No. 26-426

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
PETITIONERS

v.

D.V.D., ET AL., RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF PROFESSOR PHILIP HAMBURGER AND THE NEW CIVIL LIBERTIES ALLIANCE AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

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QUESTIONS PRESENTED

1. Whether the district court had jurisdiction over Respondents' claims.

2. Whether the district court had authority to enter classwide declaratory relief and APA vacatur under 8 U.S.C. § 1252(f)(1).

3. Whether the Government's Guidance on third-country removals is unlawful under 8 U.S.C. § 1231(b), the Due Process Clause, or FARRA/CAT and its implementing regulations.

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What does the Administrative Procedure Act ("APA") mean when its Section 706 requires a court to "set aside" unlawful or unauthorized agency actions? Is it speaking of a remedy—indeed, an injunction or other equitable remedy—against a party? Or is it instead echoing the super-

1. No counsel for a party authored any part of this brief. And no one other than *amici curiae*, their members, or their counsel financed the preparation or submission of this brief.

visory power of appellate courts over lower courts, attributing to an appellate court a power to supervise agencies in the same manner that it ordinarily would supervise lower courts? This *amici curiae* brief will address these questions to answer the second Question Presented, as added by the Court when it granted certiorari in this case.

The Solicitor General's office,[2] as well as some scholars and members of this Court,[3] say that the duty of courts to "set aside" unlawful agency action is a remedy akin to an injunction—a universal injunction even—thus subjecting it to all the limits on equitable remedies and tarring it with all that seems wrong with universal injunctions. These critiques might, possibly, seem to make sense if "setting aside" really were a sort of equitable remedy or universal injunction.

But a statute authorizing reviewing courts to "set aside" unlawful "agency action" does not deploy the language of equitable remedies directed at parties. Rather,

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2. Pet. Br. 29 n.5; Pet. at 11–24, *Department of Health and Human Services v. Texas Medical Association*, No. 26-491 (filed Oct. 14, 2026).

3. *See* John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 Yale J. on Reg. Bull. 37 (2020); John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 Yale J. on Reg. Bull. 119 (2023); *United States v. Texas*, 599 U.S. 670, 693–704 (2023) (Gorsuch, J., concurring in the judgment); *But see* T. Elliot Gaiser, Mathura Sridharan & Nicholas Cordova, *The Truth of Erasure: Universal Remedies for Universal Agency Actions*, U. Chi. L. Rev. Online (Aug. 28, 2024), https://lawreview.uchicago.edu/online-archive/truth-erasure-universal-remedies-universal-agency-actions [https://perma.cc/62VAP54B] (arguing that Prof. Harrison's interpretation of Section 706's 'set aside' language is "implausible").

the phrase "set aside," as used in the APA, is borrowed from and refers to the practice of courts reviewing judgments—either their own judgments or those of other courts. Once that is recognized, it becomes clear that courts have not only the power but also the duty to set aside agency actions to the extent they are unauthorized or otherwise unlawful. Indeed, the formal vacatur of an unauthorized or otherwise unlawful agency action is necessary to protect constitutional freedoms and Congress's role as legislator.

INTEREST OF AMICI

Philip Hamburger is the Maurice and Hilda Friedman Professor of Law at Columbia Law School and an historian of constitutional law. His *Law and Judicial Duty* (Harvard Univ. 2008) showed that early Americans understood judges to have an office, or duty, of independent judgment in accord with the law of the land—this being the foundation for what long afterward came to be called *judicial review*. In his book *Is Administrative Law Unlawful?* (Univ. of Chicago 2014), Hamburger traced the development of administrative power. He showed that administrative power consists of irregular legislative and judicial pathways that evade the Constitution's regular avenues of power and that the Constitution was framed to bar such evasions. He is deeply concerned that the Solicitor General's misinterpretation of APA Section 706 would encourage unconstitutional agency action and would cripple the ability of Americans to protect their constitutional freedoms.

The New Civil Liberties Alliance (NCLA) is a nonprofit, public-interest law firm founded to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other means. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to have laws made by the nation's elected lawmakers through constitutionally prescribed channels rather than executive-branch officials acting outside those channels. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because federal administrative agencies have trampled them for so long.

