No. 22-58

IN THE

Supreme Court of the United States

UNITED STATES, ET AL.,

Petitioners,

v.

TEXAS, ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PETITIONERS

ALLISON M. ZIEVE
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org

Attorneys for Amicus Curiae

September 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes and Rules

Legislative Materials

Miscellaneous

INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a consumer advocacy organization with members in all 50 states. Public Citizen appears on behalf of its members before Congress, administrative agencies, and the courts to advocate for policies that benefit the public. It is often involved in litigation under the Administrative Procedure Act (APA) either challenging or defending agency actions.

Although Public Citizen supports Petitioners' position on the second question presented, and thus supports reversal of the decision below, it submits this amicus brief to address the third question posed by the Court: whether 8 U.S.C. § 1252(f)(1) prevents the entry of an order under 5 U.S.C. § 706(2) to "hold unlawful and set aside" the agency action at issue in this case. As the brief explains, section 1252(f)(1) would not bar an order holding unlawful and setting aside the agency guidelines at issue, if those guidelines were unlawful.

BACKGROUND

The Immigration and Nationality Act (INA), in a section titled "Limit on Injunctive Relief," states that "regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, … other than with respect to the

[1] This brief was not written in whole or in part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for both parties have consented in writing to its filing.

application of such provisions to an individual alien against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1). As pertinent here, part IV addresses "[a]pprehension and detention of aliens," *id.* § 1226, and "[d]etention and removal of aliens ordered removed," *id.* § 1231.

Under section 706(2) of the APA, a "reviewing court shall … hold unlawful and set aside agency action, findings, and conclusions found to be," among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law."

As explained in the parties' briefs, this case poses a challenge under the APA to agency guidance issued by the Secretary of Homeland Security, pursuant to 6 U.S.C. § 202(5), setting as "national immigration enforcement policies and priorities" the apprehension and removal of noncitizens who threaten national security, public safety, and border security. Seeking relief under section 706 of the APA, respondents argue that the guidance violates the INA, is arbitrary and capricious, and was issued without required procedures. App. 102a–120a. Finding a likelihood of success on all three claims, the district court first issued a preliminary injunction that "ENJOINED and RESTRAINED" the federal government from enforcing the policies set forth in the guidance pending the courts' final decision. 555 F. Supp. 3d 351, 441 (S.D. Tex. 2021). Petitioners appealed but later dismissed that appeal following the en banc Fifth Circuit's decision vacating a stay pending appeal that a panel had granted. *See* 24 F.4th 407 (5th Cir. 2021).

The district court later issued a final judgment in favor of respondents on their claims that the guidance

violates the INA, is arbitrary and capricious, and was unlawfully issued without notice-and-comment rulemaking. App. 134a–135a.[2] Invoking its authority under APA section 706(2) to "hold unlawful and set aside agency action" that is contrary to law, arbitrary and capricious, or issued without procedure required by law, the court took what it recognized as the "default approach" to "awarding relief under Section 706(2)" and vacated the agency's action. App. 125a. The court observed "that, by necessity, vacating a rule applies universally." App. 129a. The district court, however, denied respondents' request for final injunctive relief, explaining that "[i]f vacatur is sufficient to address the injury, it is improper to also issue an injunction." App. 131a (citing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010)). The court denied declaratory relief for the same reason. App. 133a. The court also noted that, because it was not issuing an injunction, the bar on orders enjoining or restraining the operation of the INA's removal provisions set forth in 8 U.S.C. § 1252(f)(1) was inapplicable. App. 131a n.7.

This Court's order denying petitioners' application for a stay pending appeal, treating the request as a petition for a writ of certiorari before judgment, and granting the petition identifies three questions for review: the threshold issue of standing; the merits question whether the guidance is unlawful under either the INA or the APA; and the remedial question

---

[2] The court also decided various threshold issues in respondents' favor, including Article III standing, whether the guidance constitutes reviewable final agency action, and whether the guidance is unreviewable because the subjects it addresses are committed to agency discretion by law.

whether section 1252(f)(1)'s prohibition of orders enjoining or restraining the operation of immigration laws bars a district court from exercising its authority under the APA to set aside final agency action the court finds to be unlawful. Those questions do not encompass one of the issues argued in the stay application: whether section 706(2)'s authorization of orders "setting aside" agency action means that courts may "vacate" such actions, as courts have uniformly done since the APA's enactment. Petitioners, however, argue that point again in their merits brief. *See* Pets. Br. 40–44.

