No. 19-1212

IN THE

Supreme Court of the United States

CHAD F. WOLF,
ACTING SECRETARY OF HOMELAND SECURITY, *et al.*,
Petitioners,

v.

INNOVATION LAW LAB, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PROFESSOR MILA SOHONI AS *AMICA CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICA CURIAE*[1]

Amica curiae Mila Sohoni is a professor at the University of San Diego School of Law, where she teaches administrative law and civil procedure.[2] She is the author of *The Lost History of the "Universal" Injunction*, 133 Harv. L. Rev. 920 (2020), which assesses the history and constitutionality of nationwide injunctions, and *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121 (2020), which addresses the scope of the federal courts' power to enjoin and vacate agency regulations.

The government's petition raises the question whether a court may issue a universal preliminary injunction against federal agency action under the Administrative Procedure Act ("APA"). *Amica*'s analysis of this topic may assist the Court if it reaches that question.

SUMMARY OF ARGUMENT

The APA's text, decades of this Court's precedents, the APA's legislative history, the landscape against which the APA was enacted, and Congressional acquiescence in its applications all establish that the APA allows the universal vacatur of rules as an ultimate remedy, and allows preliminary injunctions barring the application of those rules during the course of litigation. That statutory grant of authority allowing

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[1] No party or its counsel authored this brief in whole or in part. No person or entity other than *amica* and her counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented in writing to the filing of this brief.

[2] *Amica*'s institutional affiliation is noted for identification purposes only.

courts to issue universal injunctions is both constitutional and squares entirely with traditional equity practice.

ARGUMENT

I. THE APA AUTHORIZES UNIVERSAL RELIEF FROM REGULATORY ACTION.

A. The APA Authorizes Courts To "Set Aside" Rules In Their Entirety And To "Issue All Necessary And Appropriate Process … To Preserve Status Or Rights" Pending Judicial Review.

1. The APA directs that "[t]he reviewing court shall … hold unlawful and set aside agency action, findings and conclusions" that are arbitrary and capricious or otherwise invalid. 5 U.S.C. 706. "[A]gency action" includes "the whole or a part of an agency rule." 5 U.S.C. 551(13); 5 U.S.C. 701(b)(2). Section 551 defines the term "rule" to include "an agency statement of general … applicability and future effect designed to implement, interpret, or prescribe law or policy," a definition that encompasses both statements of policy and rules of agency "procedure." 5 U.S.C. 551(4); see *Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905-07 (2020).

These provisions authorize the reviewing court to "set aside" "the whole … of an agency rule" held "unlawful." Rules are not set aside "as applied to specific parties." *Contra* Gov't Br. 47. Rules are set aside, full-stop. That relief—vacatur—erases the rule, restoring the status quo ante. See, *e.g.*, Admin. Conf. of the U.S., Recommendation 2013-6, Remand Without Vacatur, 78 Fed. Reg. 76,269, 76,273 (Dec. 17, 2013) (agencies should "work with the Office of the Federal Register to remove vacated regulations from the Code of Federal

Regulations"). The agency has to start over and make a new rule if it wishes to enforce the rule against anyone.[3]

2. A long line of this Court's cases has applied the APA to set aside an agency's rule in its entirety.[4] For example, in *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 131 (2000), the Court affirmed the circuit court's invalidation of the FDA's regulations governing tobacco. See *Brown & Williamson Tobacco Corp.* v. *FDA*, 153 F.3d 155, 176 (4th Cir. 1998). The Court nowhere limited its grant of relief only to the plaintiffs.

Earlier, in *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988), the Court affirmed the D.C. Circuit's decision invalidating a retroactive rule. The

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[3] See, *e.g.*, *Indep. U.S. Tanker Owners Comm.* v. *Dole*, 809 F.2d 847, 854-55 (D.C. Cir. 1987) (noting that court may "vacate the rule, thus requiring the agency to initiate another rulemaking proceeding"); *Action on Smoking & Health* v. *CAB*, 713 F.2d 795, 797 (D.C. Cir. 1983) (per curiam) (vacatur causes a "reinstat[ement] [of] the rules previously in force").

[4] Lower courts have also understood their powers to review regulations in the same way. See, *e.g.*, *Nat'l Mining Ass'n* v. *U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998); *N.H. Hosp. Ass'n* v. *Azar*, 887 F.3d 62, 77 (1st Cir. 2018); *Nat'l Black Media Coal.* v. *FCC*, 791 F.2d 1016, 1020 (2d Cir. 1986); *Prometheus Radio Project* v. *FCC*, 652 F.3d 431, 453-54 & n.25 (3d Cir. 2011); *N.C. Growers' Ass'n, Inc.* v. *United Farm Workers*, 702 F.3d 755, 759 (4th Cir. 2012); *Chamber of Commerce of U.S.* v. *U.S. Dep't of Labor*, 885 F.3d 360, 388 (5th Cir. 2018); *Mason Gen. Hosp.* v. *Sec'y of Dep't of Health & Human Servs.*, 809 F.2d 1220, 1231 (6th Cir. 1987); *H & H Tire Co.* v. *U.S. Dep't of Transp.*, 471 F.2d 350, 355-56 (7th Cir. 1972); *Menorah Med. Ctr.* v. *Heckler*, 768 F.2d 292, 297 (8th Cir. 1985); *Bresgal* v. *Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987); *Zen Magnets, LLC* v. *CPSC*, 841 F.3d 1141, 1155 (10th Cir. 2016); *Legal Envtl. Assistance Found., Inc.* v. *EPA*, 118 F.3d 1467, 1469 (11th Cir. 1997).

