No. 26-491

IN THE
Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

TEXAS MEDICAL ASSOCIATION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF NEITHER PARTY

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2 Henry Campbell Black,
A Treatise on the Law of Judgments (1891)..... 23

A.C. Freeman,
A Treatise on the Law of Judgments
(5th ed. 1925) 23

Attorney General's Committee on Administrative Procedure, U.S. Dep't of Justice, *Administrative Procedure in Government Agencies* (1941)..... 18, 19

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INTEREST OF AMICUS CURIAE[1]

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself: jury trial, due process of law, and the right to live under laws made by the nation's elected lawmakers through constitutionally and statutorily prescribed channels, which is at stake in this appeal. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—because Congress, federal administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by reasserting 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 administrative state within the Constitution's United States is the focus of NCLA's concern.

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[1] Pursuant to Rule 37.6, no party's counsel authored any part of this brief. No person or entity, other than *amicus curiae* and its counsel, made any monetary contribution to fund the brief's preparation or submission. All counsel of record were informed of NCLA's intent to file this *amicus* brief at least 10 days before filing, on November 3, 2026.

NCLA's interest in this litigation arises from the Question Presented which aims at limiting statutorily mandated universal vacatur that has been relied upon by citizens, courts, and Congress to eliminate unlawful regulations for more than 75 years. Pet. (I). NCLA's interest is to demonstrate that the Petition itself presents good reasons to deny *certiorari*. NCLA also wishes to dispel the notion that the APA forbids courts to formally vacate agency rules as argued by the Solicitor General—as this pernicious, revisionist understanding of Section 706 is gaining traction in academic and judicial circles. *See* John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 Yale J. on Regul. Bull. 37 (2020); *United States v. Texas*, 599 U.S. 670, 693–704 (2023) (Gorsuch, J., concurring in the judgment); *LifeLink Found., Inc. v. Kennedy*, No. 8:25-cv-2042, 2026 WL 2914221 (M.D. Fla. Sep. 29, 2026).

SUMMARY OF THE ARGUMENT

This Petition has virtually none of the hallmarks of a *certiorari* worthy question. It flies in the face of Sup. Ct. R. 10 and, it appears, intentionally so. The interpretation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), to allow universal vacatur of unlawful agency rules has not only Congressional acquiescence but affirmative Congressional use and approbation. Rarely has a judicial interpretation of a statute been more affirmatively blessed by Congress. The proposed evisceration of the remedy provided by Section 706(2) would, as demonstrated by recent and even current litigation lead disastrously to both a multiplicity of suits across countless jurisdictions, widespread violation of constitutional rights, and an

unequal application of the law to similarly situated citizens. Finally, on the merits, the traditional view of Section 706(2) vacatur application is correct.

ARGUMENT

I. THERE IS NO CIRCUIT SPLIT FOR GOOD REASON

This Court's Rule 10 notes that "[a] petition for a writ of certiorari will be granted only for compelling reasons." *Id.* The key factor, relevant here, in considering such a grant is whether a "United States court of appeals" is in conflict with a sister Circuit on the same important issue or "has so far departed from the accepted and usual course of judicial proceedings … as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

The Solicitor General forthrightly admits that not only has the D.C. Circuit applied Section 706(2) to vacate and set aside unlawful regulations routinely, but "regional circuits" are following the same precedent. Pet. at 4; and 28 ("The absence of a circuit conflict should not preclude review.") The Solicitor General refers to these mere "regional circuits" as applying the rule only "recently." *Id.* There is no citation to the oldest of these "regional" circuits' oldest use of universal vacatur. *Id.* Lower courts following the D.C. Circuit's lead have been vacating agency rules under Section 706(2) since at least the 1980s. *See e.g., Abington Mem'l Hosp. v. Heckler*, 750 F.2d 242, 243 n.1 (3d Cir. 1984) (adopting district court's universal vacatur of Medicare reimbursement rules); *Brentwood Hosp. Inc. v. Schweiker*, Civ. A. No. 83–0502, 1985 WL 77591, at * 7 (W.D. La.) (recognizing after district court vacated Medicare reimbursement rule, former rule was applicable) (citing *Action on Smoking and Health v. CAB*, 713 F.2d 795, 797 (D.C.

