

Nos. 12-1182 & 12-1183

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

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

v.

EME HOMER CITY GENERATION, L.P., *ET AL.*

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AMERICAN LUNG ASSOCIATION, *ET AL.*,  
*Petitioners,*

v.

EME HOMER CITY GENERATION, L.P., *ET AL.*

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*On Writ of Certiorari to the United States Court  
of Appeals for the District of Columbia Circuit*

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**BRIEF *AMICUS CURIAE* OF APA WATCH IN  
SUPPORT OF NEITHER PARTY**

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## **QUESTIONS PRESENTED**

These two consolidated cases present both merits and jurisdictional questions, with the latter hinging on whether review was available, given (a) failure to raise the relevant merits issues during the comment period, and (b) 42 U.S.C. §7607(d)(7)(B)'s limitation on review to issues presented during the rulemaking. This *amicus* brief focuses only on the jurisdictional question, including the implications of §7607(d)(7)(B) on review when after-arising grounds provide a basis for revisiting existing Clean Air Act rules.

### **No. 12-1182**

The Clean Air Act, 42 U.S.C. 7401 *et seq.* (Act or CAA), requires the Environmental Protection Agency (EPA) to establish National Ambient Air Quality Standards (NAAQS) for particular pollutants at levels that will protect the public health and welfare. 42 U.S.C. 7408, 7409. "[W]ithin 3 years" of "promulgation of a [NAAQS]," each State must adopt a state implementation plan (SIP) with "adequate provisions" that will, *inter alia*, "prohibit[]" pollution that will "contribute significantly" to other States' inability to meet, or maintain compliance with, the NAAQS. 42 U.S.C. 7410(a)(1), (2)(D)(i)(I). If a State fails to submit a SIP or submits an inadequate one, the EPA must enter an order so finding. 42 U.S.C. 7410(k). After the EPA does so, it "shall promulgate a [f]ederal implementation plan" for that State within two years. 42 U.S.C. 7410(c)(1).

The questions presented are as follows:

(1) Whether the court of appeals lacked jurisdiction to consider the challenges on which it granted relief.

(2) Whether States are excused from adopting SIPs prohibiting emissions that "contribute significantly" to air pollution problems in other States until after the EPA has adopted a rule quantifying each State's interstate pollution obligations.

(3) Whether the EPA permissibly interpreted the statutory term "contribute significantly" so as to define each upwind State's "significant" interstate air pollution contributions in light of the cost-effective emission reductions it can make to improve air quality in polluted downwind areas, or whether the Act instead unambiguously requires the EPA to consider only each upwind State's physically proportionate responsibility for each downwind air quality problem.

**No. 12-1183**

The Clean Air Act's "Good Neighbor" provision requires that state implementation plans contain "adequate" provisions prohibiting emissions that will "contribute significantly" to another state's nonattainment of health-based air quality standards. 42 U.S.C. 7410(a)(2) (D)(i). A divided D.C. Circuit panel invalidated, as contrary to statute, a major EPA regulation, the Transport Rule, that gives effect to the provision and requires 27 states to reduce emissions that contribute to downwind states' inability to attain or maintain air quality standards. The questions presented are:

(1) Whether the statutory challenges to EPA's methodology for defining upwind states' "significant contributions" were properly before the court, given the failure of anyone to raise these objections at all,

let alone with the requisite "reasonable specificity," "during the period for public comment," 42 U.S.C. 7607(d)(7)(B);

(2) Whether the court's imposition of its own detailed methodology for implementing the Good Neighbor provision violated foundational principles governing judicial review of administrative decision-making;

(3) Whether an upwind state that is polluting a downwind state is free of any obligations under the Good Neighbor provision unless and until EPA has quantified the upwind state's contribution to downwind states' air pollution problems.

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**INTEREST OF AMICUS CURIAE**

*Amicus curiae* APA Watch<sup>1</sup> is a nonprofit membership organization headquartered in McLean,

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<sup>1</sup> *Amicus* APA Watch files this brief with the consent of all parties; the parties have lodged 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.

