No. __-____

In the Supreme Court of the United States

AMERICAN ROAD & TRANSPORTATION BUILDERS ASS'N,
PETITIONER,

v.

ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,
RESPONDENTS.

On Petition for Writ of *Certiorari* to the U.S. Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

The Clean Air Act, 42 U.S.C. §§7401-7671q ("CAA"), is one of several public-health statutes that model judicial review on the Administrative Orders Review Act, 28 U.S.C. §§2341-2353 ("AORA"), with "petitions for review" directly to the courts of appeals within a short window after agency action. CAA §307(b)(1), 42 U.S.C. §7607(b)(1). For review outside the original window, AORA allows both (1) petitions to amend or repeal prior rules under 5 U.S.C. §553(e), with direct review of petition denials as new agency action, and (2) indirect challenges to prior rules as part of timely challenges to new agency action applying a prior rule. Unlike AORA, public-health statutes like CAA provide that "if such petition [for review] is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise." *Id.* The circuits are split on whether AORA's two methods of review outside the original window apply to statutes like CAA. Further, with §307(d)(7)(B) limiting review to issues first raised with the agency, 42 U.S.C. §7607(d)(7)(B), the circuits are split on whether review of after-arising grounds requires petitioning for review within 60 days of (a) an external event (*e.g.,* a new fact or enactment) versus (b) the denial of a §553(e) petition presenting after-arising issues.

1. Does §307(b)(1) allow petitioning for direct review within 60 days of the denial of a §553(e) petition that presents after-arising issues?

2. Does §307(b)(1) prohibit indirect review of an agency rule – outside the original 60-day window – if made as part of a timely challenge to new agency action that *applies* the prior rule?

PARTIES TO THE PROCEEDING

Petitioner American Road & Transportation Builders Association ("ARTBA") is a District of Columbia nonprofit trade organization with more than 5,000 members from all sectors and modes of the transportation construction industry (including without limitation roads, public transit, airports, ports, and waterways) and represents the collective interests of the U.S. transportation construction industry before the national executive, legislative, and judicial branches of government.

Respondents are the federal Environmental Protection Agency and its Administrator (originally Lisa Jackson and now Gina McCarthy) in her official capacity.

Pursuant to this Court's Rule 29.6, petitioner ARTBA states that it is a non-profit trade organization and that no publicly held company owns any interest in it.

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PETITION FOR WRIT OF *CERTIORARI*

The American Road & Transportation Builders Association ("ARTBA") respectfully petitions this Court to issue a writ of *certiorari* to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit that §307(b)(1) of the federal Clean Air Act ("CAA"), 42 U.S.C. §7607(b)(1), and the All Writs Act, 28 U.S.C. §1651(a), do not provide jurisdiction for ARTBA's petition for review of final agency action by the Environmental Protection Agency ("EPA").

OPINIONS BELOW

The court of appeals' decision is reported at 705 F.3d 453 and reprinted in the Appendix ("App.") at 1a. ARTBA's petition for review in the court of appeals sought review of final EPA actions announced in the *Federal Register* on May 9, 2011, at 76 Fed. Reg. 26,609, and reprinted in pertinent part in the Appendix at 23a.

JURISDICTION

The court of appeals issued its decision on January 15, 2013, and denied timely petitions for reconsideration and rehearing *en banc* on April 30, 2013 (orders reprinted at App. 16a and 17a, respectively). Under ARTBA's view of the law, the court of appeals had jurisdiction under 42 U.S.C. §7607(b)(1) and 28 U.S.C. §1651(a). This Court has jurisdiction under 28 U.S.C. §1254(1).

AUTHORITIES INVOLVED

The Appendix quotes Administrative Procedure Act §4(e), 5 U.S.C. §553(e), the All Writs Act, 28 U.S.C. §1651(a), and CAA §307(b) and (d), 42 U.S.C. §7607(b), (d), as well as CAA §110(a)(2)(E)(i) and §209, 42 U.S.C. §§7410(a)(2)(E)(i), 7543, PUB. L. NO.

108-199, §428, 118 Stat. 3, 418-19 (2004) (the "Bond Amendment"), provisions from EPA's implementing rules, and San Joaquin Valley Unified Air Pollution Control District Rule 9510.

These authorities fall into four primary areas:

1. ***Administrative Rulemaking Petitions.*** In 1946, Congress authorized the public to petition agencies to amend or repeal a rule, 5 U.S.C. §553(e), as part of the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"). As explained *infra,* judicial review of the denial of such petitions (as distinct from review of the rule's original promulgation) can "reopen" the time for challenging agency rules where the statute of limitations has run on direct challenges to the underlying rule.

2. ***CAA Judicial Review.*** In 1970, Congress applied the precursor of current §307(b) to judicial review of a subset of CAA actions, PUB. L. NO. 91-604, §12(a), 84 Stat. 1676, 1707 (1970), which the 1977 amendments expanded to apply to virtually all final CAA actions. PUB. L. NO. 95-95, §305(c)(1)-(3), 91 Stat. 685, 776 (1977). CAA §307(b)'s central provisions are (a) direct review in the courts of appeal; (b) review of nationally applicable actions exclusively in the D.C. Circuit, with review of regionally applicable actions in the court of appeals for the relevant circuit; and (c) the jurisdictional requirement to petition for review in the relevant court of appeals within 60 days of EPA's publishing notice of its action in the *Federal Register* or within 60 days of after-arising grounds. 42 U.S.C. §7607(b)(1). In addition, §307(b)(2) prohibits courts from reviewing in an enforcement proceeding any EPA action for which review could have been had

under §307(b)(1). 42 U.S.C. §7607(b)(2).[1] Subsection 307(d) provides non-APA judicial-review procedures for certain EPA actions (as relevant here for rulemakings on state implementation plans ("SIPs"), but not for denials of rulemaking petitions). 42 U.S.C. §7607(d)(1). Where those CAA-specific revisions apply, judicial review is available only on issues first presented to EPA. 42 U.S.C. §7607(d)(7)(B).

3. ***CAA Preemption.*** In 1967, Congress first introduced CAA preemption for onroad vehicular emission standards, with an exception for California. PUB. L. NO. 90-148, §208, 81 Stat. 485, 501 (1967); *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.,* 541 U.S. 246 (2004) ("*EMA v. SCAQMD*"). The 1970, 1977, and 1990 amendments modified CAA's onroad preemption *inter alia* to allow other states to adopt California's vehicular-emission program and to prohibit state regulation of federally regulated components during the federally regulated useful life. 42 U.S.C. §§7507, 7543(c). In 1990, Congress introduced parallel provisions for CAA preemption of *nonroad* vehicular emission standards and other requirements. PUB. L. NO. 101-549, §222(b), 104 Stat. 2399, 2502 (1990). Significantly, §209(e)(1) preempts all states, *including California,* from adopting or enforcing emission-related standards or other requirements for new farm and construction equipment under 175 horsepower and new locomotives. 42 U.S.C. §7543(e)(1). In 2004, Congress enacted the Bond Amendment, which

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[1] Before 1977, §307(b)(1)'s deadline was 30 days. PUB. L. NO. 91-604, §12(a), 84 Stat. at 1707. For consistency, ARTBA refers to §307(b)(1)'s 60-day window throughout this petition.