Court did not cabin its grant of relief to the *seven* hospitals that had filed suit. Rather, it directed its holding and remedy to the illegal rule. *Id.* at 216 ("The 1984 reinstatement of the 1981 cost-limit rule is invalid."). Earlier still, in *Motor Vehicle Manufacturers Association of the United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 34 (1983), the agency issued an order rescinding its passive-restraint rule, and the Court held that the rescission was unlawful. It ordered the agency to "either consider the matter further or adhere to or amend [the standard at issue] along lines which its analysis supports." *Id.* Plainly, the relief the Court ordered had an impact beyond the plaintiff—the regulation directly acted only upon automobile makers, so the plaintiff insurance company was not even regulated by the rule it was challenging.

In *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 708 n.18 (1979), examining the FCC's public access cable rules, the Court "affirm[ed] the lower court's determination to set aside the amalgam of rules without intimating any view regarding whether a particular element thereof might appropriately be revitalized in a different context." Again, the effect of this Court's decision was the complete invalidation of the rules as to all those subject to them. And in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 154 (1967), the Court explained that a benefit of pre-enforcement review under the APA is that such review may counterintuitively "speed enforcement" because if the agency "loses, it can more quickly revise its regulation." What the

Court thus contemplated was the complete invalidation and consequent revision of a regulation under the APA, rather than relief for a particular plaintiff.[5]

3. That unbroken line of precedent was consistent with pre-APA practice developed under statutory schemes that informed the crafting of the APA itself. See, *e.g.*, Urgent Deficiencies Act, Pub. L. No. 63-32, 38 Stat. 208, 219-20 (1913) (establishing "venue of any suit … brought to enforce, suspend, or set aside, in whole or in part, any order of the [ICC]" and authorizing three-judge courts to issue "interlocutory injunction[s] suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order of the [ICC]"); Communications Act of 1934, Pub. L. No. 73-416, § 402(a), 48 Stat. 1064, 1093 (applying Urgent Deficiencies Act provisions "relating to the enforcing or setting aside of the orders of the [ICC]" to "suits to enforce, enjoin, set aside, annul, or suspend any order of the [FCC] under this Act"); see also Sohoni, *Power to Vacate*, *supra*, at 1146-51.

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[5] In the early APA case of *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), this Court reviewed a court of appeals decision that expressly "struck out" select "words" from the regulatory order under review, rather than granting relief solely as to the plaintiff. *Id.* at 200. While the Court found that the original agency order itself was lawful and therefore undid the court of appeals' edits, the Court did not question the court's power to make such edits. Other instances of this Court approving the wholesale setting aside of agency regulations abound. See, *e.g.*, *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 486 (2001) (finding the EPA's "implementation policy to be unlawful," and leaving it to the EPA to "develop a reasonable interpretation" of the relevant statutory provisions); *Bd. of Governors of Fed. Reserve Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 365 (1986) ("[T]he Court of Appeals invalidated the amended regulations. … We affirm.").

For example, in *United States* v. *Baltimore & Ohio Railroad*, 293 U.S. 454 (1935), several railroads sued under the Urgent Deficiencies Act to enjoin an ICC order requiring steam engine modifications. The three-judge court ordered that the ICC rule be "vacated, set aside, and annulled" and its enforcement "perpetually enjoined," Transcript of Record at 223-24, and this Court affirmed, 293 U.S. at 463-65. And in *CBS* v. *United States*, two networks challenged the FCC's chain-broadcasting regulations. *NBC* v. *United States*, 316 U.S. 447 (1942); *CBS* v. *United States*, 316 U.S. 407 (1942). The three-judge court, while finding it lacked jurisdiction, stayed the regulations' enforcement entirely pending this Court's review. The lower court's stay protected not just the two plaintiff networks; the stay *also* protected the third national network, Mutual, which was *not* a plaintiff, and hundreds of *non*-party stations that would otherwise have been adversely affected by enforcement of the new rules.[6] This Court continued the stay when it reversed and remanded. *CBS*, 316 U.S. at 425; *NBC*, 316 U.S. at 449. When the case again came before the Court, the Court again continued the stay pending its own decision. See Journal of the Supreme Court, October Term 1942, Friday, March 12, 1943, at 184. The result was that the chain-broadcasting regulations announced in

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[6] *NBC* v. *United States*, 44 F. Supp. 688, 690-91, 696-97 (S.D.N.Y.), *rev'd sub nom. CBS* v. *United States*, 316 U.S. 407 (1942), *and rev'd*, 316 U.S. 447 (1942); Decree Granting Temporary Restraining Order, Transcript of Record at 482, *Columbia Broad. Sys.* v. *United States*, 316 U.S. 407 (1942).

1941 did not go into effect as to *any* station or *any* network, plaintiff or non-plaintiff, until ten days after the Court eventually approved their validity in 1943.[7]

4. The Court need not look beyond the APA's text and that long line of APA (and pre-APA) precedents for certainty that the APA's power to "set aside" agency action authorizes the general vacatur of rules. But that result finds further support in legislative history. The APA's drafters intended the statute's judicial review provisions "to assure the complete coverage of every form of agency power, proceeding, action, or inaction." S. Rep. No. 79-752, at 11-12 (1945) (Senate Judiciary Committee Report). They understood these provisions to allow litigants to show that "a rule … is invalid," including in a case in which a rule was promulgated without formal rulemaking. *Id.* at 28 (regarding Section 10(e), Scope of Review: "*Where … an affected party claims in a judicial proceeding that a rule issued without an administrative hearing* (and not required to be issued after such hearing) *is invalid*, *he*

