Nos. 19-431, 19-454

IN THE

Supreme Court of the United States

LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA AND STATE OF NEW JERSEY,

Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA AND STATE OF NEW JERSEY,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third 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 forthcoming *The Power to Vacate a Rule*, Geo. Wash. L. Rev. (2020), which will address the scope of the federal courts' power to "set aside" agency regulations, and *The Lost History of the "Universal" Injunction*, 133 Harv. L. Rev. 920 (2020), which assesses the history and constitutionality of nationwide injunctions.

The government's petition raises the question whether a court may stay the effective date of federal agency action under the APA while litigation is pending. *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 staying the effectiveness 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 filed blanket consents to the filing of *amicus* briefs with the Court.

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

courts to issue nationwide injunctions not only is constitutional but squares entirely with traditional equity practice.

ARGUMENT

I. THE APA AUTHORIZES UNIVERSAL RELIEF FROM REGULATORY ACTION.

A. The APA Authorizes Courts To "Set Aside" Regulations In Their Entirety And To "Stay" Their "Effective Date" Pending Litigation.

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). These provisions authorize the reviewing court to "set aside" "the whole … of an agency rule" held "unlawful." Rules are not "set aside *as to the plaintiffs*," *contra* Br. for Profs. Bagley and Bray as *Amici Curiae* 14 ("Bagley-Bray Br."); Gov't Br. 49. Rules are set aside, full-stop. That relief—vacatur—erases the rule, restoring the status quo ante.[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

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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*

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 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 had 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

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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).

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]

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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.").

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").

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 threatened with losses of licenses under 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 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

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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).

[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.

that result finds further support in legislative history. The APA's drafters intended the statute's judicial review provisions "to ensure the complete coverage of every form of agency power, proceeding, action and inaction." S. Rep. No. 79-752, at 197-98 (1945) (Senate Judiciary Committee Report). They understood these provisions to allow litigants to show that "a rule … is invalid," including in a case (as here) in which a rule was promulgated through informal rulemaking. *Id.* at 214 (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 may show the facts upon which he predicates such invalidity*." (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 re-

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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).

duce 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 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 others areas where the 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

[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 DC Circuit

been interpreted to authorize a reviewing court to universally vacate invalid rules or orders. Had Congress been concerned about the courts' broad reversals of regulations 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 regulations, the APA further authorizes courts to prevent regulations from coming into effect 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," so by its plain terms Section 705 allows a reviewing court to issue appropriate process to postpone an entire rule's "effective date." This Court has itself exercised that power to preserve the status quo by staying entire rules pending judicial review. See Order, *West Virginia* v. *EPA*, No. 15A773 (U.S. Feb. 9, 2016). And it has declined to disturb lower-court decrees staying rules universally. See *FCC* v. *Iowa Utils. Bd.*, 519 U.S. 978 (1996) (mem.).

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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 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).

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) & Fed. R. Civ. P. 65).[10]

B. *Amici*'s Suggestion That Courts May "Set Aside" Regulations Only As To Particular Plaintiffs Defies Text And Precedent.

1. *Amici* Bagley and Bray and the government contend that, before the APA, it was "conventional" judicial practice to "set aside" agency action only as to a suit's plaintiffs. So, they say, the APA's "set aside" language should be read only to authorize plaintiff-specific relief absent a clear statement allowing broader relief. Bagley-Bray Br. 14; Gov't Br. 49.

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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.").

Amici draw the wrong inference from pre-APA "conventional" practice. That adjudication, rather than rulemaking, was more prevalent in the pre-APA period (as *amici* emphasize) is not relevant; it sheds no light on the pertinent question: what type of relief did courts offer when broad-gauged regulatory action *was* under review? As discussed, 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. Strikingly, neither the government nor *amici* cite even a single case in which a court reviewing a regulation used the APA's language, "set aside," in the unusual sense they urge as its natural meaning: to "set aside" the regulation only "as to a particular plaintiff."[11] That is because the natural, and "conventional," meaning of "setting aside" a regulation is to invalidate it entirely.

Amici also have it backwards in urging that a clear statement was required for Congress to grant equitable authority to review agency action. The governing rule was the opposite, for as this Court had repeatedly emphasized in the run-up to the APA's enactment, 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.

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[11] *Virginia Society for Human Life, Inc.* v. *FEC*, 263 F.3d 379, 393-94 (4th Cir. 2001) (cited at Bagley-Bray Br. 12) 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," as *amici* would have it. 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.

