No. 13-145

# In the Supreme Court of the United States

AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION, PETITIONER

*v.*

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

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## QUESTION PRESENTED

Whether the court of appeals correctly dismissed as untimely a petition for review seeking to challenge regulations issued by the Environmental Protection Agency to implement the Clean Air Act, 42 U.S.C. 7401 *et seq.*, when that petition was filed years after the regulations were promulgated and more than 60 days after any cognizable new ground was alleged to have arisen.

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 705 F.3d 453.

## JURISDICTION

The judgment of the court of appeals was entered on January 15, 2013. A petition for rehearing was denied on April 30, 2013 (Pet. App. 16a-17a). The petition for a writ of certiorari was filed on July 29, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Environmental Protection Agency (EPA) has authority under Section 213 of the Clean Air Act (CAA or Act), 42 U.S.C. 7547, to promulgate emission standards for "new nonroad engines." The term "non-

road engines" encompasses a wide variety of mobile, non-highway engines, including engines used in tractors, lawnmowers, construction equipment, and locomotives. See 40 C.F.R. 1068.30, 1074.5.

The CAA also preempts many state regulations pertaining to nonroad engines. States may not adopt "any standard or other requirement relating to the control of emissions" from two types of "new nonroad engines or nonroad vehicles": new locomotive engines and new engines that are used in construction or farm equipment and that are under 175 horsepower. 42 U.S.C. 7543(e)(1). For all other nonroad engines, States are preempted from adopting "standards and other requirements relating to the control of emissions," except that California may adopt and enforce such regulations if the EPA authorizes it to do so, according to specific enumerated criteria. 42 U.S.C. 7543(e)(2). Other States may then adopt and enforce, as their own regulations, provisions identical to California's. 42 U.S.C. 7543(e)(2)(B). If a state regulation is not a "standard" or "requirement" relating to the "control of emissions," it is not governed (and therefore is not preempted) by these provisions. See 42 U.S.C. 7543(e); *Engine Mfrs. Ass'n* v. *U.S. EPA*, 88 F.3d 1075, 1094 (D.C. Cir. 1996) (*EMA*).

2. In 1994, the EPA completed two rulemakings addressing nonroad engine emissions. See *Control of Air Pollution; Determination of Significance for Nonroad Sources and Emission Standards for New Nonroad Compression-Ignition Engines At or Above 37 Kilowatts*, 59 Fed. Reg. 31,306 (June 17, 1994); *Air Pollution Control; Preemption of State Regulation for Nonroad Engine and Vehicle Standards*, 59 Fed. Reg. 36,969 (July 20, 1994); see also 42 U.S.C. 7547(a) (gov-

erning EPA rulemaking authority for nonroad engine emissions); 42 U.S.C. 7543(e) (directing the EPA to issue regulations governing preemption provisions).

In one of the resulting rules, the EPA defined the scope of the statutory term "*new* nonroad engines." 42 U.S.C. 7547(a)(3) (emphasis added). Under the EPA's definition, an engine is considered "new" until it is either placed into service or sold to an ultimate purchaser. See 40 C.F.R. 1074.5; 59 Fed. Reg. at 31,328-31,331. The EPA's regulations also distinguished the subset of "new" engines for which States may never adopt or enforce "standard[s] or other requirement[s] relating to the control of emissions" under 42 U.S.C. 7543(e)(1) from those for which they may promulgate such requirements if they adopt EPA-approved California rules. 40 C.F.R. 1074.10, 1074.12, 1074.101.

Also in 1994, the EPA issued an interpretive rule that elaborated upon the agency's interpretation of the preemption provisions. See 59 Fed. Reg. at 31,313, 31,339; *id.* at 36,971-36,974. The interpretive rule states in relevant part:

> [The] EPA believes that [S]tates are not precluded under [42 U.S.C. 7543(e)] from regulating the use and operation of nonroad engines, such as regulations on hours of usage, daily mass emission limits, or sulfur limits on fuel; nor are permits regulating such operations precluded, once the engine is * * * no longer new.