Virginia. APA Watch has participated as *amicus curiae* before this Court and the Courts of Appeals on both justiciability and the Clean Air Act (“CAA”), including in *Stormans Inc. v. Selekty*, No. 07-36039 (9th Cir.); *Envtl. Defense v. Duke Energy Corp.*, No. 05-848 (U.S.); *Astra USA, Inc. v. Santa Clara County, Cal.*, No. 09-1273 (U.S.); *Douglas v. Independent Living Ctr. of Southern California, Inc.*, Nos. 09-958, 09-1158, 10-283 (U.S.). In addition, APA Watch members seek to compel the Environmental Protection Agency (“EPA”) to revisit CAA rules and orders outside CAA §307(b)’s 60-day window for judicial review, 42 U.S.C. §7607(b), which implicates the same statutory text and legislative history on the question of CAA issue-exhaustion that petitioners present here. Accordingly, APA Watch has a direct and vital interest in the issues raised here.

#### **STATEMENT OF THE CASE**

As relevant to this *amicus* brief, this case presents the jurisdictional question whether the industry petitioners below (“Industry”) and the D.C. Circuit could reach an issue that no party pressed in their comments to EPA. *Amicus* APA Watch takes no position on that issue *per se*, but rather outlines the related issues of whether and when parties can seek renewed review under the CAA for after-arising grounds (*i.e.*, grounds that arise outside §307(b)’s 60-day window for judicial review and outside the comment period. *See* 42 U.S.C. §7607(b)(1), 7607(d)(7)(B). Although these issues may not appear to be conceptually related to the question presented here, Congress enacted §307(d)(7)(B) for the very reason of channeling the process for review of after-

arising grounds.

### **Constitutional Background**

Absent a waiver of sovereign immunity, federal agencies are jurisdictionally immune from suit. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). Statutes that allow judicial review obviously waive sovereign immunity, Louis L. Jaffee, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 432 (1958) (“If a statute provides for judicial review the consent has, of course, been given”), at least for the scope of review that the statute grants.

### **Statutory Background**

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).<sup>2</sup> Subsection 307(d) provides a hybrid judicial-review procedure for many (but not all) EPA rulemakings, 42 U.S.C. §7607(d), which differs in some respects from the more general provisions of the Administrative Procedure Act, 5 U.S.C. §§551-706 (“APA”). 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).

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 §307(b)(1) and the APA procedure to address after-arising grounds, 5 U.S.C. §553(e). 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) to present their issues to the Agency and then petition for review under the Clean Air Act on the “grounds” of EPA’s denying the administrative petition. 515 F.2d at 666.<sup>3</sup>

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<sup>2</sup> Before 1977, §307(b)(1)’s deadline was 30 days. PUB. L. NO. 91-604, §12(a), 84 Stat. at 1707. For consistency, APA Watch refers to §307(b)(1)’s 60-day window throughout this brief.

<sup>3</sup> In 1970, Congress amended S. 4358 in conference to require suing on after-arising *grounds* (e.g., petition denials), not “whenever ... significant new information has become

In broadening §307(b)'s scope in the 1977 amendments, Congress expressly 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. Inst. v. Bd. of Governors, Fed'l Reserve Sys.*, 551 F.2d 1270, 1280-81 (D.C. Cir. 1977) ("*Investment Co.*") that might allow escaping §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 or that seeks to raise an issue that arose after EPA acted on its original rule or order.<sup>4</sup>

#### **SUMMARY OF ARGUMENT**

*Amicus* APA Watch takes no position on either the jurisdictional question presented (whether issue exhaustion under §307(d)(7)(B) is jurisdictional) or on the merits questions presented. Instead, this *amicus* brief explains §307(d)(7)(B)'s legislative history and its relevance to renewed review – *i.e.*,

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available." *Navajo Tribe*, 515 F.2d at 660 (*quoting* S. 4358, 91st Cong., 2d Sess., §308(a) (1970)).