(among other things) reinforces the breadth of the "standards and other requirements" language. PUB. L. NO. 108-199, §428(e), 118 Stat. at 418-19. Procedural thresholds aside, this litigation concerns the scope of §209(e)'s nonroad preemption.

4. ***Implementation Plans.*** In 1970, Congress amended CAA to require SIPs for attaining the national ambient air quality standards ("NAAQS"), where states model the emission reductions needed to attain the NAAQS and then develop SIP control measures to provide those emission reductions. *See* 42 U.S.C. §7410. As relevant here, the main requirement for SIP measures is that states must have the authority to enforce them. 42 U.S.C. §7410(a)(2)(E)(i). Obviously, state rules that §209(e) preempts cannot meet this criterion for EPA approval of a SIP measure. Finally, Rule 9510 imposes additional emission-based standards and requirements on construction equipment, App. 31a-32a, without regard for whether that equipment already is subject to CAA standards.

STATEMENT OF THE CASE

Rule 9510 is part of a larger trend of state and local governments' imposing additional, fleet-based standards and other requirements that ratchet emissions below the stringent manufacturer-based emission standards that apply to covered vehicles. Although the trend is new, its legal rationale hatched in a 1994 EPA rule that interpreted CAA's new-vehicle preemption to evaporate when vehicles roll off the showroom floor. At the time, however, no regulators envisioned retrofit requirements, much less fleet-based ones, and the rule survived token resistance from *manufacturers*. Users were silent.

The industries targeted for these fleet-based retrofit rules – *e.g.,* trucking, construction, and shipping – appear to lack the political strength to reverse this trend, but the general public would never stand for applying the same principle to *their* vehicles. Anyone buying a new car expects that states cannot tamper with a car's CAA-mandated emissions standards (and its corresponding CAA-mandated warranty for the emission system) during the CAA-regulated "useful life." This trend would justify revisiting EPA's 1994 rule for policy reasons alone, but legislative, regulatory, and court developments since 1994 compel a new look.

As the success of *onroad* vehicular emission standards shows, regulators can most efficiently and equitably impose vehicular controls at the manufacturing stage, with costs spread across entire markets and incurred by purchasers incrementally as fleets expand or turn over. Certainly, new-vehicle preemption does not end the instant vehicles leave the showroom, subjecting owners to regulation by all 50 states and countless political subdivisions.

Against that backdrop, this litigation raises three primary issues on §209(e)'s preemptive scope:

- Whether §209(e) preempts fleetwide averaging, early retirement, and purchase-sale rules ("Fleet Rules")?
- Whether §209(e) preempts restrictions on the use, hours of operation, and fuel of new and non-new nonroad vehicles ("In-Use Controls")?
- Whether §209(e)(1)'s uniform treatment of new locomotives vis-à-vis new construction and farm equipment under 175 horsepower allows EPA's preferential treatment of locomotives vis-à-vis such construction and farm equipment?

Although this petition presents jurisdictional issues on the availability and timing of judicial review, the underlying substantive issues explain the procedural setting and inform the jurisdictional analysis.

Factual Background

A construction company's value and ability to do its work depend on its employees and equipment. Beyond the obvious and essential roles of employees and equipment, companies use existing equipment as assets against which not only to borrow to purchase new equipment but also to meet their obligations to bond their work. State measures allowed by EPA but prohibited under ARTBA's interpretation of §209(e) threaten both the employees and the equipment of ARTBA's members. Moreover, because states must adopt new SIP control measures for each new SIP deadline (*e.g.,* whenever EPA lowers a NAAQS), even past instances where ARTBA prevailed provide only temporary relief. Either the states themselves re-raise these measures or environmental plaintiffs seek to compel the states to adopt them at the next SIP deadline. Only definitive answers on §209(e)'s scope will end the serial regulatory uncertainty.

In Texas, ARTBA has fought morning construction bans, which seek to shift emissions later in the day so they "bake" less in the sun and blow away at night. These measures would deny employees the ability to spend evenings – much less afternoons – with their families, changing a way of life and driving invaluable people from the industry.

In California (and states that adopt California standards), ARTBA members face a perversely perfect storm that requires expensive new equipment *and* expensive, unsafe, untested, stop-gap retrofits, while (a) prohibiting use of existing equipment on

projects, (b) depressing existing equipment's market value and thus the borrowing capacity to meet new costs, (c) decreasing the capacity to bond projects and thus to earn income to bear new costs, and (d) requiring layoffs that further reduce the capacity to earn income to bear new costs. Even without the worst economy since the Great Depression, this would be an existential fight for survival.

Statutory Background

Although this litigation ultimately concerns the preemptive scope of CAA §209(e), one jurisdictional question turns on the relation between APA §4(e) and CAA §307(b) for purposes of judicial review of EPA actions. 5 U.S.C. §553(e); 42 U.S.C. §7607(b). This subsection summarizes the two provisions and the litigation that interprets them.

As indicated, §553(e) authorizes petitioning agencies to amend, repeal, or promulgate a rule. 5 U.S.C. §553(e). Within the APA, "[§553(e)] *is of the greatest importance* because it is designed to afford every properly interested person statutory authority to petition for the issuance, amendment, or repeal of a rule." *Administrative Procedure Act: Legislative History,* S.DOC. NO. 79-248, at 359 (1946) (emphasis added) (hereinafter "*APA Leg. Hist.*"). "The right of petition is written into the Constitution itself," and "[§553(e)] confirms that right where Congress has delegated legislative powers to administrative agencies." *Id.* "Even Congress, under the Bill of Rights, is required to accord the right of petition to any citizen," and "a petitioner [who] states and supports a valid ground for … relief, manifestly [is] entitled to … relief." *Id.* at 21.

The §553(e) petition process is particularly important when direct challenge to underlying rules

is untimely. In such cases, the agency's action on the petition provides a new final agency action for which the petitioner can seek judicial review. *Am. Road & Transportation Builders Ass'n v. EPA,* 588 F.3d 1109, 1112 (D.C. Cir. 2009) ("*ARTBA II*"); *Investment Co. Inst. v. Bd. of Governors, Fed'l Reserve Sys.,* 551 F.2d 1270, 1280-81 (D.C. Cir. 1977) ("*Investment Co.*"); *Baltimore Gas & Elec. Co. v. ICC,* 672 F.2d 146, 149-50 (D.C. Cir. 1982) ("*BGE*"). ARTBA refers to this as the "petition-reopener" doctrine.