*Id.* at 31,339; see *Control of Air Pollution: Emission Standards For New Nonroad Compression-Ignition Engines At or Above 37 Kilowatts; Preemption of State Regulation for Nonroad Engine and Vehicle Standards; Amendments to Rules*, 62 Fed. Reg.

67,733 (Dec. 30, 1997). In the EPA's view, such use restrictions are not "standard[s] or other requirement[s] relating to the control of emissions" and therefore are not subject to preemption under 42 U.S.C. 7543(e)(1) or 7543(e)(2). 59 Fed. Reg. at 31,339.

Soon after the regulations and interpretive rule were promulgated in 1994, they were challenged in the D.C. Circuit. That court upheld in relevant part the EPA's interpretation of the statutory provisions. See *EMA*, 88 F.3d at 1099.

3. On July 12, 2002, more than eight years after the EPA first promulgated these rules, petitioner asked the agency to commence a new rulemaking to amend or repeal them. Pet. App. 2a. Raising a number of the same challenges that the D.C. Circuit had previously rejected in *EMA*, petitioner asked the EPA to specify that certain types of state nonroad engine regulations (*i.e.*, those "that impose in-use and operational controls or fleet-wide purchase, sale or use standards") are preempted. *Control of Emissions from Nonroad Spark-Ignition Engines and Equipment*, 73 Fed. Reg. 59,034, 59,130 (Oct. 8, 2008).

In 2006, petitioner filed a petition for review in the D.C. Circuit, asserting that the EPA had unreasonably delayed taking action on petitioner's rulemaking petition. The EPA subsequently announced its intent to grant or deny that rulemaking petition in the context of a larger rulemaking concerning nonroad engines. See *Control of Emissions from Nonroad Spark-Ignition Engines and Equipment; Proposed Rule*, 72 Fed. Reg. 28,098, 28,209-28,210 (proposed May 18, 2007). The D.C. Circuit then dismissed peti-

tioner's petition for review as moot. Petitioners refer to that decision as "*ARTBA I*."

The EPA took public comment on the proposed rule, and in its final rule on nonroad engines, the agency denied the rulemaking petition. 73 Fed. Reg. at 59,130. Petitioner sought review in the D.C. Circuit, which dismissed the petition as time-barred under Section 307(b)(1) of the CAA, 42 U.S.C. 7607(b)(1). *ARTBA* v. *EPA*, 588 F.3d 1109 (D.C. Cir. 2009), cert. denied, 131 S. Ct. 388 (2010).[1]

In that 2009 decision, the court of appeals explained that the CAA requires petitions for review of any "nationally applicable regulation[]" to be filed within 60 days after the rule's promulgation, unless the petition is based "solely on grounds arising after such sixtieth day," in which case it must be brought within 60 days after the date on which those new grounds arose. *ARTBA II*, 588 F.3d at 1112 (quoting 42 U.S.C. 7607(b)(1)). The court of appeals went on to note that, when a particular statute does not specifically address the circumstances under which newly-arising events will provide a basis for judicial review, the court had found that "agency denial of a petition for a new rulemaking which complains of substantive infirmities in existing rules is, for the most part, judicially reviewable irrespective of time limits dating from the rules' enactment." *Ibid.* (emphasis omitted).

The court of appeals explained, however, that judicial-review provisions like the one in the CAA require a different analysis because they demonstrate that "Congress has 'specifically address[ed] the conse-

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[1] Petitioner refers to this decision as "*ARTBA II*," while the court below refers to it as "*ARTBA I*." This brief will use petitioner's naming convention.

quences of failure to bring a challenge within the statutory period.'" *ARTBA II*, 588 F.3d at 1113 (quoting *National Mining Ass'n* v. *Department of the Interior*, 70 F.3d 1345, 1350 (D.C. Cir. 1995)) (brackets in original). Accordingly, under such a provision, review of rules after the expiration of the original 60-day period is permitted only under the circumstances specifically identified in the statute. *Ibid.* The court further explained that the CAA's judicial-review provision "imposes one additional constraint on petitions brought outside the original 60-day window based on after-arising grounds: they must be filed within 60 days of the new event, rather than any time after it." *Ibid.*

