**Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, 12-1272 (Consolidated)**

# In the Supreme Court of the United States

UTILITY AIR REGULATORY GROUP, *ET AL.*,

*Petitioners,*

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,

*Respondents.*

**ON WRITS OF *CERTIORARI* TO THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

## *AMICUS CURIAE* BRIEF OF THE AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION IN SUPPORT OF NEITHER PARTY


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## QUESTIONS PRESENTED

After this Court decided *Massachusetts v. EPA,* 549 U.S. 497 (2007), the Environmental Protection Agency ("EPA") found that its promulgation of motor vehicle greenhouse gas ("GHG") emission standards under Title II of the Clean Air Act ("CAA"), 42 U.S.C. §7521(a)(1), compelled regulation of carbon dioxide and other GHGs under the CAA's Title I prevention of significant deterioration ("PSD") and Title V stationary-source permitting programs. Even though EPA determined that including GHGs in these programs would vastly expand the programs contrary to Congress's intent, EPA adopted rules adding GHGs to the pollutants covered. The panel below held the CAA and *Massachusetts* compelled inclusion of GHGs and, based on that holding, dismissed all petitions to review the GHG permitting program rules on standing grounds.

Against that background, this Court limited its review to the following question: Whether EPA permissibly determined that its regulation of GHGs from new motor vehicles triggered permitting requirements under the CAA for stationary sources that emit GHGs.

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## INTEREST OF *AMICUS CURIAE*

*Amicus curiae* American Road & Transportation Builders Association ("ARTBA") is a nonprofit trade organization that represents the transportation construction industry before the national executive, legislative, and judicial branches.[1] As an umbrella group for more than 6,000 members from all sectors and modes of the transportation construction industry (including public transit, airports, and waterways), ARTBA is the industry's primary advocate on environmental regulatory actions by the Environmental Protection Agency ("EPA") and its state counterparts.

In this litigation, ARTBA does not support either party on the limited question covered by the Court's grant of the writ of *certiorari.* Viewed more widely, ARTBA supports the petitioners' implicit views that Congress did not intend the Clean Air Act ("CAA") to regulate greenhouse gases ("GHGs") as "pollutants." While ARTBA thus respectfully submits that this Court decided the merits of *Massachusetts v. EPA,* 549 U.S. 497 (2007), incorrectly, ARTBA files this brief protectively to ensure that the Court does not inadvertently affirm the *Massachusetts* merits here, when the Court may have lacked jurisdiction to reach the merits in *Massachusetts.*

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[1] *Amicus* ARTBA files this brief with the consent of all parties, which have lodged their blanket letters of consent with the Clerk. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

ARTBA is petitioner in *ARTBA v. EPA,* No. 13-145 (U.S.), which asks this Court to review the U.S. Court of Appeals for the D.C. Circuit's holding that CAA's provision for judicial review based on "after-arising grounds," 42 U.S.C. §7607(b)(1), requires filing within 60 days of the after-arising *information* on which a petitioner bases its request for regulatory change. *ARTBA v. EPA,* 705 F.3d 453, 456-57 (D.C. Cir. 2013) ("*ARTBA III*"). Under that view, the D.C. Circuit dismissed ARTBA's petition for review for lack of subject-matter jurisdiction. *Id.* In ARTBA's view, the "grounds" for suit are EPA's *denial* of a rulemaking petition pursuant to 5 U.S.C. §553(e), *after* a petitioner presents its new information to EPA. Accordingly, like the petitioners in *Massachusetts,* ARTBA first petitioned EPA administratively and petitioned for review within 60 days of EPA's denial of the petition. The jurisdictional question, then, is what constitutes an after-arising "grounds" for suit: (a) an external event, or (b) an EPA action. However this Court ultimately answers the question, ARTBA and the *Massachusetts* petitioners followed the same procedure, and both rise or fall on the same answer. ARTBA files this *amicus* brief to call the Court's attention to the issue and to protect against the Court's *inadvertently* addressing that important question by assuming that jurisdiction existed in *Massachusetts.*