The D.C. Circuit considers petition-reopener review as part of the *Functional Music* line of cases, *Nat'l Labor Relations Bd. Union v. FLRA,* 834 F.2d 191, 195-196 (D.C. Cir. 1987), but that "line" consists of two distinct paths to renewed judicial review, outside the original 60-day window. *Functional Music, Inc. v. F.C.C.,* 274 F.2d 543, 546-47 (D.C. Cir. 1958), held that "the statutory time limit restricting judicial review of [agency] action is applicable only to cut off review directly from the order promulgating a rule" and "does not foreclose subsequent examination of a rule where properly brought before this court for review of further [agency] action applying it." Here, for example, EPA's 2011 SIP rulemaking applied the 1994 preemption rule, which reopens the 1994 rule's substance to challenge in ARTBA's timely petition to review the 2011 rule, without any need to petition EPA administratively under §553(e) to change the 1994 rule. ARTBA refers to this form of review as "challenge-when-applied" review to distinguish it from petition-reopener review.

Several post-APA statutes include limitations on review like those found in §307(b), requiring petitions for review in court within a short period –

usually 30 to 90 days – of agency action and limiting subsequent review on after-arising grounds:

> Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the *Federal Register,* except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

42 U.S.C. §7607(b)(1); *see also* 30 U.S.C. §1276(a)(1) (Surface Mining Control & Reclamation Act or "SMCRA"); 42 U.S.C. §300aa-32 (National Childhood Vaccine Injury Act); 42 U.S.C. §6976(a)(1) (Resource Conservation & Recovery Act); 42 U.S.C. §300j-7(a)-(b) (Safe Drinking Water Act); 42 U.S.C. §4915(a) (Noise Control Act).

In *Olijato Chapter, Navajo Tribe v. Train,* 515 F.2d 654 (D.C. Cir. 1975) ("*Navajo Tribe*"), the D.C. Circuit addressed the interplay between §553(e) and §307(b)(1). There, the Tribe sought to challenge an EPA rule outside §307(b)(1)'s window, but based on after-arising information. The Tribe had filed suit in district court and, based on that court's determining it lacked jurisdiction, also filed a belated petition for review in the court of appeals. 515 F.2d at 658-59. *Navajo Tribe* held that – in order to present such information to EPA in a manner that the court of appeals could review – one first must petition EPA under §553(e). 515 F.2d at 666.

In broadening §307(b)'s scope in the 1977 amendments, Congress ratified the *Navajo Tribe* approach. H.R. REP. 94-1175, 264 (1976); S. REP. 95-

294, 323 (1977). In addition, Congress rejected *dicta* from *Investment Co.* that would allow avoiding §307(b)'s time bar for "an undefined legitimate excuse." S. REP. 95-294, at 322. By negative implication, Congress did not reject the *Investment Co.* holding that such petitions are *required* for a party to challenge a rule that it lacked a ripe claim to challenge within the 60-day window.

In *Nat'l Mining Ass'n v. Dep't of Interior,* 70 F.3d 1345 (D.C. Cir. 1995) ("*National Mining*"), the D.C. Circuit addressed SMCRA's similar language, which the court found to prohibit use of the petition-reopener doctrine. 70 F.3d at 1351. Although *National Mining* recognized that CAA's judicial review resembles SMCRA's, *National Mining,* 70 F.3d at 1350 n.2, neither that panel nor the *National Mining* parties even mentioned (much less considered) *Navajo Tribe* as binding precedent.[2]

Although the *National Mining* panel thought that the D.C. Circuit had "never held that this

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[2] *See National Mining,* 70 F.3d at 1347-53; *National Mining,* No. 94-5351 (D.C. Cir.), Brief of Appellants Interstate Mining Compact Commission, 1995 WL 17204298 (Jul. 08, 1995); *id.,* Brief of Appellants National Mining Association, *et al.,* 1995 WL 17204297 (Jul. 28, 1995); *id.,* Brief for the Federal Appellees, 1995 WL 17204299 (Aug. 01, 1995); *id.,* Brief of Appellees National Wildlife Federation, *et al.,* 1995 WL 17204300 (Aug. 28, 1995); *id.,* Reply Brief of Appellants National Mining Association, *et al.,* 1995 WL 17204304 (Sep. 11, 1995); *id.,* Reply Brief of Appellants Interstate Mining Compact Commission, 1995 WL 17204305 (Sep. 11, 1995); *id.,* Supplemental Brief of Appellants National Mining Association, *et al.,* 1995 WL 17204301 (Oct. 23, 1995); *id.,* Supplemental Brief of Appellant Interstate Mining Compact Commission, 1995 WL 17204302 (Oct. 23, 1995); *id.,* Supplemental Brief for the Federal Appellees, 1995 WL 17204303 (Oct. 23, 1995).

[§553(e)] procedural device, standing alone, was sufficient to avoid the congressional bar," *National Mining,* 70 F.3d at 1351, that panel was wrong:

> [W]e note that the public's right to petition the Administrator for revision of a [rule] and the Administrator's duty to respond substantively to such requests exist completely independently of Section 307[.]

Navajo Tribe, 515 F.2d at 667 (*citing* 5 U.S.C. §553(e)). ARTBA respectfully submits that *National Mining* was wrongly decided to the extent that it denies review of *ultra vires* CAA rules, particularly ones unripe for review when first promulgated.

Regulatory and Litigation Background

In initially promulgating rules to implement §209(e), EPA split non-locomotive nonroad vehicles from locomotives, and promulgated a narrow definition of preemption for the former, 59 Fed. Reg. 36,969, 36,973 n.8 (1994), which EPA defended in *Engine Mfrs. Ass'n v. EPA,* 88 F.3d 1075, 1093-94 (D.C. Cir. 1996) ("*EMA v. EPA*"). Two years later, EPA adopted broad preemption for locomotives, including in-use fleet standards. 63 Fed. Reg. 18,978 (1998). Locomotives' absence from *EMA v. EPA* enabled EPA to argue that its rules "harmonized" the statute, *EMA v. EPA,* 88 F.3d at 1087, without addressing the clanging discord from longstanding locomotive preemption. *Napier v. Atlantic Coast Line,* 272 U.S. 605, 611-13 (1926). Whether by design or chance, EPA's 1994 rule interpreted §209(e) only for non-locomotives, without considering that the addition of locomotives makes the rule untenable.