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. 79-180, at 275 (1946) (House Judiciary Committee Report). No "clear statement" of broad remedial authority was required for courts to have that power under the APA. But it anyway would not matter if a clear statement was required, 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 understanding 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 clear statement that *amici* demand.

2. *Amici* also suggest that the APA's grant of "set aside" authority must be plaintiff-specific because Section 706 allows a court to set aside "agency action, findings, and conclusions," and "findings" and "conclusions" are subjects of appellate review and are specific to a plaintiff. So, because a word is known by its fellows, "agency action" must also be plaintiff-specific. But their premise is wrong, for "findings" and "conclusions" need not be specific to a plaintiff. A perfect example is *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956), where the agency made "findings" about which product classes were "agricultural" and so exempt from carriage permitting requirements, and this Court found that the agency's action was subject to pre-enforcement review. *Id.* at 41-42. Because review of "findings" is not limited to the review of a lower

court's findings in a particular case, Congress's inclusion of "findings" does not suggest that Section 706 relief can extend no further than enjoining agency action against a plaintiff.

3. *Amici* next suggest that because appellate courts often "set aside" (meaning vacate or reverse) lower court orders and judgments, the APA's use of that phrase can only have been intended to refer to plaintiff-specific relief. See Bagley-Bray Br. 12-13. Certainly, "set aside" was used in that particular way. But it was also, at the time of the APA's enactment, used to denote judicial invalidation of generally applicable laws and regulations.

The 1941 Attorney General's Report, written by a venerated group of experts in administrative law, 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 argument to aid in judging it; the entire administrative record must be examined." *Id.*

Congress likewise understood that federal laws and regulations 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 Emer-

gency 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 the appellate-review, plaintiff-specific sense to which *amici* point, but instead refer to judicial review of laws or regulations. So *amici* are wrong to suggest that "set aside" was a term of art limited to the reversal of judicial judgments and narrow-gauged orders.

4. *Amici* further stress that the APA's review scheme was largely modeled on appellate court review of district court judgments. See Bagley-Bray Br. 12-13. But that model supports, rather than undermines, reading the APA to allow universal relief. The APA defines "rule[s]" and "order[s]" as types of "agency action," 5 U.S.C. 551(13), and it treats *both* rules and orders as analogous to a lower-court decision that can be set aside and vacated by an appellate court, 5 U.S.C. 706. When an inferior court's decision is vacated by a superior court, that decision no longer has force. Similarly, when an agency's defective rule is vacated by a reviewing court under the APA, the rule no longer has force. See, *e.g.*, *Action on Smoking & Health*, 713 F.2d at 797 (so holding); 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 a party.

5. *Amici* are, 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 Bagley-Bray Br. 11. The statute's language says no such thing. Beyond that, Rule 23 was 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. Rule 23's adoption 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 F. Supp. 831, 833-34 (S.D.N.Y.), *aff'd*, 419 U.S. 987 (1974); *Sepulveda* v. *Block*, 1985 WL 1095, at *5 (S.D.N.Y. 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). *Amici*'s contention (at 11) that today Rule 23 "takes up" the "entire waterfront" 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).

Taylor v. *Sturgell*, 553 U.S. 880 (2008)—treated by *amici* (at 11) as standing for the proposition that Rule 23 preempts the possibility of universal relief under the APA—means no such thing. *Taylor* rejected the idea that preclusive effect could be imposed on a non-party outside the Rule 23 framework. But when a court issues a nationwide injunction, it does not *preclude* any *non*-party from doing anything. The court's decree only orders the defendant before it—the federal officer or agency—to refrain from violating the law. In short, the APA's clear statutory language continues to allow courts to "set aside" regulations and to enjoin them pending a decision on whether to set them aside. Rule 23 does not change that.

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

1. *Amici* stress that allowing courts to enjoin or "set aside" regulations with national effect has negative "practical consequences." Bagley-Bray Br. 18. 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 consequences" 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 in all cases. 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 regulations 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 regulations will not challenge them and the government will be free to treat illegal regulations 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 regulations.