Cir. 1983)). An unbroken practice across at least seven Presidential administrations can hardly be termed "recent." Yet, according to the Solicitor General, administrations only began objecting in 2009. Pet. at 23 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009)) and Gov't Br. at 40-43, *Summers*, *supra* (No. 07-463)).

The Government's explanation for why there is no circuit split—because it allowed vacatur in the D.C. Circuit—and its suggestion it was previously willing to grant the D.C. Circuit powers no other Circuit had, provide this Court with ample reason to reject *certiorari*. While it is fully within its power as a frequent litigator before the D.C. Circuit to challenge that circuit's interpretation of Section 706(2), "[t]he government ha[s] not historically challenged that practice in that forum, given that court's unique status." Pet. at 4. This is a practical admission that the Petitioner has not sought relief in lower courts before applying to this one. And its reason—that subsequent litigants could sue in the D.C. Circuit after one litigant had prevailed and get the same relief—is nonsensical. The D.C. Circuit has jurisdictional features that the other circuits do not have, but it has no different powers under the APA. Similarly, the assertion that the Government sought the Fifth Circuit en banc to reassess its precedent, and it would not, is not a reason to grant *certiorari* but to deny it. Pet. at 28. Rule 10 exists for that very reason. It is also the nature of law that the D.C. Circuit and the Fifth Circuit have the same power to interpret the APA. The APA is the same in the Pecos as in Petworth. Stripped to its essence, the Solicitor General's argument is that one reason there is no circuit split is because the Government has not

diligently pursued one. This Court seeks the lower court's wisdom before granting certiorari. *See O'Donnell v. City of Chicago*, , No. 25–1098, 2026 WL 3116855, at *1 (Oct. 19, 2026) ("Because that split would continue to benefit from further percolation, however, and because this case is not the best vehicle to resolve the split, I concur in the Court's denial of certiorari.") (Statement respecting the denial of *certiorari* of Gorsuch, J., joined by Sotomayor, J.). The Petitioner, far from seeking percolation, has not even approached the coffee pot. The Court should not reward such a shortcut.

Section 706(2) has been used by courts outside the D.C. Circuit to vacate unlawful regulations for at least four decades. As the Solicitor General admits, the Circuit Courts are in unanimity on the subject. Within the last two months the percolation this Court prefers, and the Solicitor General seeks to avoid, began. *LifeLink Found., Inc. v. Kennedy*, No. 8:25-cv-2042, 2026 WL 2914221 (M.D. Fla. Sep. 29, 2026). There is no urgency and no special circumstances. "In litigation as in life, there is much to be said for maxims such as 'if it ain't broke, don't fix it'." *United States v. Natanel*, 938 F.2d 302, 310 (1st Cir. 1991). That is the case here, and the Court should deny this Petition.

II. CONGRESS HAS NOT MERELY ACQUIESCED BUT AFFIRMATIVELY SOUGHT APA VACATUR

This Court is circumspect in interpreting congressional acquiescence as approval. But long-standing practice can demonstrate such congressional acquiescence. *See NLRB v. Noel Canning*, 573 U.S. 513, 526 (2014) ("practice is an important interpretive

factor [including] congressional acquiescence") (internal citations omitted). An important reason to reject this Petition is the fact that Congress relies on Section 706(2) to maintain its own power to legislate. Section 706(2) is an important instrument in Congress's toolbox to ensure that it, and not the executive branch, retains the sole power to legislate. The bedrock foundation of administrative law is that an agency is without power to act "unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). "An agency may not confer power upon itself." *Id.* To do that would permit an agency to override Congress, which is something the Supreme Court is "both unwilling and unable to do." *Id.* at 374–75. "[A]n administrative agency's power to regulate … must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

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. This setting aside 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 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).

