No. 23A82

In the Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.,

APPLICANTS,

V.

JENNIFER VANDERSTOK, ET AL.,

RESPONDENTS.

BRIEF FOR FIREARMS REGULATORY ACCOUNTABILITY COALITION, INC. AS *AMICUS CURIAE* IN OPPOSITION TO THE EMERGENCY APPLICATION TO STAY THE VACATUR OF THE FINAL RULE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Executive Materials

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Firearms Regulatory Accountability Coalition, Inc. is the premiere national trade association representing U.S. firearms manufacturers, retailers, importers, and innovators on regulatory and legislative issues impacting the firearms industry in the United States. An important part of FRAC's mission is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, FRAC regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the firearms community.

FRAC has a strong interest in this case because the unwarranted departure from settled administrative law principles advocated by the Government here would effectively gut the judicial remedy provided by the district court and affirmed by the Fifth Circuit. For reasons Respondents have explained, the federal regulation at issue in this litigation is unlawful because it was promulgated in excess of statutory authority and is unconstitutional, arbitrary, capricious, and otherwise contrary to law. Since the enactment of the Administrative Procedure Act ("APA") in 1946, it has been well settled that "[w]hen 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." *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs.*, 145 F.3d 1399, 1409 (D.C. Cir. 1998); *see Camp v. Pitts*, 411 U.S.

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[1] No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution to fund the brief's preparation or submission.

138, 142–43 (1973). Following that ordinary practice, the Fifth Circuit below affirmed the district court's vacatur with respect to those portions of the federal rule it held unlawful.

Nevertheless, the Government here advances the radical position that more than seventy years of unbroken appellate and district court practice since the enactment of the APA has ever and always been wrong. According to the Government, "nationwide vacatur" of a federal regulation "contradict[s] Article III and traditional equitable principles, which limit courts to 'case-by-case judgments with respect to the parties in each case.'" Application for Stay at 5.

In making this argument, the Government effectively seeks this Court's imprimatur to continue enforcing an unlawful rule against persons who, for whatever reason, lacked "the incentive and the capacity to challenge th[at] rule[ ] immediately." *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2062 (2019) (Kavanaugh, J., concurring). But the Government never says why it would be justified in continuing to enforce an unlawful rule against non-parties to this litigation, and it nowhere attempts to square its position with this Court's teaching that whenever "a provision [of law] is declared invalid[,]" that provision "cannot be lawfully enforced" "against the plaintiff" or "against others." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2351 n.8 (2020).

For firearms industry and other business plaintiffs, adoption of the Government's position here would be disastrous. Just like many other regulated businesses, members of the firearms industry challenge unlawful agency regulations

because they inhibit sales. By restricting relief to the named business plaintiffs in a litigation, the Government could effectively keep in place against successful litigants its unlawful prohibitions, by continuing to threaten their suppliers and potential customers with criminal liability. In this case, for example, the Government argues that the district court's injunction should not extend to "no[n] parties." Application for Stay at 34. But that would render nugatory the judicial remedy that the business plaintiffs here have already obtained by cutting off their suppliers and customers. Such limited relief is no relief at all.

SUMMARY OF ARGUMENT

The Court should reject the Government's invitation to jettison seven decades of unbroken administrative law practice in this emergency posture. Since the APA's enactment in 1946, courts at all levels of the federal judicial system have consistently interpreted the statutory directive to "set aside" unlawful agency action as authorizing vacatur. The text, structure, history, and purpose of the APA confirm that this view is the correct one.

This case shows why vacatur is a necessary remedy. The unlawful rule adopted by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") imposes felony criminal penalties on those who violate it. Absent vacatur, federal criminal law will be applied inconsistently by ATF based on nothing more than the happenstance of which parties joined a particular APA complaint. The restriction of the remedy to the parties below would also foreclose the possibility of meaningful relief to the firearms industry plaintiffs because their suppliers and potential

customers could still face the risk of criminal liability under the rule. Finally, elimination of the vacatur remedy would result in the waste of judicial and private resources as plaintiffs across the country file duplicative cases seeking protection from the Government's efforts to enforce a patently unlawful rule.