## STATEMENT OF THE CASE

The D.C. Circuit upheld EPA action on GHG emissions based in part on *Massachusetts,* which "clarified that greenhouse gases are an 'air pollutant' subject to regulation under the Clean Air Act." *Coalition for Responsible Regulation, Inc. v. EPA,* 684 F.3d 102, 113 (D.C. Cir. 2012). Specifically, this

case concerns the impact on CAA *stationary-source* provisions of the *Massachusetts* determination that EPA must regulate GHGs as CAA pollutants for CAA *mobile-source* purposes. When it decides the important questions presented here, this Court should not *inadvertently* assume – as the D.C. Circuit did – that jurisdiction existed for the decision in *Massachusetts*. That said, the Court could decide to address the issue intentionally, thereby avoiding uncertainty on whether CAA-based GHG regulation will survive into the next administration.

## STATEMENT OF FACTS

Given our economy's reliance on fossil fuels, any major reductions in GHG emissions will cost many billions of dollars, to say nothing of the proposed technology and financial transfers that developing countries seek to reduce their GHG emissions. In addition, the "well-documented rise in global temperatures" that a majority of this Court held to "coincide[] with a significant increase in the concentration of carbon dioxide in the atmosphere," *Massachusetts,* 549 U.S. at 504-05, appears less well documented today for several reasons. Most notably, rising temperatures have paused for more than a decade, while GHG emissions have continued to rise. Whether the current pause represents a landing on an upward climb or a plateau or inflection, the data on which *Massachusetts* relied have been undermined.

The rulemaking petition that provided the basis for the *Massachusetts* litigation was filed on October 20, 1999. *See* International Center for Technology Assessment *et al.,* Petition for Rulemaking and Collateral Relief from New Motor Vehicles under § 202 of the Clean Air Act (Oct. 20, 1999) ("ICTA

Pet.").[2] The petition did not rely on any information that arose within 60 days of the administrative filing (*i.e.,* information arising on or after August 21, 1999), although the petition relied on information from well before then. *See, e.g.,* ICTA Pet. at 16 (citing 1988 data). EPA denied the petition on September 8, 2003, 68 Fed. Reg. 52,922 (2003), and the petitioners filed *Massachusetts* within 60 days on October 23, 2003.

## SUMMARY OF ARGUMENT

Under the holdings of the D.C. Circuit's *ARTBA* decisions, CAA does not allow judicial review of EPA action to deny a rulemaking petition based on after-arising grounds unless filed within 60 days of an after-arising event. By that test, the D.C. Circuit and thus this Court lacked subject-matter jurisdiction for *Massachusetts,* which sought review of EPA's denial of a petition to revise model-year 2000 and subsequent vehicular emission standards. While the jurisdiction for *Massachusetts* may not be dispositive here, this Court should not *inadvertently* hold here that the Court already has lawfully decided these GHG issues in *Massachusetts.*

Should the Court intentionally elect to decide the issue, the Court should decide that it had jurisdiction for *Massachusetts* because the 1970 CAA allowed such review, and the 1977 CAA amendments did not "clearly and manifestly" remove such review, as would be required under the canon against repeals by implication. Indeed, quite the contrary, the 1977 amendments' history suggests that Congress adopted the holding of a D.C. Circuit decision that expressly

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[2] The judicially noticeable ICTA petition is available at http://www.regulations.gov/contentStreamer?objectId=09000064800bcf5c&disposition=attachment&contentType=pdf.

required presenting after-arising information to EPA in an administrative petition before seeking to bring suit based on the after-arising information. Under this view, the after-arising "grounds" for suit are EPA's action on the petition, not the after-arising information that informs the administrative petition.