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[7] In *The Assigned Car Cases*, 274 U.S. 564 (1927), the three-judge district court "set aside, annulled, and suspended" the ICC's rule and permanently enjoined the federal defendants from enforcing it. Transcript of Record at 75. While the Court reversed on the merits, 274 U.S. at 584, it took no issue with the sweeping scope of the lower court's decree. Similarly, in *Lukens Steel Co.* v. *Perkins*, 107 F.2d 627 (D.C. Cir. 1939) (per curiam), the D.C. Circuit granted a universal preliminary injunction that enjoined the government from conditioning its procurement contracts on the payment of specified minimum wages. This Court reversed, but for lack of standing. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 128 (1940). In dictum, the Court did call into question the wisdom of the breadth of the court of appeals' injunction by suggesting that (had there been standing) it should have applied to all bidders in the plaintiffs' specific "locality" rather than to all localities. *Id.* at 123. The Court thus appeared ready to accept that injunctive relief that went beyond the plaintiff could have been appropriate had there been standing.

may show the facts upon which he predicates such invalidity." (emphasis added)); *accord* H.R. Rep. No. 79-1980, at 42 (1946) (House Judiciary Committee Report) ("Declaratory judgment procedure … may be utilized to determine *the validity* or application of *any agency action*. By such an action the court must determine *the validity* or application of *a rule* or order, render a judicial declaration of rights, and *so bind an agency* upon the case stated and in the absence of a reversal." (emphasis added)).

5. Consistent with that broad intent, Congress has long abided the courts' uniform interpretation of the APA. It has made no changes to the "set aside" power as this Court and lower courts for decades have repeatedly used that power to strike unlawful rules. By 1967, *Abbott Laboratories* had removed any doubt that the APA authorized pre-enforcement facial challenges to regulations, even in the absence of a separate and express statutory authorization of such suits.[8] Yet in 1976, when Congress enacted amendments to the APA's judicial review provisions, Congress did not reduce the remedial powers of federal courts adjudicating challenges to agency rules. See Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721 (amending 5 U.S.C. 702, 703).

"Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication

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[8] See *Abbott Labs.*, 387 U.S. 136; *Gardner* v. *Toilet Goods Ass'n, Inc.*, 387 U.S. 167 (1967); *Toilet Goods Ass'n, Inc.* v. *Gardner*, 387 U.S. 158 (1967). The dissent in *Abbott Laboratories* confirmed that the majority's decision there "authorize[d] threshold or pre-enforcement challenge by action for injunction and declaratory relief *to suspend the operation of the regulations in their entirety and without reference to particular factual situations*." *Toilet Goods Ass'n*, 387 U.S. at 175 (Fortas, J., dissenting) (emphasis added).

that 'Congress at least acquiesces in, and apparently affirms, that [interpretation].'" *Monessen Sw. Ry.* v. *Morgan*, 486 U.S. 330, 338 (1988) (quoting *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 703 (1979)). As in other areas where courts have interpreted a statutory command with "virtual unanimity over more than seven decades" and Congress has not acted, the Court should not revise its "longstanding" view of what Congress's statute allows the courts to do "in the face of such congressional inaction." *Id.* at 338-39.

Here, the inference that Congress affirmatively approves of how the courts have construed the APA is even stronger than in the pure "failure to disturb" context. Not only has Congress declined to reduce that power in the APA itself, but it has multiplied the contexts in which broad-scale agency rules may be challenged nationwide, as many statutes enacted since 1946 provide for facial, pre-enforcement attacks on rules and orders, including the Hobbs Act (1950), the Clean Air Act (1970), the Clean Water Act (1972), and CERCLA (1980). Crucially, like the APA, these statutes do not *expressly* say that the reviewing court may set aside agency action *for everyone*, as opposed to *just* the parties challenging the action.[9] Yet they have long

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[9] See, *e.g.*, Hobbs Act, 28 U.S.C. 2342 & 2349 (authorizing reviewing court to set aside certain agency actions, but not specifying that relief should extend to nonparties); Clean Water Act, 33 U.S.C. 1369(b)(1)-(2) (specifying timing and place of review, but not specifying that relief should extend to nonparties); CERCLA, 42 U.S.C. 9613(a) (specifying exclusive review in D.C. Circuit within 90 days of any regulation promulgated, but not specifying that relief should extend to nonparties); Clean Air Act, 42 U.S.C. 7607(b) (providing complex provisions for review of covered rules, but not specifying that relief should extend to nonparties); OSH Act, 29 U.S.C. 655(f) (specifying venue and timing of petitions to

been interpreted to authorize a reviewing court to universally vacate invalid rules or orders. Had Congress been concerned about the courts' broad reversals of rules under the APA, it would have specified in these statutes that "set aside" or similar relief would be limited to a specific party. But none of these statutes does that.

6. Attendant to the power to set aside rules, the APA further authorizes courts to maintain the status quo while a challenge is pending. Section 705, "Relief Pending Review," works hand-in-glove with Section 706 to allow such relief, providing that a "reviewing court" may "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. 705. As noted, "agency action" is defined to include "the whole … of an agency rule," and encompasses general statements of policy and rules of procedure. 5 U.S.C. 551(4), (13). By its plain terms, Section 705 allows a reviewing court to issue appropriate process to halt the application of a rule either by "issu[ing] … process" or by "postpon[ing]" the rule's "effective date." This Court has itself exercised that power to preserve the status quo by staying entire rules pending judicial review. See, *e.g.*, Order, *West Virginia* v. *EPA*, 136 S. Ct. 1000 (2016). And it has declined to disturb lower-court decrees enjoining regulatory action universally. See *FCC* v. *Iowa Utils. Bd.*, 519 U.S. 978 (1996) (mem.); see also *Texas* v. *United States,* 809 F.3d 134, 187-88 (5th Cir. 2015), *aff'd by an equally divided Court*, 136

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challenge standards, but not that relief should extend to nonparties); Toxic Substances Control Act, 15 U.S.C. 2618(c) (setting forth standards for judicial review, but not specifying that relief should extend to nonparties).