NCLA aims to defend civil liberties primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

NCLA takes no position on the jurisdictional or constitutional due-process arguments that appear in the Solicitor General's brief. NCLA's interest in this litigation arises from the Solicitor General's misguided insistence that the phrase "set aside" in Section 706 of the APA cannot authorize universal vacatur of "agency action." Pet. Br. 29 n.5. The Solicitor General has asked the Court not to resolve the meaning of "set aside" in this litigation, and

NCLA agrees with the Solicitor General that it would be ill advised for this Court to weigh in when the parties have not locked horns on the issue. But NCLA nonetheless wishes to dispel the notion that the APA forbids courts to formally vacate agency rules—as this revisionist understanding of Section 706 is gaining traction in academic and judicial circles. *See* Harrison, *supra*; *Texas*, 599 U.S. at 693–704 (Gorsuch, J., concurring in the judgment); *Life-Link Found., Inc. v. Kennedy*, No. 8:25-cv-2042, 2026 WL 2914221 (M.D. Fla. Sept. 29, 2026).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 706 provides, in relevant part:

> The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;

> (E) unsupported by substantial evidence in a case subject to sections 556 and 557of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

ARGUMENT

I. CONGRESS ADOPTED A JUDICIAL MODEL OF AGENCIES, BY WHICH THEIR RULES ARE REVIEWED IN THE MANNER OF TRIAL COURTS' JUDGMENTS

The APA's use of the phrase "set aside" draws upon familiar language about the power of appellate courts to "set aside" or "vacate" the action of a lower court, thereby giving appellate courts a similar power over administrative agencies. This is clear from the language and context of 5 U.S.C. § 706.

The relationship between appellate courts and trial courts served as the model for the courts' relationship to federal agencies. This judicial model has been the foundation of federal administrative structures since the early twentieth century. *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 Colum. L. Rev. 939, 940 (2011) (explaining how judicial review of agency action is "built on the appellate review model of the relationship between reviewing courts and agencies," which "was borrowed from the understandings that govern the relationship between appeals courts and trial courts in

civil litigation"); Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 Colum. L. Rev. 253, 258 (2017) ("The APA instructs federal courts to 'hold unlawful and set aside' arbitrary or unlawful agency action. When the APA was enacted in 1946, that instruction reflected a consensus that judicial review of agency action should be modeled on appellate review of trial court judgments … . Just as a district court judgment infected with error should be invalidated and returned for reconsideration, so too with agency action." (footnotes omitted)). Congress adopted this model in Section 706 of the APA, and it remains the key to understanding that section's phrase "set aside."

From 1887 onward, Congress authorized one commission after another to hold hearings in a judicial manner. On the basis of these hearings, the commissions both made rules and adjudicated—in what came to be known as "formal rulemaking" and "formal adjudication." This judicial model of agency proceedings, which included the sorts of activities otherwise done in Congress and the courts, became the basis for courts to review agency actions in a manner similar to an appellate court's review of trial-court proceedings.

The early decisions of the Supreme Court in this area recognized this judicial model of federal agencies. As the Court summarized in the syllabus of one of its cases, relied upon here for historical description, not as matter of law: "The Act to Regulate Commerce, as amended by the Hepburn Act, gives a right to a full hearing on the subject of rates, and that confers the privilege of introducing testimony and imposes the duty of deciding in accordance

with the facts proved." *Interstate Com. Comm'n v. Louisville & Nash. R.R. Co.*, 227 U.S. 88, 88 (1913). The Court added that these agency hearings were reviewable in a structure akin to an appellate court's review of trial-court proceedings: "Administrative orders quasi-judicial in character are void if a hearing is denied; if the hearing granted is manifestly unfair, if the finding is indisputably contrary to the evidence, or if the facts found do not, as matter of law, support the order made." *Id.*

John Dickinson's 1927 treatise explains that the judicial model of agencies, including the power of courts to set aside (*i.e.*, formally vacate) their decisions as if they were jury verdicts, was essential to preserving the supremacy of law and thus the legitimacy of the administrative state: "The door through which a way is properly opened for judicial interference with administrative application of standards is the well-established doctrine that a determination will be set aside which is without evidence to support it. This is a rule obviously borrowed from the law governing court control of the verdicts of juries." John Dickinson, *Administrative Justice and the Supremacy of Law in the United States* 320 (1927).