## ARGUMENT

### I. UNDER THE D.C. CIRCUIT'S HOLDINGS ON PETITION-DENIAL REVIEW, THE *MASSACHUSETTS* LITIGATION LACKED SUBJECT-MATTER JURISDICTION

In litigation over EPA's denying rulemaking petitions filed by ARTBA, the D.C. Circuit has held that CAA's provisions for renewed review based on "after-arising grounds" do not allow review when the petitioner files within 60 days of only EPA's denial of a rulemaking petition. *ARTBA II,* 705 F.3d at 456-57, *petition for cert. pending,* No. 13-145 (U.S.); *ARTBA v. EPA,* 588 F.3d 1109, 1112 (D.C. Cir. 2009) ("*ARTBA II*"). Specifically, the D.C. Circuit held that a mere petition-denial claim does not "count" as an after-arising ground. *ARTBA II,* 588 F.3d at 1114 (*citing Nat'l Mining Ass'n v. Dep't of Interior,* 70 F.3d 1345, 1351 (D.C. Cir. 1995)). Insofar as the *Massachusetts* petitioners did the same thing that ARTBA did, the D.C. Circuit's *ARTBA* decisions hold that *Massachusetts* exceeded the jurisdictional reach of CAA's judicial review provision.

If the D.C. Circuit correctly decided the *ARTBA* decisions, *Massachusetts is* void as *ultra vires* and cannot control future litigation:

> For a court to pronounce upon the meaning or the constitutionality of a state or federal

> law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires.*

*Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 101-02 (1998). Further, a "lack of subject matter jurisdiction goes to the very power of a court to hear a controversy; ... [the] earlier case can be accorded no weight either as precedent or as law of the case." *U.S. v. Troup,* 821 F.2d 194, 197 (3d Cir. 1987) (*quoting Ala. Hosp. Ass'n v. U.S.,* 228 Ct.Cl. 176, 656 F.2d 606 (1981)) (alterations in original); *Orff v. U.S.,* 358 F.3d 1137, 1149-50 (9th Cir. 2004) (same). Finally, nothing precludes collaterally attacking the *Massachusetts* courts' subject-matter jurisdiction because the issue goes to the waiver of the United States' sovereign immunity, which is open to collateral attack. *Travelers Indem. Co. v. Bailey,* 557 U.S. 137, 166 n.6 (2009). In short, if an administration – whether the current one or a future one – determines to revisit the issue, it is likely that the Executive Branch would reject *Massachusetts.*[3]

To save *Massachusetts* from lacking jurisdiction under the D.C. Circuit's *ARTBA* holdings, EPA has argued that *Massachusetts* "challenge[d] a new regulatory determination rather than an old one." *ARTBA v. EPA,* No. 13-145 (U.S.), Federal Respondents' Brief in Opposition, at 21 (Nov. 26, 2013). EPA's proposed new-determination distinction is factually wrong about *Massachusetts* and legally applies equally to ARTBA.

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[3] Even if a procedurally proper "do-over" were possible, the new climate data available since 2003 suggest that it would be difficult to establish standing, even under the relaxed rules for states' standing announced in *Massachusetts.*

The *Massachusetts* petitioners petitioned EPA to "[r]egulate the emissions of [various alleged pollutants] from new motor vehicles and new motor vehicle engines under § 202(a)(1) of the Clean Air Act." Int'l Ctr. for Technology Assessment *et al.,* Petition for Rulemaking and Collateral Relief from New Motor Vehicles under § 202 of the Clean Air Act, at 2 (Oct. 20, 1999) (hereinafter, "ICTA Pet."). Since 1970, §202(a)(1) has required EPA to "by regulation prescribe (and *from time to time revise*) … standards applicable to the emission of any air pollutant from any class or classes of new motor vehicle." 42 U.S.C. §7521(a)(1) (emphasis added); Pub. L, No. 91-604, §6(a), 84 Stat. 1676, 1690 (1970). For example, between model years 2000 and 2002, EPA was phasing in its "Emission standards for 2000 and later model year light-duty vehicles." 40 C.F.R. §86.000-8(e) (2000). Until EPA amended them, the then-existing motor-vehicle standards applied to all such vehicles sold prospectively. The *Massachusetts* petition asked EPA to revise those existing standards under §202(a)(1)'s authority to "from time to time revise … standards," based not only on information that post-dated the model-year 2000 standard's promulgation in 1996,[4] but also on information that *pre-dated* its promulgation. ICTA Pet. at 16 (1988 data). EPA's new-determination distinction simply does not describe *Massachusetts.*

In any event, exactly as in *Massachusetts,* ARTBA sought changes to existing rules based on new information. ARTBA's challenge to EPA's preemption rules relies primarily on issues that arose after EPA promulgated the 1994 EPA rule that

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[4] 61 Fed. Reg. 54,878 (1996).