Petitioner had contended that its petition was timely because its claims did not ripen until after the closing of the original 60-day window for review. *ARTBA II*, 588 F.3d at 1113. The court of appeals held that, even assuming petitioner's challenge was based on grounds that post-dated the original promulgation of the EPA rules, the challenge was nevertheless untimely because petitioner had identified no triggering event that had taken place during the 60 days before the filing of its petitions with either the EPA or the court of appeals. *Id.* at 1114. The court therefore found it unnecessary to determine whether a party that asserts a later-arising ground for review is required to file first with the EPA or with the court of appeals, given that petitioner's challenge was untimely under either approach. *Ibid.*

The court of appeals also rejected petitioner's contention that the EPA had "reopened" the rules it was challenging and had thereby triggered a new 60-day period for judicial review. *ARTBA II*, 588 F.3d at

1114. The court found that the EPA "gave no 'indication that [it] had undertaken a serious, substantive reconsideration'" of the regulations that petitioner challenged. *Id.* at 1115 (brackets in original). Instead, the EPA had effectively sought comment on whether it should reopen the regulations and had ultimately decided not to do so. *Ibid.*

Petitioner filed a petition for a writ of certiorari seeking to challenge the court of appeals' jurisdictional ruling. This Court denied that petition. See 131 S. Ct. 388 (2010).

4. In December 2005, the San Joaquin Valley Unified Air Pollution Control District in California adopted Rule 9510, which regulates indirect sources of air pollution within the San Joaquin Valley nonattainment area, with the goal of reducing emissions from construction projects and future operation of certain development projects. See *National Ass'n of Home Builders* v. *San Joaquin Valley Unified Air Pollution Control Dist.*, No. CV F 07-0820, 2008 WL 4330449, at *4-*5 (E.D. Cal. Sept. 19, 2008), aff'd, 627 F.3d 730, 734-740 (9th Cir. 2010), cert. denied, 132 S. Ct. 369 (2011) (*NAHB*). Rule 9510 provides that "[a]n applicant may reduce construction emissions on-site by using less-polluting construction equipment, which can be achieved by utilizing add-on controls, cleaner fuels, or newer lower emitting equipment." Rule 9510 sec. 6.1.2 (C.A. App. 102). Rule 9510's requirements can be satisfied through on-site measures, off-site fees, or any combination thereof. *Id.* at sec. 6.3 (C.A. App. 103).

In a suit filed in federal district court in California, parties contended that Rule 9510 was preempted by the CAA. Both the district court and the Ninth Cir-

cuit rejected that contention, holding that Rule 9510 did not apply to "new" equipment and did not specifically regulate vehicles or engines, but rather the development site as a whole. See *NAHB*, *supra*.

In 2006, Rule 9510 was also submitted to the EPA for approval as a revision of California's state implementation plan under the CAA. In comments on the EPA's proposed approval of that revision, petitioner urged the EPA to revisit its 1994 regulations. In 2011, after the Ninth Circuit's decision in *NAHB*, the EPA approved the state-plan revision and again declined to revisit the 1994 regulations. See *Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District*, 76 Fed. Reg. 26,609 (May 9, 2011). The agency explained that petitioner's request for revisions to the 1994 regulations was "duplicative of arguments the agency had already rejected in 2008" and was "inappropriate in light of the limited scope of the California [state implementation plan] proceedings." Pet. App. 6a-7a.

Petitioner petitioned for review of the EPA's decision in both the Ninth Circuit (Case No. 11-71897) and the D.C. Circuit. The Ninth Circuit action was stayed pending resolution of the D.C. Circuit case. In the D.C. Circuit decision at issue here, the court of appeals held that the Ninth Circuit was the proper venue for petitioner's challenge to the EPA's approval of the state-plan revisions. Pet. App. 4a-6a. Petitioner does not seek review of that portion of the decision.