SUMMARY OF ARGUMENT

Section 1252(f)(1) poses no barrier to judicial review and entry of relief under section 706 of the APA. Section 1252(f)(1)'s plain language refers to injunctions and restraining orders. The APA remedy for unlawful agency action—a court order holding unlawful and setting aside the agency action—is not an order "enjoin[ing] or restrain[ing] operation of" a law.

The government's assertion that the term "set aside" in section 706(2) does not authorize courts to vacate unlawful regulations, orders, or other agency actions is contrary to the APA's text and history. Other agency review statutes also make clear that "set aside" refers to vacatur. In addition, the government's view runs counter to the long-held view of the courts, as reflected in countless court decisions going back decades. And it poses practical problems, making the beneficiaries of relief difficult to discern in cases of organizational plaintiffs, and either providing no meaningful relief to some types of plaintiffs who challenge agency regulations or providing them relief

not available to others. Accordingly, although the agency action at issue here should be upheld, the Court, if it addresses the scope of relief, should reject the government's view.

ARGUMENT

I. Section 1252(f)(1) poses no barrier to entry of relief under 5 U.S.C. § 706.

"By its plain terms, and even by its title, [section 1252(f)(1)] is nothing more or less than a limit on *injunctive* relief." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481 (1999) (emphasis added). Thus, section 1252(f)(1) "does not deprive the lower courts of all subject matter jurisdiction over claims brought under sections 1221 through 1232 of the INA." *Biden v. Texas*, 142 S. Ct. 2528, 2539 (2022). Rather, it "withdraws a district court's 'jurisdiction or authority' to grant a particular form of relief," *id.*: "injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2065 (2022).

A. The relief authorized by section 706(2) is not an injunction; it is an order vacating—that is, "hold[ing] unlawful and set[ting] aside"—agency action. *See Black's Law Dictionary* (11th ed. 2019) (defining "set aside" as "to annul or vacate"). Whereas an injunction is an "extraordinary" equitable remedy as to which a court has considerable discretion, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982), "setting aside" is a statutory remedy under the APA that is normally available when agency action is unlawful. *Long Island Power Auth. v. FERC*, 27 F.4th 705, 717 (D.C. Cir. 2022). Indeed, the APA mandates that the

reviewing court "shall … hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2); *see Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (stating that "shall" "normally creates an obligation impervious to judicial discretion"). Although the APA elsewhere grants courts discretion to withhold the remedy otherwise required by section 706, *see* 5 U.S.C. § 702, exercise of that discretion is appropriate only in carefully defined circumstances. *See Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 151 (D.C. Cir. 1993).[3]

Thus, as the D.C. Circuit has stated, when a reviewing court determines that agency regulations are unlawful, "[t]he ordinary practice is to vacate." *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) (citing 5 U.S.C. § 706(2)). And when a court has fulfilled its "obligation to 'set aside' [an] unlawful regulation," injunctive relief is ordinarily unnecessary, *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1222 (D.C. Cir. 2012)—indeed, it is "anomalous." *N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 861 (D.C. Cir. 2012). *Reynolds*, for example, vacated a district court's injunction against the agency

---

[3] *See also* Richard Murphy, 33 *Federal Practice and Procedure* (Wright & Miller) § 8381 (2d ed. & Apr. 2022 update) ("Generally speaking, where a petitioner persuades a reviewing court that an agency's action is defective due to errors of fact, law, or policy, the court should vacate that action and remand to the agency for further proceedings. Along these lines, § 706(2) of the Administrative Procedure Act … instructs courts to 'hold unlawful and set aside' agency action that falls short of the various listed review standards. This approach enables a reviewing court to correct error but, critically, also avoids judicial encroachment on agency discretion." (footnotes omitted)).

and held that the proper remedy was vacatur of the regulation at issue. 696 F.3d at 1222.[4]

This Court, too, has distinguished the APA remedy from the remedy of an injunction. In *Monsanto v. Geertson Seed Farms*, this Court described the set-aside remedy of section 706 as "less drastic" than the "drastic and extraordinary remedy" of an injunction. 561 U.S. at 165–66 ("An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course. If a less drastic remedy (such as partial or complete vacatur of [the agency's] deregulation decision) was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted." (citation omitted)).