ARTBA challenges. To be sure, some of ARTBA's after-arising information arose in the late 1990s and some in 2004, making them longer ago than some (but not all) of the corresponding *Massachusetts* data.[5] Under the D.C. Circuit's reasoning, however, there is no difference between issues that arose 61 days ago and issues that arose 61 years ago. Both are jurisdictionally outside the 60-day window.

## II. IF THIS COURT ELECTS TO CONSIDER ITS JURISDICTION IN *MASSACHUSETTS*, THIS COURT SHOULD FIND THAT THE "GROUNDS" FOR SUIT ARE UNLAWFUL AGENCY ACTION, NOT NON-RECORD INFORMATION

ARTBA files this *amicus* brief primarily to avoid this Court's addressing *Massachusetts* unaware of its potential jurisdictional defect but also to encourage the Court to resolve the issue. Given the many

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[5] The *Massachusetts* petitioners' reliance on 1988 data in their 1999 administrative petition to revise the 1996 standards for the 2000-and-subsequent model years is not problematic under the limitation that renewed review must relate "solely" to after-arising grounds. *See* 42 U.S.C. §7607(b)(1). The "solely" language does not limit the scope of review, once a petitioner has met §307(b)(1)'s jurisdictional criteria. *Navajo Tribe,* 515 F.2d at 667. For example, the "solely" language prevents petitioners from reaching back to procedural defects of earlier promulgations, *Nat'l Labor Relations Bd. Union v. FLRA,* 834 F.2d 191, 196 (D.C. Cir. 1987), but not to seeking renewed review of current agency action that refuses to amend unlawful regulations based either on after-arising information or on the post-promulgation ripening of claims against prior regulations. *Id.* at 196-98. The *Massachusetts* petitioners plainly relied on *some* post-1996 data, which suffices under *Navajo Tribe* and the 1977 amendments' history, notwithstanding additional reliance on 1988 data, because the after-arising grounds (*i.e.,* EPA's allegedly unlawful action) accrued in 2003.

billions that the Nation will spend furthering this Court's decision, fiscal prudence calls for resolving the issue now, before the Nation has invested in potentially useless technology to comply with potentially unlawful EPA regulations. If the Court considers its jurisdiction, *amicus* ARTBA respectfully submits that it should find jurisdiction.

Prior to the 1977 amendments, CAA plainly allowed the type of petition-denial review on which the *Massachusetts* petitioners relied. *Olijato Chapter, Navajo Tribe v. Train,* 515 F.2d 654, 665-66 (D.C. Cir. 1975); *Union Elec. Co. v. EPA,* 515 F.2d 206, 220 (8th Cir. 1975); Pub. L. No. 91-604, §12(a), 84 Stat. at 1708. *Union Electric* deemed the grounds for suit to be EPA action on a petition, and *Navajo Tribe* deemed it within a Court of Appeals' power to require presenting after-arising issues to EPA before suit. In the 1977 amendments, both the House and Senate ratified *Navajo Tribe,* H.R. REP. 94-1175, 264 (1976); S. REP. 95-294, 323 (1977), noting only that Congress intended to reject *dicta* from *Investment Co. Inst. v. Bd. of Governors, Fed'l Reserve Sys.,* 551 F.2d 1270, 1280-81 (D.C. Cir. 1977), that allowed avoiding the 60-day time bar for "an undefined legitimate excuse." S. REP. 95-294, at 322.[6] The question, then, is whether the 1977 CAA amendments removed this form of judicial review.