The Attorney General's 1941 Report on Administrative Procedure in Government Agencies, which laid the foundation for the APA, likewise recognizes the judicial model. It explains that regulation, not just adjudication, took the form of a trial, subject to judicial review: "Some of the recent statutes conferring rule-making power … require that the regulations in question be based upon findings of fact; that these, in turn, be based upon evidence made of record at a hearing; and that a reviewing

court set aside a regulation not only for failure of the findings to support it, but also for failure of a finding to be based upon substantial evidence in the record." Attorney General's Committee on Administrative Procedure, U.S. Dep't of Justice, *Administrative Procedure in Government Agencies* 116–17 (1941) [hereinafter "Report"]. After certification of the administrative record to the court, "[a] judgment adverse to a regulation results in setting it aside." *Id.* at 117.

This was a "novel type of judicial review" because it dealt with "regulations," not "an ordinary trial." *Id.* The key point is that it treated regulation-making like the decision of a trial court, which could be set aside (*i.e.*, formally vacated) on review by a higher court.

Section 706—the APA's provision authorizing judicial review of agency action, which includes the phrase "set aside"—clearly built upon this judicial model. That section concludes: "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party … ." This spells out that the agency is being treated like a trial court, which develops a record subject to review by a higher court.

The Committee's Report, as might be expected, objected to suggestions that an agency should be subject to the same standard of review as a trial court: "Judicial review of administrative decisions might be expanded to include a review of the findings in the light of the weight of the evidence, just as a trial judge may set aside a jury's verdict on this ground . . . . but the plan is unquestionably against the present trend of administrative legislation …

." Report 250. Agencies were to be reviewed like courts, but not so rigorously.

This vision of agencies as if they were courts is apparent through much of the APA, including its requirements of finality and exhaustion. Section 704 restricts judicial review to "final agency action for which there is no other adequate remedy in a court" and requires exhaustion of agency remedies. Similar is the tendency of appellate courts to "remand" proceeding to agencies. Agencies are thus treated like lower courts, not like parties.

In this context, when Section 706 requires reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions," it clearly is speaking about setting aside an agency's action as if it were a lower court. Tellingly, this setting aside is required when the agency action is found to have failings akin to those of trial courts:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706. These categories are not all exactly the errors of trial courts, but even where they deviate from the traditional errors of trial courts, they are the sort of errors that justify appellate courts reversing and setting aside (*i.e.*, formally vacating) the decisions of trial courts. Setting aside is part of the judicial model, in which appellate courts treat agencies roughly like trial courts.

Of course, it is open to doubt whether this treatment of agencies as if they were courts is fully constitutional. The validity of vacatur, however, is a different question. The Solicitor General argues that Section 706's use of the phrase "set aside" refers to injunctions or something analogous to injunctions against a party. But federal law from the early twentieth century through the present, including Section 706, gave appellate courts the sort of supervisory power over agencies that these courts ordinarily wielded over trial courts. Section 706's words "set aside" are therefore inescapably part of the judicial model of agencies and any attempts to deny this framework wrest those words out of the context that throughout the twentieth century was assumed to legitimize administrative power.

II. UNDER THE APA, COURTS HAVE A DUTY TO "SET ASIDE" AGENCY ACTION IN THE SAME WAY THAT THEY SET ASIDE LOWER-COURT DECISIONS

As one might expect from the judicial model of agencies, the phrase "set aside" in Section 706 means the

power of a court to set aside, or vacate, the act of an agency in the same manner that an appellate court could set aside, or vacate, the action of a lower court. It has been suggested by academics and the Solicitor General that those words are ambiguous or that they mean something akin to an injunction or other remedy directed at parties. But those words had a very different meaning in treatises and countless judicial decisions on the supervisory power of courts over other courts, and Section 706's phrase "set aside" must be read in light of that conventional meaning.