Further, the standard for issuing an injunction is meaningfully different from the standard for setting aside agency action under section 706. "The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." *Weinberger*, 456 U.S. at 312 (citing cases). No such findings are necessary to set aside agency action under the APA. Rather, the standard for setting aside final agency action is that the reviewing court has "found [the action] to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," among other possibilities. 5 U.S.C. § 706(2); *e.g.*, *Dep't of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1901 (2020) (stating "we

[4] Although part of *Reynolds*'s merits analysis was later overruled, *see Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014), that later decision had no effect on the remedial analysis.

conclude that the Acting Secretary did violate the APA, and that the rescission must be vacated").

B. The government argues that vacatur "enjoin[s] or restrain[s]" the operation of the INA. *See* Pets. Br. 44. But the consequences of an order vacating an agency action are meaningfully different from those of an order (like the preliminary injunction improperly entered by the district court in this case) "enjoin[ing] or restrain[ing] the operation of" the specified INA provisions. 8 U.S.C. § 1252(f)(1). Although an order setting aside an agency action nullifies it, the order (unlike an injunction) neither compels nor prohibits further action on pain of contempt sanctions. *See Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (holding that a judgment declaring agency action unlawful is not enforceable by contempt).

Put another way, an order vacating an agency rule does not "tell[] someone what to do or not to do," *Aleman Gonzalez*, 142 S. Ct. at 2064 (quoting *Nken v. Holder*, 556 U.S. 418, 428 (2009)), and does not "prevent" the agency "from *doing* something," *id.* (quoting Black's Law Dictionary 784 (6th ed. 1990)). Rather, it nullifies a source of authority on which the agency might otherwise rely to justify a course of action, without directly barring the course of action itself, which the agency may engage in if otherwise lawful. That is, the court's order setting aside an agency regulation or order operates to render that regulation or order a nullity; its object is not the ongoing "actions of officials or other persons" who implement the agency's governing statutes. *Id.*

By contrast, in *Aleman Gonzalez*, the Court explained that injunctions requiring the agency to

provide bond hearings for a class "enjoin or restrain the operation" of section 1231(a)(6) of the INA "because they require officials to take actions that (in the Government's view) are not required by § 1231(a)(6) and to refrain from actions that (again in the Government's view) are allowed by § 1231(a)(6). Those injunctions thus interfere with the Government's efforts to operate § 1231(a)(6)." *Aleman Gonzalez*, 142 S. Ct. at 2065. An order vacating an agency regulation, policy, or guideline does not similarly compel the agency to take or refrain from taking any action authorized by or prohibited by its authority under the INA.[5]

That an order setting aside or vacating an action is distinct from one enjoining or restraining a party is confirmed by the "common understanding of judges," who are the decisionmakers "to whom [section 706] is addressed." *Comcast Corp. v. FCC*, 579 F.3d 1, 10 (D.C. Cir. 2009) (Randolph, J., concurring) ("'Set aside' means vacate, according to the dictionaries and the common understanding of judges, to whom the provision is addressed."). Tellingly, the APA adopts judicial usage by incorporating a term commonly used to describe the action that an appellate court takes with respect to an order or judgment improperly entered by a lower court. In such circumstances, the appellate tribunal "sets aside," or vacates, the lower court's action. Indeed, those terms are typically used to describe an appellate court's vacatur of an

[5] Of course, the legal reasoning a court used to vacate an agency action might indicate that some future agency action or course of action would be unlawful for the same reason, but neither the reasoning nor the vacatur would directly enjoin or restrain such action.

injunction improperly issued by a lower court.[6] But no one would say that, in such circumstances, the appellate court has issued an injunction or restraining order against the lower court, let alone that it has enjoined or restrained the operation of a law. The use of the same language to describe the ordinary remedy in APA cases signifies that, under the APA, courts function as "appellate tribunal[s]" in applying the APA's standard of review and set-aside remedy to agency action. *N. Air Cargo*, 674 F.3d at 861.