Under the circumstances, it seems clear that petition-denial review survived the 1977

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[6] The *Investment Company* holding (which Congress did not reject) was that parties seeking renewed review because they lacked a ripe challenge within the original 60-day window must petition the agency to change the rule and sue upon the agency's denying the petition. *Investment Co,* 551 F.2d at 1280-81 (discussing renewed review under the Hobbs Act).

amendments: "repeals by implication are not favored and will not be presumed unless 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) (alteration in original, interior quotations and citations omitted). Indeed, "this 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). The 1977 amendments – *i.e.,* as relevant here, the current §307(b) – are consistent with Congress' assuming that courts would continue to follow the *Navajo Tribe* precedent that Congress affirmed. *See* 42 U.S.C. §7607(b). The D.C. Circuit's divergence from its own precedent results from mistakes made in a 1995 case under a different statute, which lacked CAA's relevant history.

Unfortunately, neither the parties nor the panel in *Nat'l Mining Ass'n v. Dep't of Interior,* 70 F.3d 1345 (D.C. Cir. 1995), considered *Navajo Tribe* as controlling. Specifically, although *National Mining* recognized that CAA's judicial review resembles the one there at issue,[7] *National Mining,* 70 F.3d at 1350 n.2, neither that panel nor the *National Mining* parties even mentioned (much less considered) *Navajo Tribe*.[8] The two *ARTBA* decisions apply the

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[7] *National Mining* concerned a similarly worded provision under the Surface Mining Control & Reclamation Act, 30 U.S.C. §§1251-1279 ("SMCRA").

[8] *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. 8, 1995); *id.,* Brief of Appellants National Mining Association, *et al.,* 1995 WL 17204297 (Jul. 28, 1995); *id.,* Brief for the Federal

*National Mining* precedent, notwithstanding *Navajo Tribe* and the presumption against repeals by implication. In doing so, 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); *cf. Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837, 863-64 (1984) ("agency interpretation is not instantly carved in stone [and] to engage in informed rulemaking, [agencies] must consider varying interpretations … on a continuing basis"). In short, *National Mining* and the *ARTBA* decisions are simply mistaken.

*Honeywell Int'l, Inc. v. E.P.A.,* 705 F.3d 470 (D.C. Cir. 2013), provides a good example of how far off the rails the D.C. Circuit's misinterpretation has gone. In *Honeywell,* a divided panel held that a court

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Appellees, 1995 WL 17204299 (Aug. 1, 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).

decision involving third parties – namely, *Arkema Inc. v. EPA,* 618 F.3d 1 (D.C. Cir. 2010) – constituted an after-arising ground that triggered CAA's 60-day window for renewed review. *Honeywell,* 705 F.3d at 473. *Honeywell* could have held that the effect of the *Arkema* decision on Honeywell International's rights, as memorialized in a *subsequent* EPA rulemaking to implement *Arkema,*[9] reopened review of *prior* EPA action by "changing the stakes" of the prior EPA actions. *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior,* 88 F.3d 1191, 1213, 1226-27 (D.C. Cir. 1996). Instead, *Honeywell* made the *Arkema* decision itself the after-arising ground. *Honeywell,* 705 F.3d at 473. Because non-mutual preclusion is wholly unavailable against EPA, *U.S. v. Mendoza,* 464 U.S. 154 (1984), Congress cannot have intended that non-party decisions – standing alone – constitute after-arising grounds, even before EPA acts to implement a decision in a way that affects non-parties' rights.

The other circuits have supported ARTBA's position under both CAA[10] and SMCRA (*i.e.,* the statute at issue in *National Mining*).[11] For that reason, this Court should confirm its jurisdiction in

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[9] 76 Fed. Reg. 47,451, 47,459-60 (2011).

[10] *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 Co. v. Donovan,* 656 F.2d 910, 914-15 (3d Cir. 1981); *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).

[11] *Tug Valley Recovery Ctr. v. Watt,* 703 F.2d 796, 800 (4th Cir. 1983) (describing petition-reopener doctrine as SMCRA's "proper procedure")

*Massachusetts,* thereby eliminating considerable uncertainty in this costly area of EPA regulation.

## CONCLUSION

However it rules on the merits, this Court should not inadvertently affirm *Massachusetts* without addressing the serious jurisdictional questions that underlie that decision. If it decides to address jurisdiction for *Massachusetts,* this Court should affirm CAA provides judicial review when EPA denies a rulemaking petition that presents after-arising information.

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Respectfully submitted,


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