Dictionaries make clear that to "vacate" or "set aside" was typically to annul or hold void a legal proceeding or decision. Kinney's Law Dictionary said that to "set aside" was primarily "[t]o annul, make void or vacate," and similarly "vacatur" was "a rule or an order by which a proceeding is vacated." J. Kendrick Kinney, *A Law Dictionary and Glossary* 620, 677 (1893). Bouvier's Law Dictionary explained that to "vacate" was to "annul; to render an act void: as, to vacate an entry which has been made on a record . . ." and that to "set aside" was "to make void: as, to set aside an award." *Vacate*, Bouvier's Law Dictionary: Student Edition (1928); *set aside*, Bouvier's Law Dictionary. Black's Law Dictionary similarly observed: "To set aside a judgment, decree, award, or any proceedings is to cancel, annul, or revoke them." *See set aside*, Black's Law Dictionary (2nd ed. 1910), https://blackslaw.io/.

The term "set aside" could be used interchangeably with "vacate," "annul," and "reverse" to refer to the supervisory power of an appellate court to hold another court's judgment void. *See, e.g.*, 1 Henry Campbell Black, *A Treatise on the Law of Judgments* 408 (1891); *see also*

A.C. Freeman, *A Treatise on the Law of Judgments* 590 (5th ed. 1925) ("The power to vacate a judgment carries with it the power to set aside the verdict on which it was founded"); *id.* at 616 ("suits seeking to set aside or annul judgments"); *id.* at 1407 ("subsequent proceedings to vacate or set aside the judgment"); *id.*at 1524 ("reversed or set aside").

Often these terms were used together, as if for emphasis, as in to "set aside and vacate" or to "vacate and set aside." A search in Google Books for the first phrase in publications appearing from 1930 to 1950 has about 3,400 results.[4] The second produces about 15,200 results.[5] Overwhelmingly, the prevailing context is an appellate court vacating or setting aside the judgment or other action of a court.

A court could set aside its own judgments, as "[a]ll judgments, decrees or other orders of a court are under its control during the term and may be set aside, vacated, modified or annulled by it." Freeman, *Judgments* at 377. A court could also set aside the judgments of courts subject to its supervision—this being part of the court's supervisory power over another court.

Until a court's judgment was reversed or set aside, the judgment remained binding. 2 Henry Campbell Black, *A Treatise on the Law of Judgments* 709 (1891) ("Like any other adjudication, a judgment against a garnishee, no

4. Google Books, "set aside and vacate" (Oct. 26, 2026), https://bit.ly/4jM8omr.

5. Google Books, "vacate and set aside" (Oct. 26, 2026), https://bit.ly/4zkBbTY.

matter how erroneous, is final and binding until it is reversed or set aside."). Once the judgment was set aside or reversed, however, it was void, in the sense of devoid of obligation.

The judgment that another court's judgment was to be set aside was distinct from any injunctive or equitable remedy, and lawyers understood this: "Quite generally bills and complaints to set aside or impeach the judgment" are "accompanied … with a prayer that its enforcement be enjoined." Freeman, *Judgments* at 613–14. Setting aside a judgment and enjoining its enforcement were different. Similarly, it was said that "even an inequitable judgment will not be set aside nor will its enforcement be enjoined where it was the result of the complaining party's fault or inexcusable neglect." *Id.* at 2500.

To be sure, proceedings to set aside the judgment of another court were sometime loosely said to be "equitable," in sense that they were to secure justice, but they were not equitable in the sense of being within equitable jurisdiction or involving an equitable remedy. Speaking of the proceedings of a court to vacate its own judgments, Freeman explained: "While proceedings to set aside judgments are often regarded as equitable in their nature, unless they are actually or in legal effect suits in equity, they are not governed by the equitable rule that the existence of another adequate remedy bars the right to relief. If the statute gives the right to have a judgment vacated under given conditions, the fact that there may be a concurrent remedy by appeal or otherwise is immaterial." Freeman, *Judgments* at 402 (footnotes omitted). To "set aside" was

to annul the action of a court, not to grant an injunction or other equitable remedy.