<sup>4</sup> Notwithstanding *Navajo Tribe* and the 1977 amendment's legislative history, the D.C. Circuit subsequently held that parties cannot seek judicial review of petition denials. *Nat'l Mining Ass'n v. Dep't of Interior*, 70 F.3d 1345 (D.C. Cir. 1995); *Am. Road & Transportation Builders Ass'n v. EPA*, 588 F.3d 1109, 1114 (D.C. Cir. 2009). The circuits are split on that issue, *see, e.g., Union Elec. Co. v. EPA*, 515 F.2d 206, 220 (8th Cir. 1975), and the issue is before this Court on petition for a writ of *certiorari* in *Am. Road & Transportation Builders Ass'n v. EPA*, No. 13-145 (U.S.).

outside §307(b)'s 60-day window – of EPA rules and orders based on after-arising grounds. On that issue, such review predated the 1977 amendments that added §307(d)(7)(B) and were the very reason that Congress added §307(d)(7)(B), which makes clear that the Court should preserve (or at least not foreclose) such review under that congressional intent and the policy against repeals by implication (Section II.A). In addition, denying or foreclosing that review would violate due process and further defeat congressional intent by allowing review *outside the CAA framework* under the APA and in equity (Section II.B). In addition, APA Watch also argues that neither the APA nor other issue-exhaustion statutes provide useful guidelines here for CAA review because of difference between the CAA on the one hand and the APA (Section I.A) and the other issue-exhaustion statutes on the other hand (Section I.B).

### **ARGUMENT**

#### **I. NEITHER THE APA NOR NON-CAA ISSUE-EXHAUSTION STATUTES NECESSARILY RESOLVE THIS ISSUE UNDER THE CAA**

*Amicus* APA Watch respectfully submits that the Court should use care in generalizing principles from the APA and administrative-law generally on the one hand and other statutes with issue-exhaustion provisions on the other hand. In both situations (and particularly the latter), neither non-statutory review under the APA or common law nor statutory review under statutes that differ from the CAA will necessarily provide a rule of decision for judicial review under the CAA.

For example, §307(d) and the APA are similar in many respects, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001) (standard of review), but they also differ. Indeed, Congress wrote §307(d) precisely to override the APA template in those areas where the APA and §307(d) differ. As such, while the APA may guide the Court's understanding of §307(d) in some respects, the APA does not apply here where APA and CAA review do not align:

The meaning and applicability of [the first statute] are useful guides in construing [the second statute], therefore, only to the extent that the language and history of [the second statute] do not suggest a contrary interpretation.

*North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 529-30 (1982). While *amicus* APA Watch will defer to the parties to establish the rule of decision in this case, Section II, *infra*, will discuss issues of CAA review that the Court should consider for the wider impact of its decision here.

#### **A. The APA Does Not Necessarily Resolve the Question Presented Here**

Under *Sims v. Apfel*, 530 U.S. 103 (2000), non-adversarial proceedings like most rulemakings would provide a much weaker case for judicially requiring exhaustion than would adversarial proceedings. *Sims* cautions against applying APA principles here, and it also cautions against too readily adopting holdings from adversarial proceedings into litigation that does not involve an adversarial proceeding.

1. **If It Arose under the APA, this Case Would Present a Weak Case for Issue Exhaustion**

To the extent that issue exhaustion principles apply under the APA and common law, they apply judicially, under general principles of administrative law. This Court's recent decision in *Sims* is the leading authority, and it ties the question to the adversarial nature of the agency proceedings:

[C]ourts require administrative issue exhaustion "as a general rule" because it is usually "appropriate under [an agency's] practice" for "contestants in an adversary proceeding" before it to develop fully all issues there. ... But, as *Hormel* and *L. A. Tucker Truck Lines* suggest, the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding. Where the parties are expected to develop the issues in an adversarial administrative proceeding, it seems to us that the rationale for requiring issue exhaustion is at its greatest. *Hormel*, *L.A. Tucker Truck Lines*, and *Aragon* each involved an adversarial proceeding. ... Where, by contrast, an administrative proceeding is not adversarial, we think the reasons for a court to require issue exhaustion are much weaker.