Congress, when granting power to the executive, has often tried to cabin that power so as not to unbalance our system of separation of powers. *See e.g., INS v. Chada*, 462 U.S. 919, 954 (1983) (invalidating legislative veto). The APA is a constitutional statute for congressional self-preservation, allowing the Courts to strike and set aside regulations that do not comport with the Constitution, or the statute Congress wrote, or that were otherwise improperly adopted. And Congress has used it that way. In the *U.S House of Representatives v. Burwell*, 130 F.Supp.3d 53, 78 (D.D.C., 2015), the House of Representatives—to protect its own power—brought a Section 706(2)(A) (and alternatively a Section 706(2)(B)) claim seeking the exact relief the Solicitor General seeks to deny exists. *Id.* at 78. The court denied the Government’s attempt to dismiss the House’s cause of action under the APA). This is not the only example. The House also sued using the APA to set aside and vacate certain funding for a border wall in *U.S. House of Representatives v. Mnuchin*, 976 F.3d 1 (D.C. Cir. 2020), *vacated* by *Yellen v. U.S. House of Representatives*, 595 U.S. 992 (2021) (*certiorari* granted and circuit decision vacated as moot) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)).

Congress, through many administrations, has not amended the APA. Instead, in high-profile cases it has invoked the exact remedy here challenged against

administrations of different parties. That is a powerful indication of Congressional practice not merely acquiescing but affirmatively vindicating the long-standing interpretation of the courts of section 706(2)'s reach. This is another reason for the Court not to grant the Petition.

III. RECENT HISTORY AND PRESENT LITIGATION DEMONSTRATE THE FOLLY OF THE GOVERNMENT'S ARGUMENTS

The Petition before the Court is a *cri de coeur* against the nature of judicial review itself. The Solicitor General complains: "Thus, at the behest of a handful of plaintiffs, those regulations are erased from the books as to *everyone*." Pet. at 4. Well, yes. That is the nature of law rather than law only for those with the resources to bring lawsuits. The plaintiff bears the burden of proof in a suit under the APA. *See generally Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882–885 (1990) (describing requirements of APA suit and who bears the burden of proof at summary judgment in such a suit). So, it is not at the "behest" of a party but after a party has shown an Article III court that the regulation does not stem from the statute, is unconstitutional, or is procedurally, logically, or factually deficient.

The Government's lament that the Justice Department has to obtain stays of district court orders that vacate a regulation until this Court can rule is not a reason for granting *certiorari*. Pet. at 4. A final decision under the APA is immediately appealable. It is no hardship for the Government to seek a stay while it appeals—and these are routinely granted by district courts, or failing that Appellate

courts, or failing that, this Court. The Government cites *Trump v. Casa, Inc.*, 606 U.S. 831 (2025), extensively but that case explicitly reserved the question presented here and interpreted a completely different statute and authority. *Id.* 847 n. 10. The APA exists so that Americans would not be subject to unlawful regulations crafted by rogue bureaucrats. But the Solicitor General argues that even after a final order in a court with the regulation "set aside," it should be active and alive as to everyone else. In effect, the Government is arguing that it does not like to be told "no" by the courts. In any event, the Government can and routinely does seek stays of adverse decisions. That is our tripartite system working.

But that is not necessarily what happens, as the examples below demonstrate. The Government almost always gets a stay and has many opportunities to do so. It then continues to violate Americans' rights through these stays—for years in many cases.

A brief history of recent APA litigation this Court is familiar with demonstrates the ease with which the Government obtains stays. Such stays can inflict long, drawn-out procedures and unconstitutional regulations that litigants must endure while the Government appeals. NCLA filed cases against the Center for Disease Control's nationwide eviction moratorium in a number of jurisdictions under the APA and other theories. *See Brown v. Sec'y, U.S. Dep't of Health and Hum. Servs.,* 4 F.4th 1220 (11th Cir. 2021) (denying injunction); 20 F.4th 1385 (11th Cir. 2021) (vacating previous order and dismissing case per district court final order in *Ala. Ass'n of Realtors v. U.S. Dep't of Health and Hum. Servs.*, 539

F.Supp.3d 29 (2021)); *Mossman v. U.S. Ctrs. for Disease Control and Prevention*, No. 21–cv–28, 2021 WL 5498746 (N.D. Iowa, 2021) (dismissing class-action suit as moot after issuance of final order in *Alabama Association of Realtors*).