To be sure, injunctive relief that goes beyond setting aside an unlawful agency action may be available in an APA action when the requirements for issuance of such relief are satisfied. The APA expressly contemplates that, in some circumstances, an "injunctive decree" may be available, 5 U.S.C. § 702; it also provides for the issuance of preliminary equitable relief when necessary "to prevent irreparable injury," *id.* § 705, and allows orders to "compel" agency action in appropriate circumstances, *id.* § 706(1). Injunctive relief under the APA, however, is subject to traditional equitable constraints, *see*, *e.g.*, *Cobell v. Kempthorne*, 455 F.3d 301, 307 (D.C. Cir. 2006), including those governing the issuance of preliminary and permanent injunctions, *see Winter v. NRDC*, 555 U.S. 7, 20 (2008). That the APA addresses the relief of setting aside agency action separately, and using different terms, from its references to

---

[6] *See*, *e.g.*, *FTC v. Consumer Def., LLC*, 926 F.3d 1208, 1211–12 (9th Cir. 2019) (stating the standard for "set[ting] aside" a preliminary injunction); *N. Mex. Dep't of Game & Fish v. U.S. Dep't of the Interior*, 854 F.3d 1236, 1240 (10th Cir. 2017) ("vacat[ing] the district court's entry of a preliminary injunction"); *Ala. v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1136 (11th Cir. 2005) ("vacat[ing]" a district court injunction).

injunctive decrees, orders granting preliminary relief to prevent irreparable injury, and orders compelling agency action underscores that the set-aside remedy is distinct from orders enjoining agency action.[7]

Another APA provision, 5 U.S.C. § 559, further reinforces that an order setting aside unlawful agency action under section 706(2) of the APA does not "enjoin or restrain" the operation of the immigration laws and, therefore, that the plain language of section 1252(f)(1) does not encompass such orders. Section 559 provides that a "[s]ubsequent statute may not be

---

[7] In support of its argument that "enjoin or restrain" may include an order of vacatur, the government cites *Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289 (1975), to argue that this Court exercised jurisdiction over appeals from orders of vacatur based on a statute providing for appellate jurisdiction over injunctions. Pets. Br. 46. The government overstates the point: There, the Court considered appellate jurisdiction under a statute that authorized a 3-judge court to grant "[a]n interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission" (ICC). *Aberdeen & Rockfish*, 422 U.S. at 307. In that context, the Court found no "jurisdictional difference *in ICC cases* between 'injunctions' and orders 'setting aside' ICC determinations." *Id.* at 307 n.11 (emphasis added). The facts of the case illustrated the basis for the conclusion: Although the appellees claimed "that since the court below declined to restrain collection of the increased rates, its order was not an injunction but a declaratory judgment," the district court had "directed the ICC to perform certain acts" and its "order was plainly cast in injunctive terms." *Id.* at 307. Specifically, "[t]he order 'directs' the ICC to reopen [the rate proceeding] and to conduct further proceedings which 'must' include preparation of an impact statement dealing with enumerated issues." *Id.* The district court too viewed the relief as injunctive: "In declining to restrain collection of the rates, the court said it was declining to grant 'to plaintiffs additional injunctive relief.'" *Id.*

held to supersede or modify … chapter 7 [of title 5] … except to the extent that it does so expressly." Chapter 7 includes section 706, and section 1252(f)(1) was enacted decades after the APA. But section 1252(f)(1) contains no express indication of intent to limit or modify the remedial authority granted by section 706. Accordingly, section 559, together with the more general strong presumption that judicial review of agency action is available, *see*, *e.g.*, *Regents*, 140 S. Ct. at 1905, forecloses any argument that section 1252(f)(1) impliedly limits APA relief.

Further, in *Nielsen v. Preap*, 139 S. Ct. 954, 962 (2019), this Court held that section 1252(f)(1) posed no bar on judicial authority to issue declaratory relief, even where the bar on injunctive relief might apply. *Accord Make the Road N.Y. v. Wolf*, 962 F.3d 612, 635 (D.C. Cir. 2020) ("Section 1252(f) prohibits only injunctions against 'the operation of the provisions of part IV of this subchapter' as amended …. It does not proscribe issuance of a declaratory judgment[.]"). That point reflects the more general principle that a bar on injunctive relief does not ordinarily strip the courts of authority to issue other forms of relief. *See Steffel v. Thompson*, 415 U.S. 452, 472 (1974) ("[T]he only occasions where this Court has ... found that a preclusion of injunctive relief inevitably led to a denial of declaratory relief have been cases in which principles of federalism militated altogether against federal intervention in a class of adjudications."); *Brito v. Garland*, 22 F.4th 240, 252 (1st Cir. 2021) (quoting *Steffel* and noting that, "[b]ecause section 1252(f)(1) concerns federal courts' ability to enjoin the operation of *federal* law, it does not implicate federalism concerns"). Notably, declaratory relief typically is integral to relief under section 706, which

instructs courts to "hold unlawful" and "set aside" agency action in specified circumstances. 5 U.S.C. § 706(2).