*Sims*, 530 U.S. at 110 (second alteration in original, citations omitted). As used in *Sims* and its earlier

cited precedents, an “adversarial administrative proceeding” entails elements of due process – e.g., the ability to cross examine witnesses – that are wholly absent from most APA rulemakings. Indeed, even some APA hearings are not adversarial. See, e.g., *Nat’l Ass’n of Psychiatric Treatment Ctrs. for Children v. Mendez*, 857 F. Supp. 85, 89-90 (D.D.C. 1994); *Norwegian Nitrogen Prod. Co. v. U.S.*, 288 U.S. 294, 317 (1933) (because “the word ‘hearing’ as applied to administrative proceedings has been thought to have a broader meaning,” “[a]ll depends upon the context”).

Specifically, an “adversary proceeding [includes] the attendant rights to counsel, confrontation, cross-examination, and compulsory process.” *Ellis v. District of Columbia*, 84 F.3d 1413, 1422 (D.C. Cir. 1996); see also *U.S. v. Boney*, 68 F.3d 497, 502 (D.C. Cir. 1995); *Communications Satellite Corp. v. Fed’l Communications Com’n*, 611 F.2d 883, 887 (D.C. Cir. 1977); *Delta Found. v. U.S.*, 303 F.3d 551, 561-62 (5th Cir. 2002); *Coalition for Gov’t Procurement v. Fed. Prison Indus.*, 365 F.3d 435, 465-66 (6th Cir. 2004); *Gambill v. Shinseki*, 576 F.3d 1307, 1326 (Fed. Cir. 2009) (Bryson, J., concurring) (collecting cases); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). With APA actions that are not adversarial proceedings, the case for *judicially imposing* issue exhaustion is “much weaker” under *Sims*.

*Sims* undermines EPA’s citation to decisions that involved adversarial proceedings because – at least under the APA – the case for issue exhaustion is more forceful with adversarial proceedings than it would be here, with this non-adversarial rulemaking.

See, e.g., EPA Br. at 35 (citing *U.S. v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)); cf. *Sims*, 530 U.S. at 110 (“*L.A. Tucker Truck Lines* ... involved an adversarial proceeding”). This Court cannot necessarily draw inferences from the APA, and particularly not from APA situations in which (unlike here) the agency provided an adversarial proceeding.

**2. If the APA Applied, Industry Could Excuse Exhaustion Based on the Futility of Seeking Review from EPA**

If the Court holds that general administrative-law decisions apply to this dispute, EPA’s rejection of the industry position on the merits, EPA Br. at 33-55, would render exhaustion futile:

[I]n view of Attorney General’s submission that the challenged rules of the prison were “validly and correctly applied to petitioner,” requiring administrative review through a process culminating with the Attorney General ‘would be to demand a futile act.’”

*McCarthy v. Madigan*, 503 U.S. 140, 148 (1992) (quoting *Houghton v. Shafer*, 392 U.S. 639, 640 (1968)); cf. *McKart v. U.S.*, 395 U.S. 185, 197-99 (1969) (exhaustion not required if question “solely one of statutory interpretation” where “the proper interpretation [was] certainly not a matter of [agency] discretion”). Here, if EPA indeed decided its merits views, there would be no point to asking that industry raise the issues with EPA.

## **B. Non-CAA Issue-Exhaustion Statutes Do Not Resolve the Question Presented Here**

The argument against relying too heavily on general APA and administrative-law issues is even stronger when it comes to other statutes that provide issue-exhaustion principles as part of their statutory review.<sup>5</sup> Here, Congress is even less likely to have intended courts to interpret different statutory text to mean the *same* thing.

Although it has on occasion strictly enforced issue-exhaustion statutes, *see, e.g., EEOC v. FLRA*, 476 U.S. 19, 23-24 (1986), this Court has not yet ruled on the issue-exhaustion criteria presented by §307(d)(7)(B). While the Court perhaps can draw some general principles from its precedents on other issue-exhaustion statutes, *amicus* APA Watch respectfully submits that many of those decisions do not generalize to this CAA context because the statutes at issue in those other cases differed from the CAA statute at issue here.