NCLA's clients suffered the unlawful denial of their right to go to state court to obtain their property because of repeated stays and extensions. *See Mossman v. CDC*, *2 ("As this case wound through the early stages of litigation, *Alabama Association of Realtors v. U.S. Department of Health and Human Services* addressed the core issues in dispute here.") And as this Court well knows, the Government in that case obtained stays to continue its illegal order and issued a new illegal order even after this Court had ruled the Government likely violated the law but allowed a stay to continue presumably because of its short remaining duration. *Id.* at 2-3.

This Court's decision in *Alabama Realtors* lays out the extraordinary lengths all the D.C. courts went through to deny any relief to plaintiffs there (or as NCLA's cases demonstrate, anywhere else) until this Court ruled.[2] When Congress refused to extend the

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[2] NCLA represented intervenors in *KC Tenants v. Byrn*, 504 F.Supp.3d 1026 (W.D. Mo. 2020) (seeking to prevent enforcement of CDC Order) (vacated by *KC Tenants v. Byrn*, No. 4:20-cv-00784, 2022 WL 365453 (W.D. Mo. Aug. 24, 2022) and filed *amicus* briefs in two other eviction moratorium cases. *Skyworks Ltd. v. Ctrs. of Disease Control and Prevention*, 542 F.Supp.3d 719 (N.D. Ohio 2021) *; Tiger Lily, LLC v. U.S. Dep't of Hous. and Urb. Dev.*, 5 F.4th 666 (6th Cir. 2021). Under the Solicitor General's argument every landlord in America would

eviction moratorium it had passed, CDC renewed it anyway but going further than Congress had in both scope and criminal liability. *Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs.*, 594 U.S. 758, 760 (2021). That action was to end at the close of the year 2021. *Id.* But the CDC continued to extend it, on its own hook. *Id.* Judge Dabney Friedrich granted summary judgment on the APA claims but stayed her ruling for appeal. *Id.* at 761-62. The D.C. Circuit refused to lift the stay. *Id.* at 762. This Court also refused to vacate the stay with Justice Kavanaugh noting that it was to expire in six weeks in any event. *Id.* Sure enough it did expire on July 31, 2021, but the CDC reinstated it three days later. *Id.* Bound by D.C. Circuit precedent, the district court again kept a stay in place concerning the illegality of this new CDC rule and the D.C. Circuit stuck to its guns on the issue. *Id.*at 763. Finally, this Court lifted the stay stating: "The [regulated parties] not only have a substantial likelihood of success on the merits—it is difficult to imagine them losing." *Id.* The case was then remanded for final order. That case is emblematic of how Government requests for stays are handled by the Courts. The Solicitor General's concern with the difficulty of the Government getting stays rings hollow for any repeat litigant against it. That is particularly true when the Government is ultimately wrong. Stays—like the ones issued in *Alabama Association of Realtors*—can have the effect of perpetrating an unlawful regulatory scheme

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have had to sue in their own right to achieve relief from a blatantly unlawful order.

against untold numbers of Americans who should never have been injured in the first place.

Another example which demonstrates the great solicitude of the courts to the Government's requests for stays of APA claims, even when millions are affected and even when the Complaint is a class action is NCLA's still-pending case against the SEC. *Davidson v. Gensler*,[3] Civ. A. No. 6:24-cv-00197, 2024 WL 4926665 (W.D. Tex. 2024) (denying preliminary injunction in an APA case). The saga of delay through stays and abeyance since the filing of that APA case similarly belies the Solicitor General's parade of horribles on the great danger to the Government from denial of stays and overly quick litigation and decisions. *See* Motion for Status Conference, *Davidson v. Atkins,* Civ. A. No. 6:24-cv-00197 (W.D. Tex. Oct. 30, 2026). Plaintiffs brought the case on April 16, 2024. Complaint, *id.* That complaint challenges the legality of the SEC's government-mandated mass data collection and surveillance of all investing Americans' personal financial data through the "Consolidated Audit Trail" (CAT). An agency-created scheme lacking authority from Congress, the CAT is the largest government-mandated mass collection of personal financial data in American history and forces brokers, exchanges, clearing agencies and alternative trading systems to capture and send real-time detailed information on every investor's trades in U.S. markets to a centralized database. Yet, after the denial of an injunction, the Government has simply had the case stayed three times for 18 months by stating it is working to fix the

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[3] Now styled *Davidson v. Atkins*.

unconstitutional regulation, but that regulation continues apace in the meantime.