For non-locomotive nonroad vehicles and engines, EPA determined that new vehicles and

engines lose preemption when they leave the showroom floor, 40 C.F.R. §85.1602 (1995); *accord* 40 C.F.R. §1074.5 (current version), but otherwise merely restated the statute. 40 C.F.R. §85.1603 (1995); *accord* 40 C.F.R. §1074.10 (current version). EPA also opined that "states are not precluded under section 209 from regulating the use and operation of nonroad engines, such as regulations on hours of usage, daily mass emission limits, or sulfur limits on fuels." 40 C.F.R. Pt. 89, subpart. A, App. A. After successfully defending that narrow interpretation, EPA adopted locomotive rules that expressly preempt "fleet average standards," 40 C.F.R. §85.1603(c)(2) (1995); *accord* 40 C.F.R. §1074.12(b) (current version), backdate locomotive "newness" to 1972, and extend it perpetually, 40 C.F.R. §§85.1602, 92.2 (1995) (newness-based preemption extends 1.33 times an engine's useful life and perpetually via remanufacturing); *accord* 40 C.F.R. §§1074.5, 1033.901 (current version).

Of the issues that ARTBA seeks to raise, *EMA v. EPA* addressed only one (In-Use Controls), *EMA v. EPA,* 88 F.3d at 1093-94, notwithstanding that the petitioner lacked standing on that issue. ARTBA's other issues arose after *EMA v. EPA* and, ARTBA submits, require EPA to revisit its 1994 conclusions:

- EPA's disparate treatment, vis-à-vis locomotives, came in 1998;
- In 2004, *EMA v. SCAQMD* recognized that fleet rules qualify as standards.
- Congress enacted the Bond Amendment in 2004, undermining EPA's 1994 interpretation that "other requirements" means only certifications and inspections, which the D.C. Circuit upheld in *EMA v. EPA,* 88 F.3d at 1093.

- Narrowing the presumption against preemption in *U.S. v. Locke,* 529 U.S. 89, 107-08 (2000), and later cases undermined EPA's 1994 rule because states were not in the nonroad-emission field when Congress acted in 1990.
- *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 873 (2000), abrogated *Motor & Equipment Mfrs. Ass'n, Inc. v. E.P.A.,* 627 F.2d 1095, 1105-06 (D.C. Cir. 1979), on CAA's allowing conflict preemption, notwithstanding its savings clause and express preemption.
- Conflict preemption from §209(c) abrogates *Allway Taxi v. City of New York,* 340 F. Supp. 1120, 1124 (S.D.N.Y.), *aff'd* 468 F.2d 624 (2d Cir. 1972), on which EPA based is 1994 rule.
- EPA's post-1994 promulgation of nonroad emission standards with CAA-regulated useful lives gave rise to the argument that regulation of vehicles within that CAA-regulated period was inconsistent with CAA §202(a)(1): "standards shall be applicable to such vehicles and engines for their useful life," 42 U.S.C. §7521(a)(1), and thus inconsistent with §209. 42 U.S.C. §7543(b)(1)(C), (e)(2)(A)(iii); *Am. Motors Corp. v. Blum,* 603 F.2d 978, 981 (D.C. Cir. 1979).

ARTBA's first exposure to preempted state rules that EPA purports to allow came circa 2000 in Texas, 25 Tex. Reg. 4059, 4073 (2000); 25 Tex. Reg. 4080, 4101 (2000), where ARTBA successfully challenged those rules in district court. *Engine Mfrs. Ass'n v. Huston,* 190 F.Supp.2d 922 (W.D. Tex. 2001). Texas repealed its rules while *Huston* was on appeal. 26 Tex. Reg. 6935, 6936-37 (2001).

In 2002, after the Fifth Circuit vacated *Huston* as moot, ARTBA petitioned EPA under §553(e) to

amend its preemption rules based on the arguments that ARTBA had made successfully in *Huston.* In 2004, EPA and ARTBA exchanged correspondence on the impact of the Bond Amendment and this Court's ruling in *EMA v. SCAQMD* on ARTBA's petition. In 2006, ARTBA petitioned the D.C. Circuit for review under §307(b)(1) and the All Writs Act, challenging EPA's inaction as both unreasonable delay and constructive denial. *ARTBA v. EPA,* No. 06-1112 (D.C. Cir. filed Mar. 29, 2006).[3] After an unsuccessful motion to dismiss and full briefing on the merits, less than a month before oral argument, EPA again moved to dismiss, this time for mootness on the theory that an EPA notice of proposed rulemaking ("NPRM") "commenced a rulemaking on the issues ARTBA raised." *ARTBA v. EPA,* Respondents Motion to Dismiss for Mootness, No. 06-1112 (D.C. Cir.), at 3. The D.C. Circuit granted EPA's motion. *Am. Road & Transportation Builders Ass'n v. EPA,* No. 06-1112 (D.C. Cir. Oct. 5, 2007) ("*ARTBA I*").

When EPA finalized that rulemaking, it elected to deny ARTBA's rulemaking petition in its preamble and a companion document inserted in the docket, 73 Fed. Reg. 59,034, 59,130 (2008), which ARTBA timely challenged. This time, the D.C. Circuit held that ARTBA needed to petition for review within 60

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[3] Significantly, ARTBA filed that petition for review within sixty days of Texas' renewed consideration of nonroad rules on February 6, 2006. Declaration of Jed Anderson, *ARTBA v. EPA,* No. 06-1112 (D.C. Cir.), at ¶9. During that action, ARTBA's dispute over California's nonroad regime ripened, and (again within 60 days) ARTBA advised the D.C. Circuit of that development. *ARTBA v. EPA,* Declaration of Lawrence J. Joseph, No. 06-1112 (D.C. Cir.), at ¶6; Motion for Judicial Notice, *ARTBA v. EPA,* No. 06-1112 (D.C. Cir.).

days of an after-arising event (*i.e.,* precisely what ARTBA did in the *ARTBA I* litigation) and dismissed because a mere petition-denial claim does not "count" as an after-arising ground. *ARTBA II,* 588 F.3d at 1114 (*citing National Mining*).