II. The government's notion that section 706(2) does not authorize vacatur is contrary to the APA's text, its history, and the long-held view of the courts.

Although courts, including this Court, have consistently stated otherwise, *see infra* pp.17–18 & n.9, the government argues that section 706(2) does not authorize orders vacating unlawful agency actions—and, indeed, "does not pertain to remedies at all," Pets. Br. 40—but simply "direct[s] the reviewing court to disregard unlawful 'agency action, findings, and conclusions' in resolving the case before it," *id.* The government cites no judicial decision supporting its interpretation of section 706(2). And this Court's third question appears to assume that the district court's vacatur order was "an order to 'hold unlawful and set aside' the Guidelines under 5 U.S.C. § 706(2)," and asks only if it was barred by section 1252(f)(1), not whether it was authorized by section 702(2). As the Court's question suggests, the government's argument is mistaken, for several reasons.

First, the government's argument is not supported by the text of section 706. Section 706 has two parts that speak to two different types of actions that "[t]he reviewing court shall" take: It shall (1) "compel agency action unlawfully withheld or unreasonably delayed, and" (2) "hold unlawful and set aside agency actions, findings, and conclusions found to be" problematic on one of the specified bases. Although the government argues that section 706(2) does not address remedy, it makes no attempt to reconcile its reading with 706(1),

which plainly states the judicial *remedy* for unlawfully withheld or delayed agency action: an order compelling the action.[8] Section 706(1) belies the government's contention that section 706 does not address remedy. *See also United States v. Taylor*, 142 S. Ct. 2015, 2023 (2022) (noting "our usual rule of statutory interpretation that a law's terms are best understood by 'the company [they] kee[p]'" (alteration in original)).

That the statutory term "set aside" speaks to remedy is further confirmed by the use of that same term in other statutes. For instance, 28 U.S.C. § 2342 gives the courts of appeals "exclusive jurisdiction to enjoin, set aside, [or] suspend (in whole or in part)" final orders, rules, and regulations of specified agencies. Sandwiching "set aside" between two indisputable remedies—"enjoin" and "suspend"—reflects that, in the context of court review of agency action, Congress uses the term "set aside" to refer to a

---

[8] *See, e.g.*, *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1178 (9th Cir. 2002) (in a case under § 706(1), ordering the agency to complete the delayed action by a date certain); *Forrest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1998) (in a case under § 706(1), stating that when an agency fails to act by a statutory deadline, it has "unlawfully withheld" the action and the court must compel the agency to act); *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (in a case under § 706(1), imposing a deadline for issuance of an agency rule unreasonably delayed); *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026 (D.C. Cir. 1983) (in a case under § 706(1), holding that the agency had unreasonably delayed disposition of the company's complaint and ordering the agency to reach a final decision within 60 days); *Pub. Citizen Health Res. Group v. Auchter*, 702 F.2d 1150, 1158–59 (D.C. Cir. 1983) (in a case under § 706(1), ordering the agency to promulgate a notice of proposed rulemaking within 30 days).

remedy. *Beecham v. United States*, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well.").

Likewise, 49 U.S.C. § 46110 authorizes courts "to affirm, amend, modify, or set aside any part of" certain orders of the Transportation Security Administration and the Federal Aviation Administration. And 15 U.S.C. § 825*l*(b) authorizes courts reviewing orders of the Federal Energy Regulatory Commission "to affirm, modify, or set aside such order[s] in whole or in part." In each, the term "set aside" appears in a list of remedies and plainly refers to a remedy—the remedy of vacating the order (which is the opposite of affirming it or leaving it in place as amended or modified). *See*, *e.g.*, *Moshea v. Nat'l Transp. Safety Bd.*, 570 F.3d 349, 350 (D.C. Cir. 2009) ("grant[ing] petition for review, vacat[ing] the Board's decision, and remand[ing]" for further proceedings); *Col. Gas Transm'n Corp. v. FERC*, 404 F.3d 459, 463 (D.C. Cir. 2005) ("grant[ing] the petition and vacat[ing] the [agency] orders").