ARGUMENT

I. CONGRESS AUTHORIZED REVIEWING COURTS TO VACATE UNLAWFUL AGENCY RULES.

A. The Court Should Not Use Its Emergency Docket To Unsettle Administrative Law.

The APA instructs reviewing courts to "hold unlawful and set aside agency action" that is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Based on that clear textual command, "the default rule" in every Circuit is "vacatur of an [unlawful] agency action." *Cargill v. Garland*, 57 F.4th 447, 472 (5th Cir. 2023) (en banc); *see, e.g.*, *United Steel v. MSHA*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) ("The ordinary practice is to vacate unlawful agency action."); *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018) ("vacatur of an unlawful agency action normally accompanies a remand."); *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs.*, 781 F.3d 1271, 1290 (11th Cir. 2015) ("vacatur . . . is the ordinary APA remedy" (citation omitted)); *Owner-Operator Indep. Drivers Ass'n, Inc. v. FMCSA*, 656 F.3d 580, 588 (7th Cir. 2011) ("When th[e] [APA] standard has not been met, it is necessary to vacate the agency's action.").

This Court has likewise directed vacatur of unlawful agency action. In *DHS v. Regents of the University of California*, 140 S.Ct. 1891 (2020), the Court held the Deferred Action for Childhood Arrivals program "must be vacated" because DHS had violated the procedures required by the APA. *Id.* at 1901. As Justice Alito later explained, "[i]f the court in that case had lacked the authority to set aside the rule adopting the program, there would have been no need to examine the sufficiency of DHS's procedures." *United States v. Texas*, 143 S. Ct. 1964, 1996 n.7 (2023) (Alito, J., dissenting). But the Court did examine those procedures, and it held that their violation by the agency meant its challenged action could not stand. *See also Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 471 n.4 (2001) ("If . . . the [EPA] Administrator had not followed the law" "it would be grounds for vacating the NAAQS"); *Pitts*, 411 U.S. at 143 (holding that if a "finding is not sustainable [under § 706(2)(A)] on the administrative record made, then the [agency's] decision must be vacated"); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting) (observing that "the result [of an APA rulemaking violation] is that the rule is invalidated, not simply that the court forbids its application to a particular individual").

In this case, the Government contends "Section 706(A) does not provide a basis for nationwide vacatur." Application for Stay at 31. That position, if adopted, "would be a sea change in administrative law" disrupting the universal practice of the lower federal courts. *Texas*, 143 S. Ct. at 1996 (Alito, J., dissenting); *accord id.* at 1984–85 (Gorsuch, J., concurring) (acknowledging "vacatur has been the ordinary result when

the D.C. Circuit determines that agency regulations are unlawful"). "That is a serious matter, which cannot properly occur without thorough consideration." *Merrill v. Milligan*, 142 S. Ct. 879, 889 (2022) (Kagan, J., dissenting from grant of applications for stays); *see also id.* at 879 (Kavanaugh, J., concurring) (agreeing the Court should not "make[ ] any new law" through emergency docket); *id.* at 882–83 (Roberts, C.J., dissenting) (explaining stay making new law is unwarranted where lower court "properly applied existing law"). In this emergency posture, the enormous ramifications of a finding that the APA does not authorize vacatur is reason enough to reject the Government's position.

B. The Lower Courts Have Correctly Interpreted "Set Aside."

The universal position of the courts of appeals is the correct one. As explained, the APA instructs reviewing courts to "hold unlawful and set aside agency action" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A court "set[s] aside" agency action by vacating it. *See Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 671 (D.C. Cir. 2006) ("'Set aside' usually means 'vacate.'"); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) ("To vacate . . . means to . . . set aside.") (cleaned up); *Massachusetts ex rel. Div. of Marine Fisheries v. Daley*, 170 F.3d 23, 32 (1st Cir. 1999) (using "set aside" to mean vacatur and contrasting "a remand for further explanation while leaving the regulation in force"); section I.A., *supra* (collecting cases).

This result is clear from the text. "When called on to resolve a dispute over a statute's meaning, this Court normally seeks to afford the law's terms their ordinary meaning at the time Congress adopted them." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021). The APA was enacted in 1946. Then as now, the term "set aside" meant "to cancel, annul, or revoke." "Set Aside," *Black's Law Dictionary* 1612 (3d ed. 1933); *see also* "Set Aside," *Black's Law Dictionary* (11th ed. 2019) ("to annul or vacate"). Indeed, the Third Circuit confirmed this understanding shortly after the APA was enacted by explaining—apparently without objection from the Government—that the term "set aside" in APA section 706(2) "affirmatively provides for vacation of agency action." *Cream Wipt Food Prods. Co. v. Fed. Sec. Adm'r*, 187 F.2d 789, 790 (3d Cir. 1951).