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 and *amici*'s policy arguments for eliminating the relief authorized by the APA, they are wrong. The government's "running the

table" problem (at 45), to the extent such a problem exists, still remains even if requests for broad relief are channeled into Rule 23 suits as *amici* would like to see happen. For example, the government had to run the table 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 Bagley-Bray Br. 18, and injunctions issuing without a "developed factual record," see *id.* at 19, are overblown. The former is an inevitable byproduct of *all* litigation in a multi-district system that broadly permits plaintiffs to lay venue, and the latter ignores that in APA cases the record is ready-made by the agency, see *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973).[12]

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[12] Despite alleged concerns about percolation, the government notes (at 43) that other courts have opined on the rules at issue here. *Amici*'s concerns about "conflicting" injunctions, *see* Bagley-Bray Br. 23-24 (citing *DeOtte* v. *Azar*, 393 F. Supp. 3d 490, 512-14 (N.D. Tex. 2019)), are similarly misplaced. In *DeOtte*, the district court enjoined the application of the contraception mandate to a set of entities, 393 F. Supp. 3d at 513-15, whereas the district court in this case considered the validity of exemptions from that mandate. There is thus no conflict—and the same situation could equally have arisen if this case (like *DeOtte*) was a Rule 23 class action.

Amici's suggestion that the practice of "nonacquiescence" supports rejecting universal relief against rules is misguided. Nonacquiescence involves *adjudications*, not *rules*—it generally occurs "when [an] agency makes policy through administrative adjudication." Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 688 n.35, 720 n.215 (1989). It means that the agency continues to adjudicate subsequent cases under its own policy even after a reviewing court disapproves that policy in a separate case. *Id.* at 716 n.196. The difference is critical. When a court sets aside an *adjudication*—say, a Social Security disability claim—that decision may *implicate* an agency's generally applied standards for conducting adjudications, but all that is formally being set aside by the reviewing court is the final agency action at issue in the case. See, *e.g.*, *Baeder* v. *Heckler*, 768 F.2d 547, 553 (3d Cir. 1985). When a rule is under review, there is only one agency action for the court to review—the rule itself. If that rule is set aside, an agency that carried on as if the rule still existed would not be "refusing to acquiesce"; it would be disobeying the mandate of the court that set aside the rule. That is why agencies do not engage in this form of "nonacquiescence," and also why the APA should not now be read to allow agencies to disregard (not "nonacquiesce in") a decision setting aside a rule.

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 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. 43-44; Bagley-Bray Br. 28). Using this case as an example, the complaining parties have standing to complain about the regulations at issue, and the district court had jurisdiction over the government and express statutory authority to order it to stay its regulation. That the *effect* of a stay of the agency's rule 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). There is no standing problem with a plaintiff obtaining such an injunction, even though (like the injunction here) it protects non-parties who would otherwise be harmed by the defendant's illegal acts.

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.[13] There is no standing problem with a court granting judgment for the plaintiff even though the judgment's effect helps non-plaintiffs.

Further, no party here appears to dispute that in a class action, a court may issue nationwide relief. That demonstrates that whatever complaint there may be

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[13] *United States* v. *Mendoza*, 464 U.S. 154 (1984), 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.

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 and *amici* also suggest 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 "set aside" rules and "may issue all necessary and appropriate process" to "stay the[ir] effective date."

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

1. Modern-era nationwide injunctions continue 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.[14] 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 the traditions of equity.

Amici contend 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-

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[14] *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").

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 … who were not parties to it"). *Amici* cite cases of the first type (at 10), but the second type is the correct analog to this case, where 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 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). *Amici* minimize that injunction as merely enforcing "the government's contractual commitment," but their argument is

one of constitutional infirmity, and they have no theory for why the Court had the power to issue such an injunction if (as they believe) the plaintiffs had no standing to seek it and traditional equity would forbid it.

The courts reconfirmed their willingness to issue injunctions protecting non-plaintiffs from enforcement of federal law 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 against federal statutory law 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).[15]

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[15] 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

3. Courts similarly and repeatedly enjoined the enforcement of state law in this period. 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 such injunctions.

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

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enforcement of laws. *See Ex parte Young*, 209 U.S. 123, 126 (1908). Neither the government nor *amici* suggest that the Constitution requires this Court to walk back *Young* just because it represented an evolution of equity practice.

Nor is there anything important to be learned from the "absence" of nationwide injunctions during the "New Deal era." *Contra* Bagley-Bray Br. 3. Nationwide injunctions existed both *before* and after the New Deal. 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 broad injunction on *standing* grounds); *Frothingham* v. *Mellon*, 262 U.S. 447 (1923) (affirming dismissal 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).

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 an 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 enforcement 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. *Contra* Gov't Br.

46 (asserting, without citation, the government's untested assertion that more nationwide injunctions have been issued in the last 3 years than in prior years combined).[16] What is new is the contention that such universal relief could only be sought through a Rule 23 class 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 regulations and to stay their effective date, with universal effect, while litigation is pending.

Respectfully submitted,

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[16] 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 Attorney General.