On June 11, 2025, the SEC filed a motion to hold this case in abeyance "while the SEC engages in ongoing and anticipated proceedings that may narrow or substantially affect the issues in the case," and further requested that the court suspend the dispositive motion schedule it had previously ordered. That stay of the case for six months was granted over the plaintiffs' objection, staying any progress of the case until January 15, 2026. On January 15, 2026, the SEC filed a motion for an additional six-month abeyance. That was granted on July 15, 2026, without addressing NCLA's motion for class certification. The court granted it and all plaintiffs' motions were outstanding. A third stay was just granted on November 2, 2026, to January 15, 2027, when new briefing has been ordered because of the delay. Order Granting Motion to Stay, *Davidson v. Atkins*. So the Court has ordered new briefing when the current order expires after 19 months. *Id*. at 2. *See also Nat'l Fed'n of Indep. Bus. v. Dept. of Labor*, 595 U.S. 109, 113 (2022) (Illegal regulation affecting 84 million workers triggered "many firms" to sue and stays of orders striking rule granted until reaching this Court).

What the Solicitor General seeks would spawn more litigation. Many more cases would have to be filed under the interpretation of the APA pressed in the instant petition. And indeed, there would be little reason to stay the judgment in such cases as the court would only be absolving the parties at issue of complying with the regulation. In the meanwhile, perhaps millions of Americans would be subject to

unconstitutional regulations sanctioned by neither Congress, nor the courts. Indeed, in the very circumstances when Presidential powers are at their nadir. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject."). This is another reason *certiorari* should be denied.

IV. BOTH TEXT AND HISTORY SUPPORT THE UNANIMOUS JUDGMENT OF THE CIRCUIT COURTS

A. Vacatur Was Understood as Reviewing Court's Proper Action over Agencies at APA's Inception

The Petition argues that the decision below is wrong primarily because it used section 706(2) vacatur in its traditional sense. NCLA takes issue particularly with the Solicitor General's argument at section A(5) "Arguments in favor of universal vacatur lack merit." Pet. 21-24. First, they so obviously contain merit that the Government traces pre-enforcement review back to *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), but still cannot find a circuit decision conflicting with that of the D.C. Circuit regarding section 706(2). Pet. at 19.

The Government then attacks drawing any conclusions from appellate review of trial court judgments in the context of review of agency action under the APA. Pet. at 21. It argues that this was not ascertainable from the text or history of the APA when enacted. *Id.* Its assertion is simply wrong. 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. Dept. 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 c learly 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" proceedings 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 or is to be constrained in some way by equity. Pet. at 20. 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. The Solicitor General's assertion that the argument that vacatur is allowable against agencies as against trial courts is a mere "analogy" is incorrect. Pet. at 21. It informed the Congress in enacting the APA itself and undermines completely the Petition's assertions as to what was understood at the time of enacting the APA in 1946.

B. Text Supports Universal Vacatur from "Set Aside"

The Petition argues certain dictionaries support its view of "set aside's" meaning. Pet. at 15. It further argues that regulations were viewed as "quasi-legislative" acts and courts don't have the power to annul statutes. Pet. at 15. 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 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 (2d 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"). The suggestion of the Petition that the APA did not mean "annul" is belied by the actual words known and used by legislators. See Pet. at 15.

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.

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 matter how erroneous, is final and binding until it is reversed or set aside."). Once

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4. Google Books, "set aside and vacate" (Nov. 12, 2026), https://bit.ly/4jM8omr.
5. Google Books, "vacate and set aside" (Nov. 12, 2026), https://bit.ly/4zkBbTY.

the judgment was set aside or reversed, however, it was void, in the sense of devoid of obligation.

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."

CONCLUSION

For all the foregoing reasons the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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