While ARTBA's petition for a writ of *certiorari* was underway in *ARTBA II,* EPA promulgated a notice of proposed rulemaking on incorporating Rule 9510 into the California SIP. 75 Fed. Reg. 28,509 (2010). ARTBA commented on this new NPRM and simultaneously petitioned EPA's Administrator to revise EPA's §209 rules. In promulgating its final rule, EPA summarily denied ARTBA's requested relief, App. 12a-15a, which the D.C. Circuit affirmed, reasoning that §307(b)(1) bars indirect challenges to EPA rules even in timely challenges to new EPA action that applies the prior rule. App. 9a-10a. The panel also held that, as a challenge to a regionally applicable SIP rule, ARTBA's challenge belonged in the Ninth Circuit. App. 6a.[4]

REASONS TO GRANT THE WRIT

The writ of *certiorari* should be granted both to resolve splits among the courts of appeals and to exercise this Court's supervisory authority in matters of national importance:

1. *Navajo Tribe,* 515 F.2d at 666, held that CAA review based on after-arising information required the petitioner first to petition EPA administratively under §553(e) and, only after failing there, to file a timely petition for review under §307(b)(1). Because

[4] ARTBA's parallel petition for review in the Ninth Circuit has been stayed pending the outcome of this litigation. *Am. Road & Transportation Builders Ass'n v. EPA,* No. 11-71897 (9th Cir. filed July 8, 2011).

so many circuits adopted the D.C. Circuit's *Navajo Tribe* holding on CAA petition-reopener jurisdiction for after-arising grounds, the D.C. Circuit's about face in the *ARTBA* decisions splits with half of the other circuits, as well as controlling D.C. Circuit precedent and legislative history. The Eighth Circuit supports petition-reopener jurisdiction even more strongly than *Navajo Tribe*. Further, although ARTBA cares little about SMCRA beyond its indirect impact here, resolving the circuit split on CAA review also would resolve a split between the Fourth and D.C. Circuits on petition-denial review under SMCRA. Finally, because the All Writs Act protects the D.C. Circuit's *prospective* jurisdiction over nationally applicable CAA rules, this case conflicts with authority from the D.C., Ninth, and Eleventh Circuits under the All Writs Act.

2. Challenge-when-applied review should have been available, even if *ARTBA II* correctly denied petition-reopener review, because ARTBA timely challenged EPA's 2011 action applying EPA's 1994 preemption rules. The circuits are similarly split on the availability of challenge-when-applied review, with the Federal Circuit's having reached a contrary result under the National Childhood Vaccine Injury Act, which has a similar judicial-review provision. Significantly, §307(b)(2) bars challenging rules in enforcement actions that one could have challenged under §307(b)(1), implying the continuation of challenge-when-applied review in actions (like this rulemaking) that are not enforcement actions. Any other reading renders §307(b)(2) mere surplus. The Seventh Circuit has held that the presumption of review requires courts to allow challenge-when-

applied review unless a statute expressly withdraws it, which CAA does not do.

3. Given the D.C. Circuit's exclusive review of nationally applicable CAA rules and its abdication of that role here, it falls to this Court to enforce §307(b)(1)'s entrusting review under this far-reaching statute to that "single court intimately familiar with administrative procedures" to "insur[e] that [CAA's] substantive provisions … would be uniformly applied" nationwide. *Adamo Wrecking Co. v. U.S.,* 434 U.S. 275, 283-84 (1978). While perhaps not controlling on the legal issues presented here, these jurisdictional issue are extraordinarily important because CAA touches almost every aspect of life, including not only public health but also the economy, energy, consumer products, land use, and apparently anthropogenic global warming.[5] Only this Court can reopen the door to review arbitrary or unlawful agency action in countless contexts under CAA, SMCRA, and other similar statutes.

Finally, both forms of review that ARTBA presses – petition-reopener review and challenge-when-applied review – were available before the 1977 amendments produced the current version of §307(b). EPA's and the D.C. Circuit's views, therefore, rely on "repeals by implication [that] are not favored and [that] will not be presumed unless

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[5] If the court of appeals is correct that it lacked jurisdiction because ARTBA failed to file a petition within 60 days of information's arising, then the court of appeals and this Court lacked jurisdiction to review EPA's denial of the petition in *Massachusetts v. EPA,* 549 U.S. 497, 510-11 (2007), which was filed October 20, 1999, within 60 days of EPA's petition denial, but not within 60 days of the 1998 temperature data or 1995 report on which petitioners asked EPA to redefine "pollutant."

the intention of the legislature to repeal [is] clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 662 (2007). "[T]his canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman,* 420 U.S. 738, 752 (1975) (internal quotations omitted). Indeed, that disfavor applies *statutorily* with special force to protect judicial review: "Subsequent statute may not be held to … modify [APA review] except to the extent that it does so expressly." 5 U.S.C. §559; *Dickinson v. Zurko,* 527 U.S. 150, 154-55 (1999) (requiring "clear evidence" to displace review). For all of these reasons, this Court should grant the writ even if §307 textually could support the *ARTBA* decisions.

I. §307 AND THE ALL WRITS ACT ALLOW REVIEW OF PETITION-DENIAL CLAIMS

Under *Navajo Tribe* and the legislative history to CAA's 1977 amendments, the petition-reopener process plainly applies to review under §307(b)(1). *Navajo Tribe,* 515 F.2d at 666-67; H.R. REP. 94-1175, at 264; S. REP. 95-294, at 322-23. Moreover, under *Navajo Tribe,* that review is not limited to post-1994 issues because §307(b)(1)'s "solely" language does not limit the scope of review, once the petitioner had met the jurisdictional criteria for being in that court. *Navajo Tribe,* 515 F.2d at 667; *see also* note 8, *infra;* Section II.B, *infra.* Nor should ARTBA's review be limited: neither ARTBA nor anyone else had a ripe claim in 1994 for the issues that ARTBA seeks to raise now.

A. §307(b) Does Not Bar Claims That Were Not Ripe in the Initial 60-Days

As EPA's 1994 rulemaking explained, neither California nor anyone else contemplated nonroad retrofit controls in 1994. 59 Fed. Reg. at 36,974 ("EPA recognizes that [California] does not envision a retrofit requirement"). With no threatened or imminent retrofit rules, no constitutionally ripe claim existed over the pertinent parts of EPA's 1994 rulemaking, and §307(b)(1)'s 60-day limit "can run only against challenges ripe for review." *Louisiana Envtl. Action Network v. Browner,* 87 F.3d 1379, 1385 (D.C. Cir. 1996) (*quoting BGE,* 672 F.2d at 149). Because ARTBA lacked ripe claims when EPA promulgated its §209(e) rules, ARTBA can challenge those rules outside §307(b)(1)'s 60-day window. The parties and *ARTBA* decisions dispute only the *process and timing* for doing so.[6]

It is black-letter law that the petition-reopener doctrine requires parties with previously unripe and presently untimely claims to cure the timeliness defect by filing an administrative petition with the agency before petitioning for review in court: if "BG&E, at some future date, should have a ripe case …, it can file a complaint with the Commission and, if the complaint is rejected, seek our review within 60 days of that Commission order." *BGE,* 672 F.2d at 149-50; *Investment Co.,* 551 F.2d at 1281. Except for constructive denial or unreasonable delay, *Sierra*

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[6] Constitutional ripeness and standing overlap, *Allen v. Wright,* 468 U.S. 737, 750 (1984), and "share[] the constitutional requirement … that an injury in fact be certainly impending." *Nat'l Treas. Employees Union v. U.S.,* 101 F.3d 1423, 1427-28 (D.C. Cir. 1996).