S. Ct. 2271 (2016) (per curiam) (affirming nationwide injunction of agency action).

The APA's authorization of universal preliminary relief makes sense given the courts' power to set a rule aside in its entirety at the end of a case. If the reviewing court may universally vacate a rule on the merits, it has to have the interim power to halt the rule from going into effect universally, pending its merits decision. See *Nken* v. *Holder*, 556 U.S. 418, 426 (2009). Otherwise, the power to afford meaningful final relief would be diminished. Once a rule begins to be applied, the "egg has been scrambled," *Sugar Cane Growers Coop. of Fla.* v. *Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002), with sometimes irreversible effects. The way that courts are to grant such interim relief is through ordinary injunctions and restraining orders. See U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 107 & n.20 (1947) (citing 28 U.S.C. 381 (1946) and Fed. R. Civ. P. 65).[10]

B. The Government's Suggestion That Courts May "Set Aside" Rules Only As To Particular Plaintiffs Defies Text And Precedent.

1. The government contends that, before the APA, it was "traditional" judicial practice to "set aside" agency action only as to a suit's plaintiffs. So, it says, the

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[10] See also *First Premier Bank* v. *CFPB*, 819 F. Supp. 2d 906, 923 (D.S.D. 2011) ("The effective date of the 2011 amendment to § 226.52 of Regulation Z is postponed, and the Board is enjoined from enforcing it."); 78 Fed. Reg. 18,795, 18,795 (Mar. 28, 2013) ("As a result of the [*First Premier Bank*] court's order, the portion of the Board's 2011 final rule applying § 226.52(a) to pre-account opening fees has not become effective.").

APA's "set aside" language should be read only to authorize plaintiff-specific relief absent a clear statement allowing broader relief. Gov't Br. 47-48.

The government misconstrues pre-APA "traditional" practice. As discussed, when broad-gauged regulatory action was under review, courts set aside and enjoined federal regulatory action wholesale under predecessor statutes to the APA, which employed substantially identical language. See *supra* I.A.3. The judicial authority to afford such relief—however often exercised—was not questioned. The government fails to cite even a single case in which a court reviewing a regulation used the APA's language, "set aside," in the unusual way the government urges: to "set aside" the regulation only "as to a particular plaintiff."[11] That is because the natural, and "traditional," meaning of "setting aside" a rule is to invalidate it entirely.

Other sources foundational to the APA confirm that understanding. The 1941 Attorney General's Report, written by a venerated group of administrative law experts, explained that "[a] judgment adverse to a regulation results in setting it aside." See Final Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 77-8, at 117 (1st Sess. 1941). The report clearly conceived of *the regulation* as the object of the court's review: "The regulation does not speak for itself, with a limited amount of evidence or

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[11] *Virginia Society for Human Life, Inc.* v. *FEC*, 263 F.3d 379, 393-94 (4th Cir. 2001), declined to "set aside" the regulation and merely enjoined its enforcement as to the plaintiff. It does not suggest that "set aside" means "set aside as to the plaintiff." It instead shows only that a plaintiff-specific injunction is a narrower alternative to a broader order that would "set aside" a regulation "for the entire country"—reinforcing that the APA's grant of "set aside" authority is broad.

argument to aid in judging it; the entire administrative record must be examined." *Id.* As the report reflects, the term "set aside" was used to denote judicial invalidation of generally applicable rules.

Congress likewise understood that federal laws and rules could be "set aside." In 1937, Congress created three-judge courts for constitutional challenges to federal laws. See Act of Aug. 24, 1937, Pub. L. No. 75-352, § 3, 50 Stat. 751, 752 (codified at 28 U.S.C. 380a). Section 380a specified the conditions under which an "interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or *setting aside, in whole or in part*, any Act of Congress" as unconstitutional could be "issued or granted." *Id.* (emphasis added). And in the Emergency Price Control Act of 1942, Congress vested jurisdiction in the Emergency Court of Appeals over certain price schedules, and denied jurisdiction to other courts over actions seeking, *inter alia*, to "set aside, in whole or in part, any provision of this Act" or "any provision of any … regulation" under the Act that met certain criteria. Emergency Price Control Act of 1942, Pub. L. No. 77-421, § 204(d), 56 Stat. 23, 33. These enactments do not use "set aside" in a plaintiff-specific sense, but instead refer to judicial review of laws or regulations. So the government is wrong to suggest (at Gov't Br. 47-48) that "nothing in the APA's text or history" supports the meaning that this Court and lower courts have long given to "set aside" in Section 706.

The government also has it backwards in contending (at Gov't Br. 47-48) that Congress could not have "*sub silentio*" conferred on courts the authority to vacate agency action universally. Prior to the APA, the governing rule was the opposite, for as this Court had repeatedly emphasized in the run-up to the APA's enact-

ment, statutes were presumed to leave courts' equitable powers intact unless Congress *divested* them by explicit statutory language. *E.g.*, *Hecht Co.* v. *Bowles*, 321 U.S. 321, 330 (1944); *Stark* v. *Wickard*, 321 U.S. 288, 310-11 (1944); *Scripps-Howard Radio* v. *FCC*, 316 U.S. 4, 11 (1942). The APA's drafters specifically relied on that rule, noting that "[t]o preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it." H.R. Rep. No. 79-1980, at 41. No clear statement of broad remedial authority was required for courts to have that power under the APA. But it anyway is incorrect to say that Congress did anything "*sub silentio*," for, as noted, Congress was in fact clear in granting broad "set aside" authority to the courts. Given the pre-APA understanding of how courts would "set aside" regulatory action (*supra* I.A.3), and the courts' uniform, broad application of that language in the APA (*supra* I.A.2), Congress's "set aside" language was intended to give, and did indeed give, exactly the straightforward command that the government demands.