There is no reason to think that the APA abandoned the conventional and dominant understanding of "set aside." The APA's statement that courts shall "set aside" unlawful action was phrased in the familiar language that almost all courts, state and federal, used in reviewing the actions of other courts. Section 706 adopted that phrase within its judicial model of agencies—treating them as if they were lower courts for purposes of review—and it did so without disclaiming the conventional and dominant usage. In light of that prevailing usage and the judicial model of agencies, no one in drafting or adopting the APA could have been in any doubt about the meaning of "set aside."

To "set aside" an agency action had the same import as to "set aside" a court decision. Setting aside was an utterly familiar part of the ordinary supervisory power of courts over the judicial system, not a remedy, let alone an injunctive or other equitable remedy. Not merely an academic theory, or the product of selective evidence, this meaning of "set aside" was familiar throughout the federal and state court systems, including for reviewing agency actions. So, when the APA adopted the phrase "set aside" in its judicial-review section, it clearly required a court in reviewing the action of an agency to set it aside in the same way, and to the same extent, as it would set aside the decision of a lower court.

III. SETTING ASIDE IS SUPERVISORY, NOT INJUNCTIVE OR OTHERWISE REMEDIAL

The history of statutes authorizing judicial review of agencies clearly shows that to "set aside" an agency action was part of the appellate review of agencies, not a remedy available for one party against another. The scholarship of Professor Emily Bremer already argues that "vacatur is not an equitable remedy but an appellate determination." Emily S. Bremer, *Vacatur Within the Appellate Model of Judicial Review*, 136 Yale L.J. (forthcoming 2026), available at https://perma.cc/J738-NP35. And even clearer evidence of that point can be found in the contrast between the two leading types of authorizing statutes.

The statutes authorizing district-court review authorized both enjoining and setting aside agency action. The statutes authorizing appellate review of agency action authorized only setting aside, not injunctions. The APA adopted the latter approach.

The Attorney General's Report on Administrative Procedure in Government Agencies (1941) already recognized the difference between these two lines of statutes. Discussing appeals to district courts, the Report observed that "the Hepburn Act in 1906 conferred jurisdiction on the Federal district courts to 'enjoin, set aside, or annul' orders of the Interstate Commerce Commission." Report at 82. The Report then explained that appellate-court review had come to seem preferable: "A method of review which has found considerable favor in recent legislation is that first enacted in the Federal Trade Commission Act in

1914, that is, review in a Circuit Court of Appeals with discretionary appellate jurisdiction in the Supreme Court." *Id.* at 83.

This appellate review, initiated by the Federal Trade Commission Act and given effect by a long line of statutes, dropped the word "enjoin" and, instead, merely authorized a circuit court to "set aside" or otherwise adjust agency action. The 1914 statute authorized circuit courts merely "to affirm, set aside, or modify the order of the commission." Federal Trade Commission Act, ch. 311, 38 Stat. 717, 720 (1914). Similarly, for example, the Securities Exchange Act of 1934 provided that the courts of appeals "shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part." Securities Exchange Act of 1934, ch. 404, § 25(a), 48 Stat. 881, 902. The National Labor Relations Act of 1935 (Wagner Act) similarly authorized courts of appeals "to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." National Labor Relations Act of 1935, ch. 372, § 10(f), 49 Stat. 449, 453–55. The Investment Company Act of 1940 and the Investment Advisers Act of 1940 authorized appellate courts "to affirm, modify, or set aside." Investment Company Act of 1940, ch. 686, § 43(a), 54 Stat. 789, 844; Investment Advisers Act of 1940, ch. 686, § 213(a), 54 Stat. 847, 855.

There were thus two lines of statutes, one giving district courts power to "enjoin" and to "set aside" etc., the other giving appellate courts power merely to "set aside" and so forth. The APA, as anticipated by the Attorney General's Report, adopted the appellate model of review

and its limitation of the courts to supervising agencies as if they were trial courts.

The remedial vision of setting aside, which would have this court imagine it is issuing an injunction against a party, collides with the overwhelming evidence that to "set aside" is part of the appellate supervision of agencies as if they were lower courts. Not a remedy, let alone an injunction, the power to "set aside" is the supervisory power to vacate lower court or agency action.