The government's notion that the APA does not address remedy in section 706, but instead in section 703, titled "Form and venue of proceeding," is also untethered to both the APA's text and its structure. "Form of proceeding" is not a term used to refer to remedy. *Compare* Fed. R. Civ. P. 2 (addressing "form of action"), *with id.* Rules 64–71 (addressing "remedies"). Furthermore, the APA's judicial review provisions follow a clear structure: Section 702 addresses the parties (who can sue and be sued); section 703 addresses the form and venue of the suit; section 704 describes the types of agency action over which one can sue; section 705 addresses interim

remedies; and section 706 addresses the scope of judicial review and final remedies. The government's notion, by reading the "form of proceeding" in section 703 to address remedy, destroys that logical progression. Moreover, the government is incorrect in asserting that the legislative history "repeatedly refers to Section 703 as governing remedies." Pets. Br. 42 (citing S. Doc. No. 79-248 at 36–37 (1946)). Rather, the cited document discusses the "Form and Venue of Action" provision in terms of the "methods of review," S. Doc. 79-248 at 36–37, while explaining that the "Scope of Review" provision authorizes courts to "compel" and to "invalidat[e]" agency action, and rejecting the notion that "invalidation of agency action 'short of statutory right' is something new." *Id.* at 40.

Second, the government's view is inconsistent with the 1941 Final Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 77-8 (1941) (1941 Report)—a report described at the time as "the most thorough and comprehensive study ever made of Federal administrative procedure." James Hart, *Final Report of the Attorney General's Comm. on Admin. Pro.*, 35 Am. Pol. Sci. Rev. 501, 501 (1941). As the 1941 Report makes clear, courts have long considered challenges to *both* the "legality of applying a regulation to a particular objector" *and* "the validity of the entire regulation." 1941 Report at 116. In the latter instance, "[a] judgment adverse to a regulation results in setting it aside." *Id.* at 117.

For example, *Morgan v. United States*, 304 U.S. 1 (1938), *cited in* 1941 Report at 88, challenged an order by the Secretary of Agriculture fixing maximum rates to be charged at the Kansas City Stockyards. The core of the case was the plaintiffs' allegation that the Secretary of Agriculture had adopted the rates

without complying with the statute's procedural requirements and that the order was arbitrary and unsupported by substantial evidence. *Morgan*, 304 U.S. at 14. The Court agreed that the agency's process was "defective" and held the agency's action "invalid." *Id*. at 21. In a follow-on case, the Court explained that its earlier decision had "set aside" the rates for "failure of the Secretary to follow the procedure prescribed by the statute." *United States v. Morgan*, 307 U.S. 183, 195 (1939). The Court clearly meant that the earlier decision had nullified the unlawful rates, not that it had "disregarded" them.

Third, the government's reading would call into question *decades* of court decisions, from this Court, courts of appeals, and district courts across the country—including seminal cases of administrative law. *See*, *e.g.*, *Regents*, 140 S. Ct. at 1901 (holding that the challenged agency action must be vacated where it violated the APA); *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2564, 2567, 2568 (2019) (affirming a district court's decision that "vacated" the challenged agency action and using "set aside" interchangeably with "vacate"); *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 471 n.4 (2001) (stating that if allegations that the EPA violated rulemaking requirements "could be proved, it would be grounds for vacating the [agency action], because the Administrator had not followed the law"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 41 (1983) (clarifying that it is an "agency's action" itself which must be set aside if it is contrary to or in excess of agency authority); *Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967) (explaining that "pre-enforcement challenge" by regulated parties "is calculated to speed enforcement" because "[i]f the Government prevails, a

large part of the industry is bound by the decree; if the Government loses, it can more quickly revise its regulation").[9] By contrast, the government cites no decision of a court at any level in the federal system in the 76-year history of the APA that adopts its construction of the term "set aside" in section 706(2).

Fourth, the government's suggestion that section 706(2) may authorize vacatur but only as to the parties to the particular case, Pets. Br. 44 n.6 (citing U.S. Application 37–38), "is nowhere in the statute," as then-Judge Jackson has explained. *Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1, 67 (D.D.C. 2019), *rev'd on other grounds*, 962 F.3d 612 (D.C. Cir. 2020); *see also State Farm Fire & Casualty Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 444 (2016) (rejecting reading that has "no textual indication in the statute"). Importantly, such an atextual limitation

---

[9] *See, e.g., Allina Health Serv. v. Sebellius*, 746 F.3d 1102, 1111 (D.C. Cir. 2014) (stating that "vacatur is the normal remedy" for an APA violation); *Ill. Pub. Telecomm. Ass'n v. FCC*, 123 F.3d 693, 693 (D.C. Cir. 1997) (stating that "unsupported agency action normally warrants vacatur"); *see Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed."); *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 799 (D.C. Cir. 1983) ("Because we find that the Secretary's decision was arbitrary and capricious, we reverse the decision of the District Court and vacate the action of the Secretary rescinding restrictions on the employment of homeworker."); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) ("To 'vacate,' as the parties should well know, means 'to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; *to set aside*.'" (emphasis added)).