2. The government also argues that Section 706 "does not pertain to remedies at all," and that Section 703 "points *outside* the APA for the available remedies." Gov't Br. 46-47. That argument is as novel as it is wrong. It is simply incompatible with the APA's text and structure. The plain language of Section 706 shows that it speaks to remedies. Section 706 itself pairs something that is quite obviously a remedy—the affirmative power to order an agency to undertake action "unlawfully withheld or unreasonably delayed," 5 U.S.C. 706(1)—with its converse remedy: the negative power to "hold unlawful and set aside agency action,"

5 U.S.C. 706(2).[12] Section 703, like Federal Rule of Civil Procedure 2, speaks merely to the "form" of action, not to remedies. Compare 5 U.S.C. 703 ("Form and venue of proceeding"), with Fed. R. Civ. P. 2 ("There is one form of action—the civil action."). Remedies come later, as they logically should. Compare 5 U.S.C. 705 ("Relief pending review") and 5 U.S.C. 706 ("Scope of review"), with Fed. R. Civ. P. tit. VIII ("Provisional and Final Remedies," containing Fed. R. Civ. P. 64-71). The government does not cite a single case to support the notion that Section 703 dictates when a party challenging agency action may win an injunction, whether universal or not. Nor is *amica* aware of one.

3. The government is, finally, plainly wrong to suggest that the APA's "set aside" relief can only stretch beyond the plaintiff if a class is certified under Rule 23. See Gov't Br. 43. The statute's language says no such thing. Beyond that, the class certification provisions of Rule 23 were only adopted in 1966, twenty years after the APA's enactment. The 1966 amendments left Rule 65—which does *not* limit preliminary or final injunctive relief only to the plaintiffs—untouched. The 1966 amendments to Rule 23 obviously made no changes to the APA, and courts deciding APA cases issued nationwide injunctions before and after 1966. Indeed, courts have frequently said that class certification is an unnecessary "formality" in suits seeking injunctive relief against federal officers, because a "court can properly assume that an agency of the government would not persist in taking actions which violate … rights." *McDonald* v. *McLucas*, 371

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[12] 33 Wright & Miller, *Federal Practice and Procedure* § 8381 (2d ed. 2018) (commencing its discussion of "Remedies" with a section entitled "Vacation and Remand of Agency Action," and therein addressing 5 U.S.C. 706).

F. Supp. 831, 833-34 (S.D.N.Y.), *aff'd*, 419 U.S. 987 (1974); *Sepulveda* v. *Block*, No. 18 Civ. 1448, 1985 WL 1095, at *5 (S.D.N.Y. Apr. 26, 1985) (noting the Secretary of Agriculture's argument that "class certification is not necessary" because "as a government official the relief sought by the named plaintiffs would benefit the proposed class"), *aff'd*, 782 F.2d 363 (2d Cir. 1986). At times, the government presses that argument before lower courts today.[13] The notion that Rule 23 offers the sole pathway to broad-gauged relief overlooks that in myriad provisions—not just the APA—Congress has allowed litigants to get collective relief *without* proceeding through the Rule 23 class action. See 7B Wright & Miller, *Federal Practice and Procedure* § 1807 (3d ed. 2019) (FLSA, Equal Pay Act, ADEA). The government itself may seek relief for groups of individuals who are "similarly situated" without satisfying Rule 23's requisites. See *CRST Van Expedited, Inc.* v. *EEOC*, 136 S. Ct. 1642, 1647-48 (2016).

United States v. *Mendoza*, 464 U.S. 154 (1984), treated by the government (at Gov't Br. 44) as standing for the "usual rule" that the government may not be non-mutually collaterally estopped, has little relevance here. On policy grounds, *Mendoza* rejected the idea that non-mutual issue preclusive effect could be used against the federal government. But when a court issues a nationwide preliminary injunction, it does not *preclude* the government (or any non-party, for that matter) from doing anything. The court's decree only orders the defendant before it—the federal

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[13] See, *e.g.*, Defendants' Opposition to Plaintiffs' Motions for Preliminary Injunction and Class Certification at 20-21, *Hall* v. *U.S. Dep't of Agric.*, No. 4:20-CV-03454-HSG (N.D. Cal. June 4, 2020), 2020 WL 6796257 (arguing, in an APA suit, that class certification should be denied because "all proposed class members would get the same relief if Plaintiffs are successful").

officer or agency—to refrain from violating the law. The injunction does not bar the government from litigating the issue in parallel cases as they arise. Nor does a preliminary injunction barring the application of a policy forever bind subsequent administrations to the outcome of a single, untested lower-court opinion, which was a prime concern of this Court in *Mendoza*. Cf. *Mendoza*, 464 U.S. at 161-62. Rather, the government remains free to redo its policy choices going forward.

In short, the APA's clear statutory language continues to allow courts to "set aside" rules and to enjoin them pending a decision on whether to set them aside. No Federal Rule, statute, or decision by this Court has changed that framework.