For example, the issue-exhaustion statute in *EEOC v. FLRA* was somewhat stricter than §307(d):

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<sup>5</sup> The Court perhaps should distinguish between nonstatutory review and special forms of statutory review, as the enactment of “statutes” such as the APA has rendered the term “nonstatutory” something of a “misnomer.” *Air New Zealand Ltd. v. C.A.B.*, 726 F.2d 832, 836-37 (D.C. Cir. 1984) (Scalia, J.); *cf. generally* Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and “Nonstatutory” Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967).

“[no] objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances.”

*EEOC v. FLRA*, 476 U.S. at 23 (quoting 5 U.S.C. §7123(c)) (alteration in *EEOC v. FLRA*). As the Court noted, this language is identical to §10(e) of the National Labor Relations Act, *id.* (citing 29 U.S.C. §160(e)), which jurisdictionally precludes courts from considering issues not raised before the agency. *Id.* (citing *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982)). If these authorities applied here, they would help EPA greatly.

But Congress did not model §307(d)(7)(B) on §10(e) of the National Labor Relations Act. First, the CAA requires only that it must have been “impracticable to raise [a timely] objection,” 42 U.S.C. §7607(d)(7)(B), which is less stringent than “extraordinary circumstances.” *EEOC v. FLRA*, 476 U.S. at 23 (quoting 5 U.S.C. §7123(c)). Moreover, whereas the latter “speaks to courts, not parties,” *EEOC v. FLRA*, 476 U.S. at 23, §307(d)(7)(B) speaks only to what issues “may be raised during judicial review,” presumably by “the person raising an objection.” 42 U.S.C. §7607(d)(7)(B). Under that less-stringent restriction, courts may feel free to insert issues *sua sponte* that the parties could not themselves raise.

## **II. CONGRESS INTENDED REVIEW UNDER §307 TO ALLOW REVISITING EPA RULES BASED ON AFTER-ARISING GROUNDS**

Although this *amicus* brief expresses no view on

whether Industry here can avail itself of §307's provisions for seeking renewed review, *amicus* APA Watch respectfully submits that this Court's decision should recognize – or, at least, not foreclose – the CAA's flexibility for seeking renewed review under §307(b), which was the genesis of §307(d)(7)(B) in the 1977 CAA amendments. Because the jurisdictional question presented is sufficiently close to the question of whether and when parties can seek renewed review, APA Watch respectfully files this *amicus* brief as a protective matter to advise this Court that the integrally related issues of renewed review under §307(b).

**A. Congress Intended §307(d)(7)(B) to Preserve and Channel the Ability to Seek Renewed Review Based on After-Arising Grounds**

As indicated by both §307(d)(7)(B)'s legislative history and the strong disfavor for repeals by implication, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007), judicial review based on after-arising grounds should *remain* available under §307(b).<sup>6</sup> Indeed, although repeal by implication requires that “the intention of the legislature to repeal [is] clear and manifest,” *id.*, the policy against repeals by implication is *even stronger* for judicial review: “this canon of

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<sup>6</sup> Under *Navajo Tribe*, 515 F.2d at 666-67, such review was available prior to the 1977 amendments, and nothing in the 1977 amendments repealed that review, except for instances of “an undefined legitimate excuse” under the *Investment Co. dictum*. S. REP. 95-294, at 322; *cf. Investment Co.*, 551 F.2d at 1280-81.

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); *cf.* 5 U.S.C. §559; *Dickinson v. Zurko*, 527 U.S. 150, 154-55 (1999). Thus, assuming *arguendo* that §307(d)(7)(B) is jurisdictional here, this Court must not inadvertently suggest that §307 limits *renewed review*, even if §307(d)(7)(B) limits review here.

