No. 26-491

IN THE

Supreme Court of the 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 OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Landmark Legal Foundation (Landmark) is a national public-interest law firm committed to preserving the principles of limited government, separation of powers, federalism, originalist construction of the Constitution, and individual rights. Landmark has advocated for limitations on judicial equitable power in past cases including *Nat'l Educ. Ass'n v. U.S. Dep't of Educ.*, No. 1:25-cv-00091 (D.N.H. 2026).

INTRODUCTION AND SUMMARY OF ARGUMENT

Last year, the Department of Education (DOE) issued a "Dear Colleague Letter" reminding educational stakeholders that discrimination based on race is illegal and violates DOE policy. Letter from Craig Trainor, Acting Assistant Sec'y for C.R., U.S. Dep't of Educ., to Colleagues (Feb. 14, 2025), https://perma.cc/SF4T-WA33 (last accessed Nov. 6, 2026). The letter did not constitute a final agency action; it did not have any force of law. Rather, it served as a clarification and affirmation of nondiscrimination requirements for all educational institutions that receive federal funding. Nonetheless, a federal district court concluded that, under the Administrative Procedure Act (APA),

1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. *Amicus Curiae* informed Petitioners and Respondents of its intent to file this brief on October 29, 2026. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

it had the equitable power to vacate the letter. *Am. Fed. of Teachers, et al. v. U.S. Dep't of Educ., et al.*, No. 1:25-cv-00628, Dkt. No. 83 (D. Md. Aug. 14, 2025).

This was not an isolated incident. In the last several years, district courts have not hesitated to use their purported authority to vacate a host of administrative actions.[2] The remedy awarded in these cases is neither limited nor tailored to provide party-specific relief. Instead, these decisions have national implications that affect hundreds of millions of Americans. A Justice of this Court describes vacatur as "a remedy that rules the

2. *See Doctors for America v. OPM*, 793 F. Supp. 3d 112 (D.D.C. 2025) (vacating Office of Personnel Management guidance and a Health and Human Services memorandum on removal of references to gender ideology on federal materials); *Cath. Legal Immigr. Network v. Rubio*, 840 F. Supp. 3d 209 (S.D.N.Y. 2026) (vacating State Department policies suspending the issuance of immigrant visas to nationals of seventy-five countries); *Dorcas Int'l Inst. of R.I. v. U.S. Customs & Immigr. Serv.*, 834 F. Supp. 3d 242 (D.R.I. 2026) (vacating holds on determining requests for immigrant benefits for nationals of thirty-nine countries, re-reviewing of previous applications, and introducing new factors for negative considerations); *Washington v. U.S. Dep't of Educ.*, No. 25-cv-01228, Dkt. No. 269 (W.D. Wash. 2026) (vacating Department of Education decision not to provide grant funding for mental health services to certain former recipients); *Metro. Gov't of Nashville & Davidson County v. U.S. Dep't of Homeland Sec.*, No. 1:26-cv-02886, Dkt. No. 42 (D.D.C. Sep. 28, 2026) (vacating the Federal Emergency Management Agency's decision to withhold certain counterterrorism funding for localities until they complied with election administration reforms); *Refugee & Immigrant Ctr. for Educ. & Legal Servs. v. Noem*, 793 F. Supp. 3d 19 (D.D.C. 2025) (vacating the Department of Homeland Security's summary removal procedures for illegal aliens insofar as these extended beyond the removal procedures set by Congress).

world." *United States v. Texas*, 599 U.S. 670, 699 (2023) (Gorsuch, J., concurring). As recently as last year, the Court recognized that a statutory grant of equitable authority "encompasses only those sorts of equitable remedies 'traditionally accorded by courts of equity' at our country's inception." *Trump v. CASA, Inc.*, 606 U.S. 831, 841 (2025) (quoting *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (1999)). This begets the question: does Section 706(2) of the APA permit a court to vacate an agency action, and by extension issue a remedy affecting millions of individuals?

Courts have become increasingly willing to abuse vacatur to thwart lawful executive action. At the same time, prominent members of the judiciary, including Justices in this Court, have voiced the opinion that the APA does not authorize vacatur. Coupled with significant and important legal scholarship challenging vacatur, this discord shows the need for the Court to resolve this issue. *Amicus*, therefore, respectfully urges the Court to grant certiorari.