C. The Government's Policy Concerns Are For Congress To Consider, Overstated, And Outweighed By Countervailing Concerns.

1. The government stresses that allowing courts to enjoin or "set aside" regulations with national effect creates "practical problems." Gov't Br. 44. Disallowing such relief would have its own negative consequences, discussed briefly below. But, however one weighs the pros and cons, they are irrelevant. It was Congress's job to weigh those consequences in enacting the APA, and as set forth above, Congress elected to authorize that relief in the APA, authorized similar relief in subsequent statutes over the years, and has abided the "practical problems" through more than 70 years of litigation challenging agency action. If the law is to be changed, that is a task for Congress. While a court should exercise remedial discretion wisely, it is not for the courts to override Congress's judgment and decide that relief Congress has authorized is categorically improper. See *Kisor* v. *Wilkie*, 139 S. Ct. 2400,

2432 (2019) (Gorsuch, J., concurring) ("When this Court speaks about the rules governing judicial review of federal agency action, we are not (or shouldn't be) writing on a blank slate or exercising some common-law-making power. We are supposed to be applying the [APA].").

2. Substantial negative effects would anyway follow if the courts were denied the power to set aside and enjoin rules entirely. If courts cannot halt illegal government acts generally and are limited to providing relief only to plaintiffs who have the will and means to litigate to judgment, then many parties subject to rules will not challenge them and the government will be free to treat illegal rules as the law. And with the courts thus defanged, the government would act with less restraint. By the same token, because the government, like any party, acts in the shadow of the law, allowing universal vacatur and nationwide injunctions gives the government additional reason not to push the envelope of legality in adopting rules.

Moreover, if every party subject to an invalid rule has to bring its own action to invalidate the rule as to it, litigation will needlessly mushroom. Just as it would be "wholly impractical—and a huge waste of resources—to expect and require every potentially affected party to bring pre-enforcement … challenges against every agency order that might possibly affect them in the future," *PDR Network, LLC* v. *Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2061 (2019) (Kavanaugh, J., concurring), it would be impractical to require a multiplicity of individual actions seeking to obtain identical relief.

3. As for the government's policy arguments for eliminating the relief authorized by the APA, they are wrong. The government's complaint about "asymmetrical[]" effects (at Gov't Br. 44), to the extent such a

problem exists, still remains even if requests for broad relief are channeled into Rule 23 suits. For example, the government faced exactly this "asymmetr[y]" in the cases underlying *Sullivan* v. *Zebley*, 493 U.S. 521 (1990), in which the Third Circuit granted relief to a nationwide class in a case involving regulations earlier deemed valid or enforceable by *four* other circuits. (This Court sided with the Third Circuit and affirmed.)

But in the end, whether injunctions are broad or narrow, the nation's system of appellate review will bring any important question that divides the circuits before this Court. To ultimately prevail, the government does not have to run the table. Rather, it has to win once and for all in this Court—just like everyone else. In that same vein, concerns about forum shopping, see Gov't Br. 44, and injunctions forcing the government to seek "emergency appellate relief," see *id.* at 44-45, are overblown. The former is an inevitable byproduct of *all* litigation in a multi-district system that broadly permits plaintiffs to lay venue. The latter seeks to blame lower court judges for the consequences of the government's own recently embraced, wholly voluntary, strategic litigation policy choice to seek emergency relief across a panoply of cases, many of which do *not* involve universal injunctions. See *Wolf* v. *Cook Cty.*, 140 S. Ct. 681 (2020) (mem.) (Sotomayor, J., dissenting from the grant of stay).[14]

4. Finally, the Court should be reluctant to tinker with the source code of administrative law by rewriting the APA. The APA's language has been borrowed and cross-referenced across the U.S. Code, and it acts as a gap-filler when other statutes are not explicit about the relief they authorize. Altering the meaning

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[14] See Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123, 124 (2019).

of the APA's remedial provisions would reverberate across public law with unpredictable and potentially disruptive consequences.

II. NATIONWIDE INJUNCTIONS UNDER THE APA ARE CONSTITUTIONAL.

A. There is furthermore no Article III standing problem with a court issuing an injunction that benefits non-parties (*contra* Gov't Br. 42-43). Using this case as an example, the complaining parties have standing to complain about the agency action at issue, and the district court had jurisdiction over the government and express statutory authority to enjoin the government from implementing that action. That the *effect* of the injunction is to restrain its enforcement universally does not create a standing problem. Such a stay is just like an injunction against future violations of the law—"the simplest use of the injunction." Douglas Laycock, *Modern American Remedies* 275 (5th ed. 2019).

Non-mutual collateral estoppel under, *e.g.*, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), is similar. Plaintiff A does not have "standing" to obtain relief for plaintiff B, but plaintiff B gets the benefit of plaintiff A's victory just as with an injunction like the one here.[15] There is no standing problem with a court granting judgment for the plaintiff even though the judgment's effect helps non-plaintiffs.

Likewise, when the Court "invalidates and severs unconstitutional provisions" from a law, *Barr* v. *Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335,

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[15] *Mendoza*, 464 U.S. at 160, shielded the federal government from non-mutual issue preclusion, but as a matter of policy, not standing. A standing holding in *Mendoza* would have knocked out non-mutual issue preclusion across the board, not just in suits against the federal government.

2351 (2020) (opinion of Kavanaugh, J.), that decision's effects extend beyond the plaintiff to nonparties. "[T]he formal remedy afforded to the plaintiff is an injunction, declaration, or damages," but "[u]nder the Court's approach, a provision is declared invalid and *cannot be lawfully enforced against others*." *Id.* at 2351 n.8 (emphasis added). Standing doctrine poses no obstacle to that relief, even though it shields "others" beyond the plaintiff.