Of course, even when agencies were treated as trial courts, they remained parties to the proceeding—a constitutional conundrum that still looks incongruous. The district-court-review statutes therefore treated agencies as ambidextrous—authorizing both injunctions against them as parties and the setting aside of their actions as if they were lower courts. The APA, however, in adopting the appellate-court approach, merely authorized setting aside. In other words, it confined itself to the judicial model of agencies, not the party model of agencies.

A court must therefore set aside agency action without regard to equitable defenses and other concerns about remedies. Setting aside is not an injunction or other remedy, and to conflate this supervisory authority of appellate courts with injunctive remedies against parties is more than mere confusion; it is a category error.

IV. DISTRICT COURTS HAVE GREATER POWER REGARDING AGENCY RULES THAN THEY DO OVER STATUTES

It makes perfect sense that Congress would give federal district courts the ability to "set aside" unlawful agency rules under Section 706, even if one does not think

that district courts have (or should have) the ability to set aside unlawful federal statutes. A statute typically arrives in federal court having gone through both houses of Congress and having obtained the President's signature. That is, it has gone through the constitutionally prescribed processes for creating law that binds the populace, which means that two separate elected branches of the federal government have already, at least implicitly, determined that the law is constitutional. So it is for good reason that a presumption of constitutionality attaches to a statute that is being challenged before a federal district court.

By contrast, in order for a rule to be published in the Federal Register, it does not go through either house of Congress, so the legislative branch has not necessarily blessed it at all. In terms of the executive branch, the President does not sign off on rules. Sometimes the secretary of the agency has not signed off on the rule. Sometimes not even the general counsel of the agency has signed off on the rule. It is not required for a rule to be published in the Federal Register that it have been signed off on by the head of the agency.[6] It is more a matter of what the internal rules are at the particular agency or department as to who has to sign off on it before it goes into

6. *See* Neomi Rao, *The Hedgehog & the Fox in Administrative Law*, 150 Daedalus 220, 228 (2021) ("Faced with a significant volume of regulatory responsibility, agency heads sometimes subdelegate their statutory authority, with varying degrees of residual oversight. Agency staff can thus seize the opportunity to identify a problem and write up an advanced notice of proposed rulemaking, then a notice of proposed rulemaking, and ultimately a final rule. Depending on the agency and its organization, and the importance of the regulation, such activity might be reviewed by senior officials[.]")

the Federal Register. In a big cabinet agency like the Department of Health and Human Services, for example, there are rules that get into the Federal Register all the time that the Secretary of HHS has not signed off on. Even fairly low-level, unelected bureaucrats sometimes have the power to promulgate regulations. For these reasons, no presumption of constitutionality attaches to an agency rule that is being challenged before a federal district court, and judges should not hesitate to set them aside when they are unlawful.

So, what happens when a rule reaches the federal district court and there is a person in court who has been injured by that rule, and that person claims that the rule is unconstitutional, or that the agency lacked statutory authority to promulgate it? That federal district court judge is potentially the first federal constitutional officer who has looked at this question in an independent way to determine whether this rule is lawful or not. If that judge decides that this rule was done without statutory authority or in violation of the constitution or in some procedurally defective or other unlawful way, the judge has a duty to set aside that rule. A judge who does so is not overcoming the will of at least half of Congress and an elected President. Rather, the judge might well be countermanding a single unelected bureaucrat—and standing up for the will of Congress at the same time.

It is not surprising then that Section 706 gave federal district judges the ability to set aside rules. Rules are not statutes. They do not have the imprimatur of the elected legislative branch nor the approval of the highest executive branch official. Administrative rulemaking is not

mentioned in the Constitution at all and it lacks the difficult-to-satisfy front-end constraints on lawmaking, so it is already of dubious provenance. To constrain the administrative state at all and to lend legitimacy to agency rulemaking, strong judicial review must remain as a backstop. District judges must have the whip hand to stop unauthorized or otherwise unlawful agency action. Otherwise, the Executive Branch will be able to outrun the courts. Congress gave district judges the power to set aside rules so that they would be able to police agencies that might otherwise get away with ignoring the will of Congress.[7]

