup> This article is available at <http://wvmetronews.com/2015/10/05/tomblin-announces-4-percent-budget-cut-for-most-government-agencies/>.

<sup>7</sup> This article is available at <http://wvmetronews.com/2015/10/07/coal-slowdown-hits-state-budget-hard/>.

<sup>8</sup> This article is available at <http://wvmetronews.com/2016/01/06/state-budget-hole-grows-deeper-revenue-shortfall-to-top-350-million/>.

have allowed state officials to craft more accurate tax revenue projections in advance of developing the following year's budget. The information may also have allowed state leaders more time to consider policy and fiscal responses to the shortfall. In short, had the EPA met its mandatory statutory duty to provide job-loss data, the State might have been able to make budgeting decisions in an atmosphere of stability and calm rather than a state of crisis.

At a minimum, West Virginia—like other States in similar situations—should be able to rely on information that Congress has unambiguously directed the EPA to provide. This Court's review is necessary to ensure that the EPA cannot evade review of its practice of deliberate, flagrant violation of federal law.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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