With that background, the only two effects of §307(d)(7)(B) on the availability for renewed review are that (1) renewed review is unavailable under the *Investment Co. dictum* about “an undefined legitimate excuse” and instead requires (minimally) that it must have been “impracticable” to have raised the issue within the original 60-day window;<sup>7</sup> and (2) issue exhaustion applies to renewed review, so that parties must first raise their issues administratively with EPA and await a denial of their administrative petition before seeking judicial review. *See* 42 U.S.C. §7607(d)(7)(B); S. REP. 95-294, at 322-23; H.R. REP. 94-1175, at 264. As indicated, *amicus* APA expresses no view on whether Industry here can avail itself of an opportunity for renewed review.

**B. Renewed Review Based on After-Arising Grounds Provides a Necessary Safety Valve under the Due Process Clause**

Allowing renewed review of after-arising grounds

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<sup>7</sup> As indicated in Section I.B, *supra*, CAA’s “impracticable” test is less stringent than the “extraordinary circumstances” that some other issue-exhaustion statutes require.

serves two important goals, one constitutional and one statutory. Both reasons caution against this Court's finding §307 to bar review permanently for any issue on which a party misses – for whatever reason – §307(b)'s original 60-day window.

First, it would deny due process for an agency action taken, for example, when a prospective plaintiff or petitioner lacked an Article III case or controversy to bind entities because their claims ripened or arose more than 60-odd days after EPA acted. This Court has noted without resolving that due-process issues raised by §307(b)(2)'s closing review *in enforcement actions* of EPA rules that could have been had under §307(b)(1). *See* 42 U.S.C. §7607(b)(2); *Adamo Wrecking Co. v. U.S.*, 434 U.S. 275, 307 n.\* (1978); *Harrison v. PPG Indus.*, 446 U.S. 578, 607 n.9 (1980). When a party with an Article III case or controversy that is *not an enforcement action* seeks to have EPA revisit a prior rule or order, §307(b)(2) does not apply by its terms, but the same due-process issues still arise. Indeed, the issues are even stronger because §307(b)(2) negatively implies that renewed review *outside enforcement actions* should be available. Were it otherwise, §307(b)(2) would be mere surplusage.

Second, if review is not available under §307 in the D.C. Circuit for nationally applicable rules, review would be available in equity in every district court nationwide, *Leedom v. Kyne*, 358 U.S. 184, 188-90 (1958) (allowing nonstatutory equitable review, notwithstanding that the statute in question

impliedly prohibits judicial review<sup>8</sup>); *cf.* 5 U.S.C. §703 (APA review available “in the absence or inadequacy” of “the special statutory review proceeding relevant to the subject matter in a court specified by statute”), thereby defeating the nationwide uniformity that Congress intended §307(b) to provide. *Adamo Wrecking Co.*, 434 U.S. at 283-84 (entrusting CAA review to the D.C. Circuit to “insur[e] that [CAA’s] substantive provisions ... would be uniformly applied” nationwide). Renewed review under §307 ensures that parties can seek EPA review administratively and then seek judicial review in the appropriate Court of Appeals in the event that EPA denies the requested relief.

### **CONCLUSION**

Although it takes no position how this Court should resolve the jurisdictional question presented by §307(d)(7)(B), *amicus* APA Watch respectfully submits that this Court’s decision should not lightly foreclose renewed judicial review for after-arising grounds if the Court finds §307(d)(7)(B) to be jurisdictional.

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<sup>8</sup> The CAA does not *expressly* limit judicial review to §307, 42 U.S.C. §7607(e) (“[n]othing in this chapter shall be construed to authorize judicial review of [EPA] regulations or orders ... under this chapter, except as provided in this section,” which does not restrict review not based “on this chapter” (*i.e.*, the CAA) such as the APA and equity), so *Kyne* jurisdiction would apply in the absence of §307 jurisdiction where the prospective plaintiff or petitioner could not have raised its after-arising grounds during §307(b)’s original 60-day window. *Board of Governor’s of the Federal Reserve System v. MCorp Financial*, 502 U.S. 32, 43-44 (1991).

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