ARGUMENT

A. It Is Unclear Whether the APA Authorizes Courts to Vacate Agency Actions.

Courts routinely rely on Section 706(2)'s "set aside" language when vacating agency actions. Yet, the APA's structure and text may not support this interpretation. Section 706 is titled, "'[s]cope of review,' a title it has borne since the [APA's] enactment in 1946." *Texas*, 599 U.S. at 696 (2023) (Gorsuch, J., concurring). "Scope of review"

appears to preclude a specified remedy such as vacatur. *Id.* Next, consider the opening limitation, which reads:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

5 U.S.C. § 706. This appears to tie the court's duties to resolving the dispute before it. This command does not speak to a court's authority to issue a remedy—rather, it requires a court "to apply 'de novo review on questions of law' as it considers the parties' arguments in the course of reaching its judgment." *Texas*, 599 U.S. at 697 (Gorsuch, J., concurring) (quoting *Kisor v. Wilkie*, 588 U.S. 558, 605 (2019)).

Within the larger statutory context, Section 702 specifies that judicial review will be limited to "person[s]" who have "suffer[ed] legal wrong because of agency action, or [been] adversely affected or aggrieved by agency action." 5 U.S.C. § 702. Accordingly, this language supports the argument that "Congress nodded to traditional standing rules and remedial principles." *Texas*, 599 U.S. at 698 (Gorsuch, J., concurring). Assuming Section 706 authorizes vacatur, then Congress "proceeded just a few paragraphs later to plow right through those rules and empower a single judge to award a novel form of relief affecting parties and nonparties alike." *Id.* That is implausible.

Section 703, not Section 706, enumerates remedies available to a court when issuing equitable relief. Legislative history repeatedly refers to Section 703 as applying to remedies. *See* Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d. Sess. 36–37 (1946); 92 Cong. Rec. 2159 (1946). The Court also has "never treated general statutory grants of equitable authority as giving federal courts a freewheeling power to fashion new forms of equitable remedies." *Trump v. Hawaii*, 585 U.S. 667, 714 (2018) (Thomas, J., concurring). To that end, Section 703 "instruct[s] courts to use an appropriate remedy from among those traditionally granted." Aditya Bamzai, *Federal Courts, Practice & Procedure: History of the Administrative Procedure Act & Judicial Review: The Path of Administrative Law Remedies*, 98 Notre Dame L. Rev. 2037, 2043 (2023). Consistent with this principle is the notion that "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 585 U.S. 48, 73 (2018). And a "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." Bamzai, *supra* at 2056 (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)).

Section 703 authorizes an aggrieved party to use available forms of legal actions, yet these provisions do not expressly list vacatur alongside declaratory judgments and injunctions. It authorizes an aggrieved party to bring "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus." 5 U.S.C. § 703. "Conspicuously missing from the list is vacatur." *Texas*, 599 U.S. at 698 (Gorsuch, J., concurring). It is not "apparent why Congress would have listed most remedies in §703 only to bury another (and arguably

the most powerful one) in a later section addressed to the scope of review." *Id.* (citing John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunction or Other Universal Remedies*, 37 Yale J. Reg. Bull. 37, 37, 45–46 (2020)). And Section 703 recognizes that certain cases are controlled by a "special statutory review proceeding" which may vest the reviewing court the authority to vacate an order or rule. 5 U.S.C. § 703; Harrison, *supra* at 39–40.

B. Justices and Circuit Court Judges Have Concluded the APA May Not Authorize Vacatur.

In oral arguments for *United States v. Texas*, former Solicitor General Prelogar argued "that the lower courts, including the D.C. Circuit . . . . have reflexively assumed that vacatur is authorized under Section 706 of the APA." Transcript of Oral Argument at 36, *United States v. Texas*, 599 U.S. 670 (2022) (No. 22–58). Chief Justice Roberts, responding in turn, said that vacatur is "a staple of [lower courts'] decision output." *Id.* Later, when addressing Justice Gorsuch, General Prelogar elaborated that the phrase "set aside" exists in reference to the parties and case before courts—not as an instruction to vacate, void, or strike the statute wholesale. *Id.* at 48–49. Justice Gorsuch then remarked that "it is kind of interesting that remedies are expressly listed in 703, that Congress would sneak in the most important remedy and by far the most sweeping one in Section 706 . . . which governs the scope of review." *Id.* at 49.