Further, the government acknowledges that in a class action, a court may issue nationwide relief. Gov't Br. 43. That demonstrates that whatever complaint there may be about nationwide injunctions, it is not a complaint about Article III standing. In a class action, as in this case, standing is assessed solely with respect to the named plaintiff. It is well established that the fact "[t]hat a suit may be a class action … adds nothing to the question of standing." *Lewis* v. *Casey*, 518 U.S. 343, 357 (1996) (quoting *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976)). Thus, the standing analysis as to a certified class is identical to the standing analysis for a non-representative plaintiff, so *standing* is not what makes the difference between broader and narrower relief. Instead, the "question"—which is prudential rather than constitutional—is simply whether the evidence shows that the problem being addressed is "widespread enough to justify systemwide relief." *Id.* at 359. If nationwide relief may constitutionally be given to a single plaintiff suing for a nationwide class, it follows that standing poses no constitutional obstacle to nationwide injunctive relief.

B. The government also suggests that nationwide injunctions are unconstitutional because they do not comport with traditional equity practice. But in this Court's cases, the question of traditional equity practice is statutory, not constitutional: this Court "leaves

any substantial expansion of past [equity] practice to Congress." *Grupo Mexicano de Desarrollo, S.A.* v. *All. Bond Fund, Inc.*, 527 U.S. 308, 329 (1999). Here, Congress authorized nationwide injunctive relief, for as discussed, the APA empowers courts to "hold unlawful and set aside" rules, as well as to "issue all necessary and appropriate process" to "preserve status or rights" pending judicial review of rules.

In any event, the broad relief here aligns with longstanding equity practice.

1. Modern-era nationwide injunctions reflect the old representative suit practice, derived from the old English bill of peace and continued on in the Federal Equity Rules, of shielding those "similarly situated" to the plaintiffs.[16] See *Trump* v. *Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) (per curiam) (retaining nationwide injunctions barring enforcement of an executive order against "parties similarly situated to" three plaintiffs), *vacated as moot*, 138 S. Ct. 353 (2017) (mem.) (per curiam); *Wirtz* v. *Baldor Elec. Co.*, 337 F.2d 518, 533 (D.C. Cir. 1963) (per curiam) (ordering a nationwide injunction in a suit brought by the plaintiffs "on behalf of themselves and all other United States manufacturers of electric motors and generators similarly situated"). Nationwide injunctions are therefore consistent with traditions of equity.

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[16] See Federal Equity Rule 48 (1842) (authorizing federal courts to "proceed in the suit" involving "very numerous" interested parties without "making all of them parties," as long as the court had "sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants"); Federal Equity Rule 38 (1913) (allowing a party to "sue or defend for the whole" when "the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court").

Some have contended that the relief given in representative suits was different than in a suit like this one because a decree in an equity representative action was binding on represented non-parties in subsequent suits. Not so. Decrees in representative suits bound absentees in "joint interest" cases where members of the class shared a common claim, but according to James William Moore, the drafter of Rule 23, decrees were not binding on absentees in "several interest" cases involving similar but independent claims or defenses. See James Wm. Moore & Marcus Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 Ill. L. Rev. 555, 561 (1938); James Wm. Moore & Marcus Cohn, *Federal Class Actions*, 32 Ill. L. Rev. 307, 314-16, 319-20, 319 n.97 (1937); see also *Wabash R.R.* v. *Adelbert Coll.*, 208 U.S. 38, 59 (1908) (judgment in Equity Rule 48 case did not "b[i]nd the defendants in error [i.e., the plaintiffs in the subsequent suit] who were not parties to it"). In representative suits of the "several interest" type, absentees would benefit from any broad injunctive relief but would not be bound by the judgment. See Moore & Cohn articles, *supra*; Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. Mich. J.L. Reform 347, 348 (1988). The long history of this type of representative suit refutes the notion that preclusive effect upon absentees down the road was traditionally thought to be necessary for a court to afford injunctive relief to absentees.

2. As described, courts did set aside and enjoin federal agency action wholesale in the pre-APA period. Further, from at least 1913 onwards, federal courts issued multiple broad injunctions against federal officers even outside of the administrative law context.

In 1913, pending decision in *Lewis Publishing Co.* v. *Morgan*, 229 U.S. 288 (1913), the plaintiffs asked this

Court to enjoin enforcement of a federal newspaper statute against the two plaintiff publications and against "other newspaper publishers" pending its decision in that case. The plaintiffs asserted that the federal government reneged on its prior "agree[ment] not to enforce the Act against the plaintiffs 'or other newspaper publishers throughout the country' pending the Court's decision." See Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 Harv. L. Rev. 920, 945 (2020). The Court granted the injunction. See *Journal of Commerce & Commercial Bulletin* v. *Burleson*, 229 U.S. 600 (1913) (per curiam).

More injunctions protecting non-plaintiffs from enforcement of federal law issued in the following years. In *Hill* v. *Wallace*, 259 U.S. 44 (1922), the Court barred enforcement of the Future Trading Act against the eight plaintiff members of the Chicago Board of Trade and any other, non-party member, too. In *Board of Trade of Chicago* v. *Olsen*, 262 U.S. 1 (1923), the Court's preliminary injunction barred the Grain Futures Act from being enforced against anyone within the jurisdiction of the local U.S. Attorney. See *Bd. of Trade of Chi.* v. *Clyne*, 260 U.S. 704 (1922) (mem.). Lower courts issued such injunctions as well. In *Wallace* v. *Thomas*, No. 152 in Equity (E.D. Tex. 1935), a federal district court preliminarily enjoined federal officers from all four districts in Texas from enforcing a federal law against "every cotton ginner in the State of Texas," conditional on the posting of a $100,000 bond. Sohoni, *Lost History*, *supra*, at 1001 n.530.