Club v. Thomas, 828 F.2d 783, 793-96 (D.C. Cir. 1987), such parties cannot sue until the agency acts on the petition. *Consolidation Coal Co. v. Donovan,* 656 F.2d 910, 915 (3d Cir. 1981). The petition-reopener doctrine allows a party to revive an otherwise time-barred claim for direct review.

The D.C. Circuit's suggestion – suing directly on the ripening of a claim – would eviscerate limits like §307(b). Under that view, *someone* could challenge a longstanding EPA rule at any time, which means that membership groups could do so at any time. For example, environmental groups could litigate based on a member's either reaching an eighteenth birthday (*i.e.,* becoming capable to sue) or moving to a threatened area (*i.e.,* suffering environmental injury in that area). Just as easily, industry groups could find a new entrant into a regulated field that thereby has newly ripe claims against longstanding rules. Whatever the range of its plausible interpretations, §307(b) clearly did not *lower* the barrier to judicial review.

The D.C. Circuit's other suggestion – petitioning for review within 60 days of new information, *ARTBA II*, 588 F.3d. at 1114[7] – contradicts settled law. *Navajo Tribe* held the Tribe could petition EPA

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[7] The D.C. Circuit resurrected a standard Congress rejected in 1970, when it amended S. 4358 in conference to require suing on after-arising *grounds* (*e.g.,* petition denials), not "whenever … significant new information has become available." *Navajo Tribe,* 515 F.2d at 660 (*quoting* S. 4358, 91st Cong., 2d Sess., §308(a) (1970)). "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 442-43 (1987).

years after its "new information" arose, with judicial review if the Tribe timely petitioned the court for review after EPA acted on the administrative petition. 515 F.2d at 666-67. In ratifying *Navajo Tribe* in the 1977 amendments, Congress expressly rejected the D.C. Circuit's proposed approach by requiring submittal of after-arising issues to EPA *before* obtaining judicial review. 42 U.S.C. §7607(d)(7)(B). *See* Section I.B, *infra.* That requires petitioning for review *after* administratively petitioning EPA.

Indeed, even *National Mining* found that the association's claim that federal over-filing conflicts with state authority in SMCRA primacy states was timely and reviewed that claim. *National Mining,* 70 F.3d at 1352. (Over filing occurs when EPA delegates authority to a state, but then enforces the statute federally, over the state's enforcement decisions.) Although they claim to follow *National Mining* as circuit precedent, the *ARTBA* decisions apply *National Mining* even more strictly than *National Mining* itself. Here, ARTBA petitioned EPA after issues arose (disparate locomotive rules, Fleet Rules) or ripened (In-Use Controls), and ARTBA sued within 60 days of EPA's final action on ARTBA's petition. That is all §307(b)(1) requires.

B. §307 Requires Pre-Suit Petitions

Both *Navajo Tribe* and §307(d)(7)(B) plainly require presenting new issues to EPA via an administrative petition and petitioning for review within 60 days of EPA's denial of the administrative petition. 42 U.S.C. §7607(d)(7)(B); *Navajo Tribe,* 515

F.2d at 666-67.[8] The House and Senate reports on the 1977 amendments each acknowledge as much by ratifying *Navajo Tribe,* H.R. REP. 94-1175, at 264; S. REP. 95-294, at 323, rejecting only the *dictum* from *Investment Co.* that the petitioner-reopener doctrine allows reopening rules for "an undefined legitimate excuse," not the holding from *Investment Co.* that both allows *and requires* the petition-reopener process for claims that ripen or arise after the 60-day window. S. REP. 95-294, at 322; *Investment Co.,* 551 F.2d at 1280-81; Section I.C, *infra* (other circuits support *Navajo Tribe*). For parties, like ARTBA, that lacked Article III injury when these §209(e) issues arose in 1994 and *a fortiori* for the post-1994 issues, due process requires renewed review after presenting those issues to EPA under §553(e).[9]

In summary, both the APA and CAA not only allow but also *require* petitioning EPA before seeking judicial review of previously unripe, presently untimely claims. *Nat'l Labor Relations Bd. Union,* 834 F.2d at 195-196 (APA); *Her Majesty the Queen in Right v. EPA,* 912 F.2d 1525, 1530-31 (D.C. Cir. 1990) (CAA). With regard to agency rules rendered arbitrary by inconsistent later developments, the petition-reopener process is the *only* way to challenge such after-the-fact arbitrariness. *Auer v. Robbins,* 519 U.S. 452, 459 (1997). *Navajo Tribe* further

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[8] Indeed, *Navajo Tribe* held that §307(b)(1)'s "solely" language does not limit the scope of review, once a petitioner meets the jurisdictional criteria. *Navajo Tribe,* 515 F.2d at 667.

[9] If APA review *is not available* under §7607(b)(1), ARTBA can seek review in district court because a "special statutory review proceeding relevant to the subject matter" poses no barrier to district-court litigation "in the *absence or inadequacy*" of the statutory review. 5 U.S.C. §703.

recognized that the petition-reopener process comes from a prior statute – namely, §553(e) – and that "[§]307's 'solely' language will never by itself excuse [EPA] from [its] duty to respond on the merits to a request for revision." 515 F.2d at 667. Congress never provided the clear evidence needed to repeal §553(e)'s application here by implication.

Without *National Mining,* EPA could not credibly deny that §307(b) allows review of ARTBA's petition-denial claim. With regard to *National Mining,* ARTBA submits that *National Mining* was wrongly decided. Accepting the *National Mining* premise that the petition-reopener doctrine was well established in 1977 does not compel the *National Mining* conclusion that "Congress appears to have devoted particular efforts" to reject that doctrine. 70 F.3d at 1351. To the contrary, under the canon against repeals by implication, Congress would have assumed that the petition-reopener doctrine *would continue.* Similarly, Congress would have viewed the SMCRA provisions to mirror the pre-existing CAA provisions addressed in *Navajo Tribe* and the contemporaneous CAA amendments that *National Mining* did not even consider. Unlike the D.C. Circuit in the *ARTBA* decisions and in *National Mining,* courts look to contemporaneous legislation to determine legislative context and intent. *See, e.g., Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America,* 325 U.S. 161, 180 (1945); *Houston Corp. v. U.S.,* 219 F.2d 841, 844 (9th Cir. 1955).[10] *National Mining* does not construe SMCRA

[10] Congress enacted SMCRA on August 3, 1977, PUB. L. NO. 95-87, 91 Stat. 504 (1977), and CAA's 1977 amendments four days later. PUB. L. NO. 95-95, 91 Stat. at 685.

correctly, much less CAA. Due process forbids saddling ARTBA with the *National Mining* parties' and panel's mistakes. *Baker v. Gen. Motors Corp.,* 522 U.S. 222, 237-38 & n.11 (1998); *S. Cent. Bell Tel. Co. v. Alabama,* 526 U.S. 160, 167-68 (1999). ARTBA deserves its day in court.