The D.C. Circuit also rejected petitioner's renewed attempt to challenge the 1994 rules, holding again that the challenge is time-barred. Pet. App. 6a-10a. As before, the court of appeals began its analysis with the text of Section 307(b)(1) of the Act, 42 U.S.C.

7607(b)(1), which provides that petitions for review of specified EPA actions must be brought within 60 days of the action unless the challenge is based solely on grounds arising after the sixtieth day, in which case a petition must be filed within 60 days of those grounds' arising. Pet. App. 7a. The court explained that petitioner's challenge to the 1994 regulations in this case was untimely "for the same reasons [the court] discussed" in *ARTBA II*. *Id.* at 8a.

The court of appeals first explained that, although "the occurrence of an event that ripens a claim constitutes an after-arising ground," all of the purported after-arising events identified by petitioner had occurred years in the past and therefore were not relevant to the timeliness inquiry. Pet. App. 8a (citing *ARTBA II*, 588 F.3d at 1113-1114). The court also noted that, while "an agency may reexamine its regulations and thereby initiate a new 60-day period of judicial review," the "agency's response to a petitioner's comments cannot provide the sole basis for reopening." *Id.* at 8a-9a (citing *ARTBA II*, 588 F.3d at 1114-1115). In this case, the court observed, the EPA had replied to petitioner's comments "only to recognize the comments and, in doing so, expressly stated that it was not reopening its Section 209(e) regulations." *Id.* at 9a (citing 76 Fed. Reg. at 26,612).

Petitioner contended that this case was distinguishable from *ARTBA II* because the earlier decision had involved "a bare petition for amendment, while this case involves a petition for amendment of the Section 209(e) regulations coupled with an *application* of those regulations to the California [state implementation plan] approval." Pet. App. 9a. In rejecting that argument, the court of appeals noted that its prece-

dent "did not imply 'any sort of limitation on the recognized ability of a party against whom a regulation is enforced to contest its validity in the enforcement context.'" *Ibid.* (quoting *ARTBA II*, 588 F.3d at 1113). The court explained, however, that this possible route to judicial review was unavailable here because "the Section 209(e) regulations were not applied in an enforcement proceeding in this case, as [petitioner] recognized at oral argument." *Ibid.* The court therefore found it unnecessary to "address the possibility of a challenge in the enforcement context." *Ibid.* The court also explained that petitioner's theory—*i.e.*, that every decision approving changes to state implementation plans reopens all relevant regulations to judicial review—was inconsistent with the statutory scheme because it would effectively erase the CAA's 60-day deadline for judicial review of EPA actions. *Id.* at 10a.[2]

**ARGUMENT**

Petitioner contends that the court of appeals had jurisdiction over its petition for review. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or of another court of appeals. In 2010, this Court denied a petition for a writ of certiorari filed by petitioner advancing very similar jurisdictional argu-

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[2] In yet another attempt to challenge the EPA's 1994 rules, petitioner filed an action in district court seeking review of the EPA's denial of its rulemaking petitions. See *American Road & Transp. Builders Ass'n* v. *EPA*, 865 F. Supp. 2d 72, 75 (D.D.C. 2012). The district court dismissed that challenge for lack of subject matter jurisdiction, see *ibid.*, and the court of appeals summarily affirmed, see *American Road & Transp. Builders Ass'n* v. *EPA*, No. 12-5244, 2013 WL 599474 (D.C. Cir. Jan. 28, 2013).

ments involving yet another of its untimely attempts to challenge the 1994 rules. See 131 S. Ct. 388 (2010). The same result is warranted here.

1. The CAA, 42 U.S.C. 7401 *et seq.*, states that a petition for review challenging EPA actions "shall be filed within sixty days from the date notice of such * * * 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). The Act further provides that any issue that could have been raised in a petition for review cannot be used as a defense in a civil or criminal enforcement action. 42 U.S.C. 7607(b)(2).