is not required by Article III. "The Court has long relied upon historical practice by the federal courts to lend meaning to the notoriously terse phrases of Article III." Mila Sohoni, *The Long History of the Universal Injunction*, 133 Harv. L. Rev. 920, 269 (2020).[10] And here, the long history of federal courts vacating agency action held unlawful, *see supra* pp.17–18 & n.9, is indisputable. That the relief may benefit persons other than the plaintiff does not mean that it is barred by Article III: Article III does not authorize, let alone require, courts to deny a statutorily authorized form of relief that redresses a plaintiff's injury merely because the relief will also benefit others who suffer a comparable injury. *See Massachusetts v. EPA*, 549 U.S. 497, 522 (2007*); FEC v. Akins*, 524 U.S. 11, 23–25 (1998); *Pub. Citizen v. DOJ*, 491 U.S. 440, 449–50 (1989).

Further, the suggestion that section 706(2) may authorize vacatur, but only as to the parties to the particular case, is wholly unworkable. In terms of judicial efficiency, the problems with the government's suggestion are illustrated by *Department of Homeland Security v. Regents of the University of California*. In *Regents*, this Court considered a

---

[10] Sohini at 926 n.37 ("*See, e.g.*, *Tutun v. United States*, 270 U.S. 568, 576 (1926); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803); *see also NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) ('[T]his Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.'). *See generally* Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 Notre Dame L. Rev. 1753, 1759–1802 (2015) (using cases from the federal courts canon to elaborate on the relevance of historical practice to constitutional meaning).").

challenge to the Acting Secretary of Homeland Security's rescission of the Deferred Action for Childhood Arrivals (DACA) program. The Court determined that "the rescission must be vacated." 140 S. Ct. at 1901. Under the government's reading, however, the APA did not authorize the Court to vacate the agency's action. Instead, it could "set aside" the rescission only as to the parties to that case. As to the thousands of DACA recipients around the country who were not parties to the case, the rescission would remain in effect, requiring each recipient separately to sue because DACA's rescission would remain in effect as to them.[11]

The government's reading also poses intractable practical problems. As Judge Moss has explained:

> As a practical matter, for example, how could this Court vacate the Rule with respect to the organizational plaintiffs in this case without vacating the Rule writ large? What would it mean to "vacate" a rule as to some but not other members of the public? What would appear in the Code of Federal Regulations? Fortunately, the Court need not engage in such logical gymnastics because the language of the APA and the controlling D.C. Circuit precedent are unambiguous.

O.A. v. Trump, 404 F. Supp. 3d 109, 153 (D.D.C. 2019).

For instance, when the Chamber of Commerce successfully sued to challenge a Department of Labor

---

[11] In light of the government's argument here that courts lack authority under the APA to vacate agency rules and can only bar enforcement of the rule as to the specific plaintiffs, the courts could not rely on the government to respond to a ruling that "holds unlawful" an agency action by withdrawing the unlawful action or committing not to apply it to non-parties to the case.

rule concerning fiduciary obligations of financial service providers, the Fifth Circuit relied on section 706(2) to "vacate the rule." *Chamber of Commerce v. Dep't of Labor*, 885 F.3d 360, 388 (5th Cir. 2018). Under the government's view, the court had authority to vacate the rule only as to the plaintiff—the Chamber. The Chamber, however, is a membership organization. Presumably, then, under the government's approach, the rule could then not be applied to companies that were members of the Chamber but could be applied to other companies. Both the agency and the many current and future investors affected by the rule would thus need a Chamber membership list to know which companies were bound by the rule and which were not. The government's brief does not address the question whether the "set aside" in such a case would apply to then-current members only or to future members as well. Because trade groups often bring APA challenges on behalf of their members, the problems posed by the government's reading would arise frequently. *See*, *e.g.*, *Iowa League of Cities v. EPA*, 711 F.3d 844, 854 (8th Cir. 2013) (vacating EPA requirements concerning water treatment processes at municipally owned sewer systems).