The meaning of "set aside" is so well established that, until recently, no one questioned that the APA authorizes vacatur. Some jurists on the D.C. Circuit have even reasoned that "the Administrative Procedure Act *requires* the court—in the absence of any contrary statute—to vacate the agency's action." *Checkosky v. SEC*, 23 F.3d 452, 491 (D.C. Cir. 1994) (separate opinion of Randolph, J.) (emphasis added); *see also ibid.* ("Setting aside means vacating; no other meaning is apparent."); *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 757 (D.C. Cir. 2002) (Sentelle, J., dissenting) (explaining remand without vacatur violates the APA); *accord Jarrell v. Nicholson*, 20 Vet. App. 326, 327 n.1 (2006) (en banc) ("Th[is] Court uses the terms 'vacate' and 'set aside' interchangeably." (citing *Checkosky*)). On this view, the APA's directive that a reviewing court "shall" "set aside" unlawful agency action necessarily

forecloses other, lesser remedies. *Checkosky*, 23 F.3d at 493. And while that view has not commanded the majority of D.C. Circuit judges, showing the terms of the debate there illustrates the Government's significant departure from APA principles here. *Cf.* Tr. Oral Argument at 35, *United States v. Texas*, 143 S. Ct. 1964 (2023) (No. 22-58) ("CHIEF JUSTICE ROBERTS: [Y]our position on vacatur, that sounded to me to be fairly radical and inconsistent with, for example, you know, with those of us who were on the D.C. Circuit, you know, five times before breakfast, that's what you do in an APA case.").

The structure of the APA likewise shows that Congress intended courts to vacate unlawful agency actions. As Texas recently explained, "[i]t would be illogical for the APA to allow a court to 'postpone the effective date of an agency action' during litigation, 5 U.S.C. § 705, but be powerless to terminate that action if the court concludes the action is 'unlawful,' *id.* § 706(2)." Br. for Respondents at 40, *United States v. Texas*, 143 S. Ct. 1964 (2023) (No. 22-58). "Likewise, section 706(1) suggests that section 706(2) authorizes vacatur[:] The former allows courts to 'compel' agency action while the latter authorizes the inverse. 5 U.S.C. § 706." *Ibid.* *See also* Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 Notre Dame L. Rev. 1997, 2009–10 (2023).

The Government's position that APA forecloses vacatur is also belied by the Administrative Orders Review Act, commonly known as the Hobbs Act. Just like the APA, the Hobbs Act authorizes a reviewing court to "set aside" unlawful agency action. 28 U.S.C. § 2342. But the Hobbs Act (in conjunction with the judicial lottery

statute) also expedites and consolidates pre-enforcement challenges in a single court of appeals. 28 U.S.C. §§ 2112, 2344. Congress enacted this scheme to "eliminat[e] . . . multiple suits challenging the same [agency] order" by providing that a single court would provide immediate nationwide review, and if necessary, nationwide relief. *See Simmons v. ICC*, 716 F.2d 40, 44 (D.C. Cir. 1983) (Scalia, J.). Thus, as this additional important administrative law statute shows, Congress plainly understood "set aside" to mean vacatur, belying the Government's view that this term somehow forecloses a universal remedy. *See, e.g.*, *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) ("When a statutory term is obviously transplanted from another legal source, it brings the old soil with it." (citations and quotations omitted)).

Finally, the Government cites no case supporting its novel position that vacatur under the APA is somehow "irreconcilable" with Article III. Application for Stay at 28. "Under the [Supreme] Court's approach, [when] a provision [of law] is declared invalid[,]" that declaration means that the provision "cannot be lawfully enforced" "against the plaintiff" or "against others." *Barr*, 140 S. Ct. at 2351 n.8. Similarly, "[w]hen 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." *Nat'l Min. Ass'n*, 145 F.3d at 1409. The Government's contrary view that it can continue to enforce its rule despite its having been declared unlawful is an assumption of executive privilege foreign to our legal system.

II. THE RULE AT ISSUE HERE IS PRECISELY THE TYPE THAT THE APA INSTRUCTS COURTS TO VACATE.

This case shows why vacatur is a necessary remedy. The rule adopted by ATF purports to regulate partially manufactured firearm parts and weapon parts kits by subjecting them to restrictions Congress enacted through the Gun Control Act and reserved for "frames or receivers" and completed "firearms." *See* Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24,652 (2022) ("Rule"); App. 28a–40a.

Violation of the rule carries criminal consequences. Specifically, the rule "reiterates that title 18 of the U.S. Code includes Federal felony violations that can apply to circumstances involving the final rule's requirements." Rule, 87 Fed. Reg. at 24,713. Thus, the consequence of the Government's position that the rule should be "set aside" only as to certain parties or specific geographic areas would be a patchwork of inconsistent application of federal criminal law administered by a federal law enforcement agency. Non-parties to the litigation could be sentenced to years in prison for violating a regulation that a federal court has adjudicated as facially unlawful. That is precisely the sort of situation that the vacatur remedy is meant to avoid.