V. APPELLATE COURTS HAVE THE CONSTITUTIONAL AUTHORITY AND DUTY TO SET ASIDE AGENCY ACTION TO THE EXTENT IT IS UNLAWFUL, WITHOUT INTERFERENCE FROM THE POLITICAL BRANCHES

The judicial power that the Constitution vests in the courts is accompanied by the judicial duty of each judge to exercise independent judgment in accord with the law—this being the heart of judicial office. *See* Philip Hamburger, *Law and Judicial Duty* (2008). Accordingly, when a judge reaches the conclusion that an agency action is unlawful, he has not only the power but also the duty to set it aside to the extent it is unlawful. This setting aside

7. T. Elliot Gaiser, Mathura Sridharan & Nicholas Cordova, *The Truth of Erasure: Universal Remedies for Universal Agency Actions*, U. Chi. L. Rev. Online (Aug. 28, 2024) ("If courts could not universally vacate agency action that unlawfully regulates with universal effect, then the Constitution's allocation of powers would be distorted by executive branch 'lawmakers' insufficiently accountable to either congressional or judicial review.").

of unlawful agency action is thus not merely a requirement of the APA; nor is the extent of setting aside left to the discretion of the judges. Instead, setting aside agency action, to the degree it is unlawful, is the natural and required consequence of finding such action unlawful. This is inherent in judicial power and duty, and Section 706 of the APA recognizes this duty by saying: "The reviewing court *shall … hold unlawful and set aside* agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law … ." 5 U.S.C. § 706 (emphasis added).

The Solicitor General suggests that only Congress or the agency itself can alter agency rules. But the judicial authority to set aside unlawful acts of lower courts or agencies is part of the judicial power, not a legislative or executive power, and it therefore cannot be confined by the political branches. Freeman explained:

> The power to vacate or set aside judgments and decrees, must be exercised solely by the judiciary. The legislature cannot set aside a judgment, nor can it empower any court to set aside a judgment which had been rendered and had passed beyond the control of the court prior the passage of the act; because in so doing the legislature is exercising judicial functions not accorded to it by the constitution . . .

Freeman, *Judgments* 395. From this perspective, it must be doubted whether, once Congress has given the courts jurisdiction over agencies, it can restrict a court from setting aside an unlawful agency action.

VI. FORMAL VACATUR OF UNLAWFUL AGENCY ACTION IS CRUCIAL TO PROTECT CONSTITUTIONAL RIGHTS

The statutory and constitutional duty to hold unlawful agency action void is essential for securing civil liberties. The establishment of administrative agencies altered the nation's constitutional structures in ways that eroded both the Constitution's structural freedoms and its enumerated rights. Accordingly, if administrative agencies are to enjoy legitimacy, they must be subject to a sort of judicial review that gives full effect to judicial findings that agency action is unlawful.

Agencies enjoy the advantages of exercising the government's tripartite powers. They regulate with their own rules and adjudicate their own enforcement prosecutions. Americans therefore need an effective mechanism to limit unlawful agency action, and the APA attempted to legitimize the administrative state by providing such a mechanism, basing it on the traditional duty of judges to set aside lower court judgments to the extent they are unlawful. The power of agencies to engage in rulemaking was premised on this understanding that reviewing judges would formally vacate agency action to the extent they deemed it unlawful. It is therefore worrisome that the Solicitor General is asking this Court to weaken the APA's judicial-oversight mechanism by misreading it as a declaratory or injunctive remedy directed at parties.

The Solicitor General's position would cast aside both the APA's judicial model of agencies and the APA's judicial review of agencies as if they were lower courts. His position confuses supervisory action against lower courts with

equitable remedies against parties. It defies the history of appellate review statutes, which dropped the word "enjoin" familiar from district court review and authorized circuit courts merely to "set aside" agency action. It denies the constitutional power and duty of judges to set aside lower court or agency action to the extent it is unlawful. It cuts off a crucial mechanism for preserving constitutional freedoms. And it undermines what little legitimacy was established for administrative agencies by subjecting them to the supervisory power of appellate courts.

CONCLUSION

The Court should reject the Solicitor General's proposed interpretation of "set aside" in Section 706 of the APA.

Respectfully submitted,

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