Similarly, when membership organizations sued under section 706(2) to challenge a U.S. Trade Representative order unlawfully closing certain meetings to the public, in violation of the Federal Advisory Committee Act, *see Pub. Citizen v. Barshefsky*, 939 F. Supp. 31, 38 (D.D.C. 1996), the court vacated that order. Under the government's view, however, the result should have been that only the order closing the meetings was "disregarded" as to the plaintiffs or perhaps their members only, but that the order would

continue to authorize closing the meetings to everyone else.

In addition, the government's theory would have a significant impact on the standing of potential APA plaintiffs by eliminating redressability in many cases. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (stating that standing requires that the injury caused by agency action can be redressed by a favorable court decision). Under the Court's longstanding view that "set aside" in section 706(2) means "vacate" and authorizes courts to vacate challenged agency action, non-regulated entities, including individuals and organizations, may have standing to challenge rules under section 706(2).[12] *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 n.2 (1990) (stating that final agency action (there, a "land withdrawal review program") "can of course be challenged under the APA by a person adversely affected—and the entire [program] insofar as the content of that particular action is concerned, would thereby be affected"). The government's view, however, would undercut the redressability prong of standing for non-regulated entities. For example, environmental groups had standing to challenge under section 706(2) a final rule of the Fish and Wildlife Service that removed a population of gray wolves from the endangered species list. *Humane Soc'y of U.S. v. Kempthorne*, 579 F. Supp. 2d 7, 9, 10 n.4 (D.D.C. 2008). Ruling in favor of the groups, the

---

[12] *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (holding that a membership organization may sue on behalf of its members where the members would otherwise have standing to sue in their own right; the interests that the organization seeks to protect are germane to the its purpose; and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit).

court vacated the unlawful rule. *Id.* at 8. In the government's view, however, the judicial remedy could go no further than the plaintiffs. A remedy reinstating the wolves to the list only as to the plaintiffs (who posed no threats to the wolves), however, would have been meaningless. Redress required vacatur of the rule.

Likewise, under the government's view, the Business Roundtable would have lacked standing in *Business Roundtable v. SEC*, 902 F.2d 406 (D.C. Cir. 1990). There, the rule at issue barred national security exchanges from listing stock of corporations that nullified, restricted, or disparately reduced per share voting rights of common shareholders, and the D.C. Circuit vacated the rule as in excess of the agency's authority. *Id.* at 407. But the members of the plaintiff organization were individuals, *see* https://www.businessroundtable.org/about-us, not companies regulated under the rule. Therefore, if the court could have vacated the rule only with respect to its application to the plaintiff, the plaintiff would have had no redress at all because the rule would continue to apply to the regulated entities.

That said, the government acknowledges that such relief as is "necessary to provide complete relief to the plaintiffs," U.S. Application 32–33, may be permissible. Perhaps, then, the government would agree that a court can vacate an unlawful rule where the plaintiff is a non-regulated party that will not have meaningful relief absent issuance of a new final rule. *E.g.*, *Pub. Citizen v. Mineta*, 340 F.3d 39, 42 (2d Cir. 2003) (in challenge by consumer groups to agency standard for tire pressure monitoring systems for passenger vehicles, concluding "that the rule is both contrary to the intent of the TREAD Act and arbitrary and

capricious under the APA," and therefore "vacat[ing] the rule, and remand[ing] for further rulemaking proceedings"). Reading section 706(2) to allow vacatur of an unlawful rule *only* when the plaintiff is *not* a regulated party has no basis in the statutory text.

Finally, the government's stay application made the important point that the APA allows one court to vacate a rule nationwide, even where other courts have upheld the rule. *See* U.S. Application 34. Yet the government's argument would bar vacatur even where petitions for review of an agency rule have been consolidated in a single court. *See* 28 U.S.C. § 2112(a)(3); *e.g.*, *In re MCP No. 165, OSHA, Interim Final Rule: Covid-19 Vaccination and Testing; Emergency Temporary Standard*, No. 21-7000 (6th Cir.) (consolidated proceeding on 33 petitions for review). Whether or not one sympathizes with the government's point, it is not a reason to rethink the relief provided in countless court decisions in decades of APA litigation before this Court and lower courts. Instead, the government's concern is properly brought to Congress.

CONCLUSION

For the foregoing reasons, section 1252(f)(1) does not prevent entry of an order "hold[ing] unlawful and set[ting] aside" agency action under 5 U.S.C. § 706. This Court should nonetheless reverse the decision below because the Guidelines do not violate the APA, as explained in the Brief for the Petitioners.

Respectfully submitted,

ALLISON M. ZIEVE
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org
Attorneys for Amicus Curiae

September 2022