Congress has repeatedly made clear the importance it places on quickly resolving challenges to EPA actions implementing the CAA. As amended in 1970, the Act's judicial review provisions required petitions for review to be brought within 30 days. The purpose of the 30-day limit was "to maintain the integrity of the time sequences provided throughout the Act." S. Rep. No. 1196, 91st Cong., 2d Sess. 41 (1970) (1970 Senate Report). The 1970 amendments also provided that a petition for review could be brought after the initial review period if "based solely on grounds arising after such 30th day." Act of Dec. 31, 1970, Pub. L. No. 91-604, § 12(a), 84 Stat. 1708. The legislative history indicates that Congress enacted this provision to account for the possibility that new factual information would arise suggesting either that further regulation is needed or that existing regulations are unnecessary. 1970 Senate Report 41-42.

In 1977, Congress amended this provision to extend the review period to 60 days and to provide that any petition based on grounds arising after the initial review period must be filed within 60 days of those grounds' arising. See 42 U.S.C. 7607(b). The legislative history emphasized that Congress continued to view this provision as "strictly limit[ing] section 307 challenges to those which are actually filed within that time." H.R. Rep. No. 294, 95th Cong., 1st Sess. 322 (1977). The House Report explained:

> The only instance in which the committee intends that later challenges may be entertained by the court of appeals are those in which the grounds arise solely after the 60th day. Thus, unless a petitioner can show that the basis for his challenge did not exist or was not reasonably to be anticipated before the expiration of 60 days, the court of appeals is without jurisdiction to consider a petition filed later than 60 days after the publication of the promulgated rule.

*Ibid.*

2. The court of appeals correctly held that petitioner's claims were untimely under these provisions. Petitioner seeks judicial review of regulations that were promulgated nearly 20 years ago. Petitioner does not claim that its petition for review is based solely on grounds that arose during the 60-day period preceding the submission of that petition. To the contrary, petitioner's claims could have been raised (and several were raised) at the time the regulation was promulgated. See *Engine Mfrs. Ass'n* v. *U.S. EPA*, 88 F.3d 1075, 1093-1094 (D.C. Cir. 1996). To the extent any claims could not have been raised when the rules were first promulgated, such claims could have

been raised years before petitioner brought this petition for review. All of petitioner's claims are therefore untimely under the plain terms of 42 U.S.C. 7607(b).

Petitioner contends that it may nonetheless obtain judicial review by petitioning the EPA to reconsider the old regulation (at any time after its promulgation), and then seeking review of the agency's rejection of that petition. Pet. 19-21. The court of appeals correctly rejected that argument, holding that the EPA's denial of a petition for reconsideration that was submitted to the agency more than 60 days after the events that allegedly form the basis for the request is not a new ground that provides a new time period for judicial review. Pet. App. 8a.

Petitioner does not identify any provision of Section 307(b) to support its claim that the EPA's rejection of its reconsideration petition is itself a new ground. Rather, it argues that its claim was not ripe until it petitioned the EPA to revise the rule and the agency denied the petition. Pet. 19. In support of that contention, petitioner relies on the court of appeals' decision in *Oljato Chapter of the Navajo Tribe* v. *Train*, 515 F.2d 654 (D.C. Cir. 1975) (*Navajo Tribe*); the right to petition administrative agencies conferred by the Administrative Procedure Act (APA), 5 U.S.C. 600 *et seq.*; and the All Writs Act, 28 U.S.C. 1651. Pet. 19-25. Petitioner's submission confuses ripeness with timeliness, and none of its contentions has merit.

a. Petitioner contends (Pet. 20-21) that the court of appeals' decision in this case is inconsistent with its earlier decision in *Navajo Tribe*. Any such intra-circuit conflict would not warrant this Court's review. In any event, there is no inconsistency between the decisions.