Justice Gorsuch's subsequent concurrence, joined by Justices Thomas and Barrett, elaborated on this skepticism. *Texas*, 599 U.S. at 693–704 (2023) (Gorsuch,

J., concurring). He contended that Section 706 "does not say anything about 'vacating' agency action ('wholesale' or otherwise)." *Id.* at 695. Instead, he wrote that the APA's obscure "set aside" language did not seem to vest courts with new remedial power. *Id.* Next, Justice Gorsuch opined on the dispute over Section 706's context and meaning, writing that "set aside" means "'disregard' rather than 'vacate.'" *Id.* at 696. He also noted that universal vacatur, "can stymie the orderly review of important questions, lead to forum shopping, render meaningless rules about joinder and class actions, and facilitate efforts to evade the APA's normal rulemaking processes." *Id.* at 703.

Circuit court judges have also expressed concerns with reliance on Section 706(2) to justify vacatur. Chief Judge Sutton of the Sixth Circuit argued in a concurrence that "[u]se of the 'setting aside' language does not seem to tell us . . . whether to nullify illegal administrative action or not to enforce it in the case with the named litigants." *Arizona v. Biden*, 40 F.4th 375, 397 (6th Cir. 2022) (Sutton, C.J., concurring). Here, Sutton raised the question of whether Congress, by passing the APA, "meant to upset the bedrock practice of case-by-case judgments with respect to the parties in each case or create a new and far-reaching power through this unremarkable language." *Id.* at 396 (Sutton, C.J., concurring).

Judge Ho of the Fifth Circuit has also criticized courts' use of universal vacatur. Writing in concurrence in the case below, he stated "[u]niversal vacatur of agency rules . . . . challenges our basic conception of the judicial power under Article III of the Constitution." J.A. at 21a.

C. Prominent Legal Scholars Disagree as to Whether the APA Authorizes Vacatur.

Within the past several years, prominent legal scholars have concluded the APA does not authorize vacatur. Addressing the meaning of "set aside," Professor John Harrison argues that both today and when the APA was adopted, "a court can 'set aside' another party's action in more than one way." Harrison, *supra* at 42. He continues, "when an appellate court reverses or vacates a lower court's judgment, it can be said to set that judgment aside." *Id.* "Set aside," according to Harrison, "can also refer to a court's decision to regard a purportedly valid juridical act as ineffective. That is what courts do when they find a statutory rule to be unconstitutional." *Id.* at 43. And "[w]hen a court finds a statutory rule unconstitutional, it does not issue an order purporting to reverse or vacate the statute. Instead, the court decides the case on the assumption that the unconstitutional statutory rule is not binding and is to be disregarded." *Id.* The remedy applied by the court "runs to the defendant, not to the legislature."[3] And some scholars have called for the Court to review the issue. Professor Alisa Klein, for instance, when addressing the APA in the context of the major questions doctrine, noted that "[i]t is . . .

3. Professor Ronald Cass has noted that "there is little to support reading the APA as a universal directive for courts to abandon traditional constraints on equitable remedies." Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, And Eroding Constitutional Structure*, 27 Geo. Mason. L. Rev. 29, 76–77 (2019). At the time of its adoption, the "evident understanding . . . was that the APA did not displace ordinary tests for application of equitable remedies." *Id.* at 77.

timely and appropriate for the Supreme Court to consider whether the principles that underlie the major questions doctrine require the Court to reject the universal vacatur interpretation of 'set aside.'" Alisa Klein, *Major Questions Doctrine Jiujitsu: Using the Doctrine to Rein in District Court Judges*, 76 Admin. L. Rev. 327, 348 (2023).

Other scholars, such as Professors Mila Sohoni and Ronald Levin, disagree, arguing that Section 706(2) authorizes vacatur. They contend that the text, structure, and history of the APA, as well as judicial decisions applying it, all support vacatur. *See* Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121, 1138 (2020); Ronald Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 Notre Dame L. Rev. 1997 (2023). Professor Sohoni, in response to arguments proffered by Professor Harrison, for example, notes that Section 706's plain language "speaks to relief." Sohoni, *supra* at 1163 n.222. She states that this section "pairs something that is quite obviously a remedy—the affirmative power to order an agency to undertake action 'unlawfully withheld or unreasonably delayed,'—with its converse remedy: the negative power to 'hold unlawful and set aside agency action.'" *Id.* (internal citations omitted).