C. The D.C. Circuit Splits with At Least Six Other Circuits

As *Navajo Tribe* acknowledged, the Eighth Circuit viewed §307(b)(1) to *require* the petition-reopener process, whereas *Navajo Tribe* imposed that process on litigants as an exercise of courts' equitable powers. *Navajo Tribe,* 515 F.2d at 665-66; *Union Elec. Co. v. EPA,* 515 F.2d 206, 220 (8th Cir. 1975). Whether required by CAA or imposed by the courts, most other circuits have also recognized the petition-reopener process under §307(b)(1). *Maine v. Thomas,* 874 F.2d 883, 889-90 (1st Cir. 1989); *Vermont v. Thomas,* 850 F.2d 99, 104 (2d Cir. 1988); *Consolidation Coal,* 656 F.2d at 914-15 (Third Circuit); *Wisconsin Elec. Power Co. v. Costle,* 715 F.2d 323, 328-29 (7th Cir. 1983); *Sierra Club v. Georgia Power Co.,* 443 F.3d 1346, 1357 (11th Cir. 2006); *accord NRDC v. Johnson,* 461 F.3d 164, 173-74 (2d Cir. 2006) (tolerances under the Food Quality Protection Act). Against these decisions from other circuits, the D.C. Circuit's *ARTBA* decisions are aberrational. Indeed, the SMCRA precedent on which the panel relied also is aberrational. *Compare National Mining,* 70 F.3d at 1351 *with Tug Valley Recovery Ctr. v. Watt,* 703 F.2d 796, 800 (4th Cir. 1983) (describing petition-reopener doctrine as SMCRA's "proper procedure"). This Court should grant the writ to ensure uniformity of the circuits on this important issue of judicial review.

D. The All Writs Act Allows Review, Even if §307 Does Not

Even without accepting ARTBA's position on *Navajo Tribe,* §307(b)(1), and §307(b)(2), the D.C. Circuit nonetheless had jurisdiction to review EPA's response to ARTBA's petition to preserve prospective jurisdiction over nationally applicable §209(e) rules. Under the All Writs Act, courts have jurisdiction to compel agency action unreasonably withheld if that action, once taken, would be reviewable in that court. *In re Bluewater Network,* 234 F.3d 1305, 1314-15 (D.C. Cir. 2000); *Sierra Club v. Thomas,* 828 F.2d at 793-94; *Pub. Utility Comm'r v. Bonneville Power Admin.,* 767 F.2d 622, 626 (9th Cir. 1985); *George Kabeller, Inc. v. Busey,* 999 F.2d 1417, 1421 (11th Cir. 1993). Without definitive answers to ARTBA's substantive questions, ARTBA will face litigation across the country against EPA and state agencies in courts that lack the D.C. Circuit's expertise and, in all likelihood, also will lack national uniformity.

The multiplicity of suits would irreparably harm ARTBA. *See, e.g., Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 273-74 (1997); *Reed Enterprises v. Corcoran,* 354 F.2d 519, 523 (D.C. Cir. 1965). As the inevitable preemption and SIP challenges wind their way through courts in various circuits, the uncertainty over §209(e)'s scope jeopardizes sound air-quality planning under the SIP process. To make matters worse for ARTBA's members, failure to meet SIP deadlines results in sanctions that withhold highway construction funding. 42 U.S.C. §7509(b). For the foregoing reasons, ARTBA's substantive issues require expeditious and uniform resolution by the D.C. Circuit, with the possibility of review here.

II. §307(b) ALLOWS INDIRECT REVIEW – OUTSIDE THE ORIGINAL 60 DAYS – IN TIMELY CHALLENGES TO NEW EPA ACTION THAT APPLIES PRIOR RULES

For purposes of judicial review under §307(b)(1), this litigation has one primary departure from *ARTBA II:* ARTBA petitioned for review within 60 days of an EPA action applying the 1994 preemption rules. Even if *ARTBA II* correctly held that §307(b)(1) does not "count" for petition-reopener review, §307(b)(1) nonetheless allows reviewing the lawfulness of EPA's preemption rules in ARTBA's timely challenge to EPA's *applying* those rules to approve Rule 9510. The challenge-when-applied line of cases allows challenges to time-barred rules "apart from the original rulemaking… when [a] rule is brought before [a] court for review of [agency] action applying it." *Murphy Explor'n & Prod'n Co. v. Dep't of Interior,* 270 F.3d 957, 958-59 (D.C. Cir. 2001). That suffices for jurisdiction, without the petition.

ARTBA II did not elaborate on what types of after-arising grounds would satisfy §307(b)(1)'s jurisdictional hook, *see ARTBA II,* 588 F.3d at 1114, but it certainly did not *hold* that §307(b) rejects challenge-when-applied review. Accepting *arguendo* that the petition-reopener doctrine does not provide review in no way assumes that federal agencies may continue to apply unlawful rules to new rules, simply because the 60-day period for direct review has run.

A. §307(b)(1) Allows Indirect Review of Prior Rules When EPA Applies Them in New Agency Action

In denying challenge-when-applied review under §307(b)(1)'s 60-day limit, *ARTBA III* is mistaken for three reasons.

First, *ARTBA II* did not require dismissal by its own terms. *ARTBA II* said nothing about jurisdiction under the All Writs Act and §307(b)(1) for *future* EPA actions that would evade the D.C. Circuit's review and jurisdiction. *See* Section I.D, *supra.* As this litigation shows, EPA's opaque preemption rule would have the Ninth Circuit set CAA policy for the states within its boundaries, whereas Congress intended §307(b)(1) to provide review here to ensure *nationwide uniformity*. Under the circumstances, the D.C. Circuit has jurisdiction under the All Writs Act, even assuming *arguendo* that it would lack jurisdiction under §307(b)(1) alone.

Second, this case squarely meets the criteria posed by *ARTBA II.* ARTBA filed its petition for review within 60 days of the after-arising ground of EPA's applying the challenged EPA interpretation to approve Rule 9510, which – according to ARTBA's interpretation – CAA §209 preempts. That is just the type of after-arising ground contemplated by *ARTBA II.* In any event, under *Functional Music,* petitioners can challenge time-barred rules "apart from the original rulemaking… when [a] rule is brought before [a] court for review of [agency] action applying it." *Murphy Explor'n,* 270 F.3d at 958-59; *Functional Music,* 274 F.2d at 546-47. Thus, §307(b)(1) provides jurisdiction based on ARTBA's comments against EPA's SIP approval, apart from EPA's denial of ARTBA's administrative petition. Thus – unlike in

ARTBA II – ARTBA relies on final EPA action that unquestionably falls within §307(b)(1)'s jurisdictional key to judicial review.