In *Navajo Tribe*, the court of appeals exercised its supervisory authority to require that, when a petitioner seeks judicial review of an EPA action on the basis of new information, the petitioner must first present that information to the EPA as a petition for agency action before seeking judicial review. See 515 F.2d at 665-666. The purpose of that requirement was to ensure an adequate record for judicial review. See *ibid.* The court's holding that submission of a petition to the EPA is a prerequisite to judicial review does *not* mean that the statutory time limits are voided. The decision in *Navajo Tribe* does not address *when* such a petition must be filed with the EPA, much less suggest that a party may petition the EPA "years after its 'new information' arose" and then obtain judicial review of the original rule, as petitioner contends (Pet. 20-21).

After *Navajo Tribe* was decided, moreover, Section 307(b)(1) was amended to require that any petitions for review based on new grounds must be brought within 60 days of those grounds' arising. See p. 12, *supra*. Addressing this statutory change, the D.C. Circuit has made clear that *Navajo Tribe* does not negate the CAA's deadlines, and that a petitioner must file within 60 days after the new ground arises. See *ARTBA II*, 588 F.3d at 1113-1114. That court has also emphasized that the rule that a petition for review is not ripe until submitted to the EPA applies to "claims that new information called for a rule change—not that a potential claim had become newly justiciable." *Id.* at 1114.

In this case, the grounds on which petitioner based its petition for reconsideration arose far more than 60 days before it submitted its petition to the EPA.

Petitioner's claim therefore became ripe long before it petitioned either the EPA or the court of appeals. Accordingly, petitioner's claim for judicial review is time-barred.[3]

Contrary to petitioner's assertion (Pet. 24), the court of appeals' decision in this case is not inconsistent with decisions in other circuits. None of the decisions cited by petitioner addressed the issue resolved by the court below, *i.e.*, whether the EPA's denial of a petition to reconsider a rule triggers a new opportunity to challenge the rule in court when the petition to reconsider was based on grounds arising more than 60 days before the petition was submitted. Indeed, in many of the decisions cited by petitioner, the only mention of an administrative petition is in dicta where the court describes that mechanism as one way that a party seeking a change to an existing regulation can proceed. Although the Eighth Circuit in *Union Electric Co.* v. *EPA*, 515 F.2d 206 (1975), aff'd, 427 U.S. 246 (1976), held that an administrative petition was a prerequisite to judicial review on newly arising grounds, it did not address the timing of such a petition or of judicial review. Like *Navajo Tribe*, moreover, *Union Electric* was decided before Section 307(b)(1) was amended to require that petitions for

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[3] The D.C. Circuit has not yet addressed, in circumstances where *Navajo Tribe* is applicable, whether a petition must be filed with the EPA or with the court of appeals within 60 days after a new ground arises for challenging a pre-existing rule. See *ARTBA II*, 588 F.3d at 1113-1114. Resolution of that question would not affect the outcome of this case, however, because petitioner did not initiate proceedings before either the agency or the court during the relevant 60-day period. *Id.* at 1114; Pet. App. 8a.

review based on new grounds be brought within 60 days of those grounds' arising.

b. Petitioner's right under the APA to petition an agency to amend or repeal a rule, Pet. 22, similarly did not give the court of appeals jurisdiction to hear petitioner's untimely challenge to the EPA's 1994 rules. The general right to judicial review conferred by the APA is displaced by specific statutory review procedures. See 5 U.S.C. 703, 704. Congress has created a very specific judicial review process for EPA actions under the CAA and has imposed limits on the courts' jurisdiction to hear such claims. In this case, the court of appeals correctly held that the EPA's denial of petitioner's rulemaking petition, which was substantively identical to one the agency had denied just two years earlier, did not constitute new grounds giving rise to a renewed opportunity to seek judicial review. Petitioner's failure to meet the specific jurisdictional requirements for filing petitions for review under the CAA does not open the door to jurisdiction under the general provisions of the APA. *Navajo Tribe*, 515 F.2d at 664.

c. Finally, the All Writs Act does not support petitioner's claim because it is not a grant of jurisdiction. The All Writs Act states that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. 1651(a). It does not vest any federal court with jurisdiction over any category of case, but speaks instead to the remedies that are available once a federal court has jurisdiction. See *United States* v. *Denedo*, 556 U.S. 904, 911 (2009) (explaining that, under the All Writs Act, a federal court may issue relief that is appropriate to the case before it, "contingent on that court's subject-matter

jurisdiction over the case"). Thus, "[w]hile the All Writs Act authorizes employment of extraordinary writs, it confines the authority to the issuance of process 'in aid of' the issuing court's jurisdiction," and "the Act does not enlarge that jurisdiction." *Clinton* v. *Goldsmith*, 526 U.S. 529, 534-535 (1999) (citations omitted).