The imposition of party specific remedies would also deny business plaintiffs (such as firearms manufacturers) complete relief. "[T]here is no doubt that an Article III court 'may administer complete relief between the parties, even if this involves the determination of legal rights which otherwise would not be within the range of its authority.'" *Health Freedom Def. Fund, Inc. v. Biden*, 599 F. Supp. 3d 1144, 1177

(M.D. Fla. 2022) (quoting *Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 507 (1928) (alteration accepted)), *vacated as moot* 71 F.4th 888 (11th Cir. 2023); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring) (explaining that historic equity permitted relief to benefit third parties if it was "merely a consequence of providing relief to the plaintiff"); *Califano v. Yamasaki*, 442 U.S. 682, 702–03 (1979) (finding "nationwide class relief" appropriate "to provide complete relief"). For firearms manufacturers and other business plaintiffs, often the only effective means of obtaining complete relief is nationwide vacatur.

The reasons are obvious. Manufacturers are only one link in a complex supply chain consisting of suppliers, designers, importers and exporters, transportation and logistics companies, retailers, and, ultimately, the gun-owning public. In this context, a party specific remedy simply cannot work because everyone else in the chain would still be subject to the unlawful regulation.

Consider first the upstream deficiencies. The rule imposes criminal liability for "aiding and abetting" or "conspiring" to "import[ ], manufactur[e], or deal[ ] in firearms without a license." Rule, 87 Fed. Reg. at 24,713 (citing 18 U.S.C. §§ 2, 371). Accordingly, a manufacturer-plaintiff who successfully obtains relief from the rule would nevertheless struggle to obtain parts and services from upstream suppliers who might fear that they could be charged with aiding and abetting because they are not specifically covered by the injunction.

The downstream effects are similar. Retailers and consumers who are not specifically named by the injunction are unlikely to purchase a manufacturer's

products if it means risking felony prosecution for unlicensed dealing or possession. A remedy that leaves a company without suppliers or customers is plainly no remedy at all, let alone "complete relief."

The Government's gamesmanship confirms that these are not empty worries. Although the Government expresses here supposed concern for the merits of "case-by-case judgment with respect to the parties in each case," Application for Stay at 5 (citation omitted), the Government sought below to prevent intervention by firearms manufacturers on the ground that their interests were "already adequately represented" by the non-manufacturer plaintiffs. Defs' Opp'n Blackhawk Mfg. Grp. Inc. Mot. Intervene at 10, *VanDerStok v. Garland*, No. 22-cv-691-O, 2022 WL 19023858 (N.D. Tex. Dec. 19, 2022) ECF No. 96; *see also Britto v. Garland*, No. 2:23-cv-019-Z, slip op. at 9–10 (N.D. Tex. Apr. 14, 2023), ECF No. 50 (denying intervention to firearms manufacturer based on the Government's arguments that the manufacturer's interests were adequately represented by individual gun owners). In other words, the Government sought to keep firearms manufacturers out of this litigation based on assurances that they would obviously be covered by any eventual APA remedy. But now, the Government seeks to deny that remedy to any firearms manufacturers who were not part of this litigation. The Government cannot be permitted to have its cake and eat it too.

The vacatur remedy also preserves judicial and agency resources. The Government says there are "[t]ens of millions of firearm owners" and "80,000 licensed firearms manufacturers and dealers around the country." Application for Stay 37.

Yet the Government does not explain how it will administer two opposing standards—one for parties to the litigation and one for non-parties—across such a vast number of individuals and companies, or how it would distinguish those who are covered by the more limited injunction it proposed and those who are not. Nor does the Government explain why the nation's courts should be burdened with the inevitable "flood of duplicative litigation" from entities seeking protection from a rule that another federal court has already held facially invalid. *Nat'l Min. Ass'n*, 145 F.3d at 1409.

Finally, vacatur protects limited private resources. As Justice Kavanaugh explained in a similar context, "[i]t would be wholly impractical—and a huge waste of resources—to expect and require every potentially affected party to bring pre-enforcement [APA] challenges against every agency order that might possibly affect them." *PDR Network*, 139 S. Ct. at 2061 (concurring opinion). And "it 'is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation—especially small [companies] scattered across the country—would have knowledge of its promulgation or familiarity with or access to the Federal Register.'" *Id.* at 2061–62 (quoting *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 290 (1978) (Powell, J., concurring)); *see also Nat'l Min. Ass'n*, 145 F.3d at 1409 (explaining not all parties are well resourced enough to litigate their rights against the federal government). By providing for the vacatur remedy, Congress ensures that these parties are protected from federal overreach as well.

CONCLUSION

For the foregoing reasons, the Court should deny the Application for a Stay.

Respectfully submitted,

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