Third, even *National Mining* found that the association's claim – namely, that federal over-filing conflicts with state authority in SMCRA primacy states – was timely for review. *National Mining,* 70 F.3d at 1352. Although that association petitioned the Department of Interior *in 1986,* over-filing conflict already was factually extant *in 1984,* 52 Fed. Reg. 21,598, 21,601 (1987), well outside the 60-day window. Of course, state-federal conflict is legally implicit in federal over-filing and thus implicit in the 1979 rulemaking that authorized SMCRA over-filing in the first place. 44 Fed. Reg. 15,302 (1979). By itself, *National Mining* poses no barrier to review.

B. §307(b)(2) Limits Indirect Review, But Only for Enforcement Actions

Appropriately, the *ARTBA II* panel concerned itself with congressional intent, *ARTBA II,* 588 F.3d at 1113, and Congress has spoken here: "Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. §7607(b)(2). Under §307(b)(2)'s plain terms, revisiting issues previously reviewable under §307(b)(1) is barred only in "civil or criminal proceedings for enforcement," *id.,* and this is no such proceeding. That counsels for allowing review in *all* other cases. In particular, the canon against repeals by implication, *Nat'l Ass'n of Home Builders,* 551 U.S. at 662; *Schlesinger,* 420 U.S. at 752, calls for review in circumstances that allowed review before the 1977 amendments. That

includes challenges in any rulemaking proceeding such as ARTBA's challenge here.

Unless one construes §307(b)(2) as surplusage – and, one cannot, *Reiter v. Sonotone Corp.,* 442 U.S. 330, 339 (1979) – CAA does not preclude raising grounds available in 1994 in a new, timely challenge to an appropriate (*i.e.,* non-enforcement) EPA action. Relying on the *Abbott Labs.* presumption of judicial review, the Seventh Circuit held that congressional silence on whether one can challenge time-barred rules in indirect challenges is dispositive. *Commonwealth Edison Co. v. U.S. Nuclear Regulatory Comm'n,* 830 F.2d 610, 614 (7th Cir. 1987) (*citing Abbott Labs. v. Gardner,* 387 U.S. 136, 141 (1967)). Thus, if Congress had been silent, CAA would allow review here. But Congress was not silent: §307(b)(2) denies review in circumstances not relevant here, which implies even more strongly that nothing precludes review here.

C. The Circuits Are Split on Indirect Review of Prior Rules When Applied in New Agency Action

Other circuits follow *Functional Music* and its challenge-when-applied progeny by allowing timely judicial review of agency action that applies prior rules to consider the prior rules' lawfulness. *See, e.g., Commonwealth Edison,* 830 F.2d at 614; *Wind River Mining Corp. v. U.S.,* 946 F.2d 710, 715 (9th Cir. 1991); *Texas v. U.S.,* 749 F.2d 1144, 1146-47 (5th Cir. 1985); *Terran v. Sec'y of HHS,* 195 F.3d 1302, 1311 (Fed. Cir. 1999). For that reason, *ARTBA III* splits with other circuits (and the D.C. Circuit) on this issue. Indeed, *Terran* arose under the National Childhood Vaccine Injury Act, which has an identical provision for judicial review. 42 U.S.C. §300aa-32. As

such, *ARTBA III* splits squarely with the Federal Circuit on this important issue of judicial review.[11]

Significantly, this doctrine of judicial review predates §307(b)(1)'s 1977 amendments, so the canon against repeals by implication requires clear and manifest evidence of congressional intent to repeal this historic review. *Nat'l Ass'n of Home Builders,* 551 U.S. at 662; *Schlesinger,* 420 U.S. at 752. Thus, *ARTBA III* not only splits with other circuits but also plainly does so incorrectly.

III. CAA REVIEW RAISES IMPORTANT ISSUES

CAA §209 affects all citizens directly through vehicles and even garden equipment, as well as indirectly through costs imposed on construction and transportation. The larger CAA affects citizens through public health, industry and the economy, consumer products, and even fireplaces and backyard barbecues. The *ARTBA* decisions would freeze CAA rulemaking on all these fronts and more.

By contrast, Congress recognized that it is "not be in the public interest to measure for all time the adequacy of a promulgation … by the information available at the time of such promulgation," and so allowed "challenge [to] any promulgat[ion] whenever it is alleged that significant new information has become available." S. REP. 91-1196, 41-42 (1970). As explained in note 7, *supra,* Congress wisely revised the Senate's trigger from after-arising *information* to

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[11] In litigation under the identical review provisions of the Safe Drinking Water Act, 42 U.S.C. §300j-7(a)-(b), the Eighth Circuit described this as an "administrative law battleground," but declined to resolve it. *Western Nebraska Resources Council v. U.S. EPA,* 943 F.2d 867, 870 (8th Cir. 1991).

after-arising *grounds,* but the larger policy issue remains: neither courts nor EPA should freeze rules in place merely because those rules once seemed correct. "[A]gency interpretation is not instantly carved in stone [and] to engage in informed rulemaking, [agencies] must consider varying interpretations … on a continuing basis." *Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837, 863-64 (1984). Here, the new information compels new rules.

For example, EPA's disparate treatment of locomotives versus non-locomotive nonroad vehicles suggests, explicitly and implicitly, that §209(e) protects in-use locomotives (but not in-use construction equipment) from Fleet Rules. Indeed, EPA previously called ARTBA's litigation against In-Use Controls and Fleet Rules in Texas an "inappropriate collateral attack on [EPA's] regulations." 66 Fed. Reg. 57,223, 57,224-25 (2001). Intentionally or not, EPA has punted to the various circuits issues that Congress wanted the D.C. Circuit to decide to ensure nationwide uniformity. *Adamo Wrecking,* 434 U.S. at 283-84; 42 U.S.C. §§7601(a)(2)(A), 7607(b)(1). EPA's preemption rules are inadequate for nationwide uniformity, so – even if ARTBA must challenge EPA's SIP rulemaking in the Ninth Circuit – the All Writs Act and §307(b)(1) require the D.C. Circuit to hear any substantive challenge to EPA's governing regulations.

Finally, the fact that §307(b)(1) and other similar statutes provide the D.C. Circuit *exclusive* jurisdiction magnifies this Court's reviewing role. Although it always is the last backstop against legal error, this Court usually can rely on the federal circuits to resolve difficult issues, with this Court's resolving circuit splits that materialize. Exclusive

jurisdiction in the D.C. Circuit greatly reduces the room for circuit splits to develop. Here, this Court is not merely the *last* backstop; it is the *only* backstop to enforce the congressional scheme.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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