The All Writs Act thus does not erase the time limits that Congress imposed in Section 307(b)(1). None of the cases cited by petitioner, Pet. 25, is to the contrary. None of those cases involved a petition for review of EPA action; instead, all were suits to compel the EPA to take an action that the petitioners claimed had been unreasonably delayed. In each of those cases, moreover, the court's jurisdiction derived from the APA or the CAA, and the All Writs Act was invoked only to justify the court's use of the remedy of mandamus.

3. The court of appeals correctly rejected petitioner's claim that the EPA's application of its 1994 rule in approving revisions to the California state implementation plan gave petitioner a new opportunity for judicial review of the underlying rule. Pet. App. 9a-10a. As the court of appeals noted, *id.* at 10a, if petitioner were correct that any application of a rule constituted a new ground for judicial review of that rule, the Act's time limitations would be meaningless.

Petitioner's contrary arguments lack merit. Petitioner argues (Pet. 27-28) that the decision below is inconsistent with prior D.C. Circuit precedent. Any intra-circuit conflict would not warrant this Court's review, but petitioner is incorrect in any event. The question whether an application of the 1994 rule to a particular circumstance provided a new ground for

review of the rule was not at issue in *ARTBA II*. And the *ARTBA II* court's holding that jurisdiction cannot be manufactured by petitioning the agency for rulemaking, see 588 F.3d at 1113, is entirely consistent with the decision below.

Decisions holding that a rule generally can be challenged in an enforcement proceeding by "a party against whom [it] is enforced," Pet. App. 9a (quoting *ARTBA II*, 588 F.3d at 1113), are inapplicable here. First, as the court of appeals explained, "the Section 209(e) regulations were not applied in an enforcement proceeding in this case, as [petitioner] recognized at oral argument." *Ibid.* The D.C. Circuit precedent upon which petitioner relies is therefore inapposite. See *ibid.*

Second, the decisions on which petitioner relies did not involve the CAA. The Act provides that "[a]ction of the [EPA] with respect to which review could have been obtained under [42 U.S.C. 7607(b)(1)] shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. 7607(b)(2). The evident purpose of that language is to supersede the general principle that agency regulations may be challenged in the course of enforcement proceedings.

Third, nothing in *National Mining Ass'n* v. *U.S. Department of the Interior*, 70 F.3d 1345 (D.C. Cir. 1995), addresses the question of collateral review of an underlying rule when it is applied. Rather, the section of the opinion cited by petitioner (Pet. 28) involved the court's determination that it had jurisdiction to review the EPA's denial of a rulemaking petition that was based on grounds arising after the initial period for judicial review. 70 F.3d at 1352-1353. In addition, the judicial review provision of the Surface Mining Con-

trol and Reclamation Act of 1977 at issue in *National Mining Association* does not contain a time limit on when claims based on grounds arising after the initial review period may be brought. See 30 U.S.C. 1276(a)(1).

Finally, there is no inconsistency between the decision below and decisions of other courts of appeals. None of the decisions cited by petitioner (Pet. 29) concerns the CAA or jurisdictional provisions analogous to Section 307(b)(1). Rather, they concern the Hobbs Administrative Orders Review Act of 1950, Pub. L. No. 900, 64 Stat. 1128 (*Commonwealth Edison Co.* v. *United States Nuclear Regulatory Comm'n*, 830 F.2d 610 (7th Cir. 1987); *Texas* v. *United States*, 749 F.2d 1144 (5th Cir.), cert. denied, 472 U.S. 1032 (1985)); the general federal statute of limitations (*Wind River Mining Corp.* v. *United States*, 946 F.2d 710 (9th Cir. 1991)); or the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (*Terran* v. *Secretary of Health & Human Servs.*, 195 F.3d 1302 (Fed. Cir. 1999), cert. denied, 531 U.S. 812 (2000)).