The nationwide injunction is not new—it has at least a century-long pedigree. What *is* new is the notion that these injunctions are somehow illegitimate. See *McDonald* v. *McLucas*, 419 U.S. 987 (1974) (affirming,

at the government's urging, a nationwide injunction against two provisions of a federal statute).[17]

3. Courts similarly and repeatedly enjoined the enforcement of state law in this period. See Sohoni, *Lost History*, *supra*, at 958-73, 987-91. By their nature, such injunctions were statewide rather than nationwide, but that makes no difference in principle. The question is whether courts were willing and able to expressly enjoin government defendants from enforcing laws against non-parties. Like the cases targeting federal laws, the cases targeting state laws show that courts issued injunctions shielding non-parties.

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[17] It is no defect that the nationwide injunction's pedigree does not stretch all the way back to 1789. See *Grupo Mexicano de Desarrollo, S.A.*, 527 U.S. at 324-27 (looking, in part, to twentieth century precedent to determine "the traditional powers of equity courts"). The injunction protecting *non*-plaintiffs has a pedigree nearly as long as the *purely plaintiff protective* injunction against enforcement of laws. See *Ex parte Young*, 209 U.S. 123, 126 (1908). The government does not suggest that the Constitution requires this Court to walk back *Young* just because it represented an evolution of equity practice.

The government (at Gov't Br. 47) contends that "there was no well-established tradition of universal injunctions before the APA's 1946 enactment." But nationwide injunctions existed both *before* and *after* 1946. See Sohoni, *Lost History*, *supra*, at 944-46; Sohoni, *Power to Vacate*, *supra*, at 1146-63. The *infrequency* of nationwide injunctions had nothing to do with courts' lack of authority to issue them and everything to do with venue rules, defects in the cases of plaintiffs who sought broad injunctions, or other unrelated doctrines. See, *e.g.*, *Perkins*, 310 U.S. at 128 (reversing nationwide injunction on *standing* grounds); *Frothingham* v. *Mellon*, 262 U.S. 447 (1923) (affirming dismissal of a suit seeking a nationwide injunction on standing grounds); *Miller* v. *Standard Nut Margarine Co. of Fla.*, 284 U.S. 498, 509 (1932) (requiring suits seeking to enjoin "an exaction in the guise of a tax" to be maintained against "the collector," i.e., the *local* federal officer).

In *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), the Court affirmed a universal injunction against a state law that imposed criminal penalties on parents who sent their children to private schools. The two plaintiff schools sued just for themselves, alleging that the law was an unconstitutional interference with their property rights. But they sought, and received, an injunction that categorically restrained the state from enforcing the law. This Court affirmed, expressly approving that injunction. *Id.* at 530 ("Rights said to be guaranteed by the federal Constitution were specially set up, and appropriate prayers asked for their protection."); *id.* at 533 ("[t]he prayer is for an appropriate injunction").

West Virginia Board of Education v. *Barnette*, 319 U.S. 624 (1943) is similar. The Court affirmed an injunction that reached beyond the plaintiff class of Jehovah's Witnesses to also shield any other children having religious scruples from a state law requiring students to salute the American flag. *Id.* at 642. In another case, the Court called "unassailable" a decree that protected not just the plaintiffs but also those "acting in sympathy or in concert with the plaintiffs or any of them" from enforcement of city ordinances that interfered with federal civil rights. See *Hague* v. *Comm. for Indus. Org.*, 307 U.S. 496, 517 (1939) (opinion of Roberts, J.); *Hague* v. *Comm. for Indus. Org.*, 101 F.2d 774, 794-96 (3d Cir.), *decree modified*, 307 U.S. 496 (1939); see also, *e.g.*, *Langer* v. *Grandin Farmers Coop. Elevator Co.*, 292 U.S. 605 (1934) (mem.) (affirming per curiam interlocutory injunction barring North Dakota governor from embargoing sales of agricultural products out of the state); *Binford* v. *J.H. McLeaish & Co.*, 284 U.S. 598 (1932) (mem.) (affirming per curiam interlocutory injunction barring enforce-

ment of a Texas law against all those similarly situated to certain plaintiff-intervenor cotton growers, farmers, merchants, handlers, and truck drivers); *Mitchell* v. *Penny Stores*, 284 U.S. 576 (1931) (affirming per curiam interlocutory injunction barring enforcement of a Mississippi chain-store tax against the plaintiff or any operators of more than five stores subject to the tax); *Hines* v. *Davidowitz*, 312 U.S. 52, 74 (1941) (affirming universal injunction of a Pennsylvania alien-registration statute).

As with nationwide injunctions, the universal injunction against state law is not new.[18] What is new is the contention that such universal relief may only be obtained through a certified Rule 23 class action suit—a device invented in the 1960s to enable the efficient exercise of Article III judicial power, not to curb its scope.

CONCLUSION

The Court should conclude that the APA authorizes federal courts to set aside rules and to preliminarily enjoin them, with universal effect, while litigation is pending.

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[18] In a filing to this Court last Term, the government asserted (without citation) that "nearly as many" nationwide injunctions have issued in the last three years as in prior years combined. See Brief for the Petitioners at 46, *Trump* v. *Pennsylvania*, No. 19-454 (U.S. Mar. 2, 2020), 2020 WL 1190624. The government has relied on that earlier brief in its filings in this case. See Gov't Pet. 30-31. But the government has not disclosed its criteria for including cases on this secret list or its method for compiling it, and has not responded to *amica*'s law librarian's FOIA requests for records supporting earlier, similar claims by the government and former Attorney General.

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