Petitioner mischaracterizes *Terran* when it asserts that the decision addressed "an identical provision for judicial review." Pet. 29. The judicial review provision at issue there (see 42 U.S.C. 300aa-32) imposed no time limit on when a petition for review based on after-arising grounds may be brought, and it contained no provision barring review of agency rules in enforcement actions. In addition, that provision stated that a petition for review "may" be filed within 60 days, whereas Section 307(b)(1) of the CAA states that a petition for review "shall" be filed within 60 days. 42 U.S.C. 7607(b)(1). Thus, although the court in *Terran*

found that the judicial review provision of the National Childhood Vaccine Injury Act of 1986 was permissive, see 195 F.3d at 1310-1311, the filing deadline in the CAA is mandatory.

4. Finally, none of the arguments made by petitioner in its supplemental brief counsel in favor of review.

a. The court of appeals' recent description of the CAA's exhaustion provision, 42 U.S.C. 7607(d)(7)(B), as jurisdictional, see *National Ass'n of Clean Water Agencies* v. *EPA*, No. 11-1131, 2013 WL 4417438, at *41 (D.C. Cir. Aug. 20, 2013), is not a "post-petition development[]," Pet. Supp. Br. 5, since the court has previously characterized the provision in that way. *E.g.*, *Portland Cement Ass'n* v. *EPA*, 665 F.3d 177, 185 (D.C. Cir. 2011). In any event, the question whether the exhaustion provision is jurisdictional is irrelevant to this case, where the issue is whether petitioner complied with the statutory requirement to raise a challenge to an old rule based on new information within 60 days of that information's arising. As noted previously, petitioner loses on that question whether or not such a challenge must be raised first before EPA or can be asserted directly in court because petitioner missed the 60-day deadline either way. For this same reason, *EPA* v. *EME Homer City Generation L.P.*, cert. granted, No. 12-1182 (oral argument scheduled for Dec. 10, 2013), is not relevant to the question presented here. Cf. Pet. Supp. Br. 6.

b. Petitioner notes (Pet. Supp. Br. 2, 6-8) that the EPA recently denied another of petitioner's requests to revisit the 1994 regulations. See 78 Fed. Reg. 58,090, 58,112-58,113 (Sept. 20, 2013) ("EPA is not * * * reviewing its regulations in the context of

this proceeding."). The fact that petitioner has had yet another challenge to the 1994 rules deemed untimely does not counsel in favor of review of the penultimate decision reaching the same result.

c. Petitioner contends (Pet. Supp. Br. 8-10) that the Court's grant of petitions for writs of certiorari regarding the EPA's regulation of greenhouse gas emissions, *e.g.*, *Utility Air Regulatory Grp.* v. *EPA*, No. 12-1146, 2013 WL 1155428 (Oct. 15, 2013), is a post-petition development supporting review here. Petitioner does not suggest, however, that there is any overlap between the question presented in the pending greenhouse gas cases and those at issue here. Instead, petitioner suggests that the court of appeals' decision here is inconsistent with the Court's exercise of jurisdiction in an earlier greenhouse gas case, *Massachusetts* v. *EPA*, 549 U.S. 497 (2007). See Pet. Supp. Br. 8-10.

There is no inconsistency. The petitioners in *Massachusetts* were attempting to challenge a new regulatory determination rather than an old one, and they filed their petition for review in the D.C. Circuit within 60 days of the EPA's denial on the merits of their petition for rulemaking. See 549 U.S. at 510-514. That case thus presented no question involving the timeliness of an attempt to seek review of an old rule based on new information.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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