Among other things, Professor Sohoni argues that the APA's judicial review provisions, i.e., the structure of the APA, "progress in a logical fashion from section to section." *Id.* She notes, "[s]ection 702 addresses who can sue; section 703 addresses where and how to sue; section 704 addresses what sorts of agency action can be challenged; section 705 addresses interim remedies pending judicial review; and section 706 addresses final remedies and scope of judicial review." *Id.* In her view,

the structure of the APA compares to the Federal Rules of Civil Procedure where the earlier sections speak to the form of action, and later sections provide forms of relief. *Id.*

D. The Court Should Answer Unresolved Constitutional Questions Pertaining to Vacatur.

Granting the Government's petition provides the Court the opportunity to address whether vacatur is constitutional under three theories. First, as a legal remedy; second, as an equitable remedy; and finally, under an appellate-determination model.

The question of whether Article III grants courts legal authority to strike a regulation from the Code of Federal Regulations has thus far gone unanswered by this Court. It is understood that "courts do not have power to remove federal statutes from the statute books." Hon. Kathryn Kimball Mizelle, *To Vacate Or Not To Vacate: Some (Still) Unanswered Questions in the APA Vacatur Debate*, 38 Harv. J. of L. & Pub. Pol. 1, 19 (2023). Yet, vacatur "enables the judiciary to formally revoke an agency's rules, orders, findings, or conclusions," much "in the same way that a President vetoes a bill." Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 1012, 1015 (2018). This raises several important questions implicating non-delegation and separation of powers for the Court to address. First, does Article I empower Congress to veto executive actions through vacatur? Second, if Congress does have this authority, can it delegate this power to Article III courts? Finally, if courts can vacate quasi-legislative agency action, why can they not exercise this quasi-veto power when reviewing

federal statutes? These questions necessitate this Court's review.

Vacatur as an equitable remedy is no less controversial. As Professor Gary L. McDowell noted, "[t]he equity power was never intended to be used to grant broad remedies to entire social classes." Gary L. McDowell, *Equity and the Constitution*, 121 (University of Chicago Press, 1982). Instead, "it was intended to provide particular relief to specific individuals in cases where the aggrieved party had suffered a clear and irreparable injury for which the law, by its generality, could not provide a plain and adequate remedy." *Id.* at 121–22.

Vacatur's constitutionality "as an equitable remedy" requires historical analogues. Specifically, it rests on whether it is "'analogous' to the relief issued by the High Court of Chancery in England at the time of the adoption of the Constitution." *Lifelink Found., Inc. v. Robert Francis Kennedy, Jr.*, No. 8:25-cv-2042, Dkt. No. 58 slip op. at 43 (M.D. Fla. Sep. 29, 2026) (citation omitted); *see CASA*, 606 U.S. at 841–42. An analogue is necessary because Article III and the Judiciary Act mirrored the powers of equity held by this English court, and therefore the constitutional limits of the judiciary must be presumed to be in line with those of the High Court of Chancery. *See* Joseph Story, *Commentaries on Equity Juris* § 57 (2d ed., 1839). And it is questionable whether such a comparison exists. At least one court has engaged in a historical analysis and found "no form of equitable relief available in the English High Court of Chancery . . . that is analogous to vacatur of rules." *Lifelink*, slip op. at 50.

Constitutional questions regarding the use of vacatur necessarily involve a broader examination of how the Framers viewed a court's general use of its equitable powers. At the time of the Founding, the Framers were concerned about unchecked judicial power and debated the matter. The Framers debated the proper scope of judicial remedies under Article III, noting the problems inherent to granting judges broad authority to issue wide-ranging equitable remedies. First, the Anti-Federalists noted that Article III's reference to equity "granted federal judges excessive discretion to deviate from the requirements of the law." *Missouri v. Jenkins*, 515 U.S. 70, 128 (1995) (Thomas, J., concurring). "Federal Farmer" found that the mention of equity jurisdiction was not meant "to lodge an arbitrary power or discretion in the judges, to decide as their conscience, their opinions, their caprice, or their politics might dictate." *Id.* (quoting Federal Farmer No. 15, Jan. 18, 1788, in 2 *The Complete Anti-Federalist* 322–23 (Herbert J. Soring ed., 1981)).

Another Anti-Federalist, Brutus, believed that overly broad equity power would permit courts to "explain the constitution according to the reasoning spirit of it, without being confined to the words or letter." Brutus No. 11, Jan. 31, 1788, in 2 *The Complete Anti-Federalist* 419 (Herbert J. Soring ed., 1981). And, when making equitable interpretations untethered to tradition or background rules, "judges [would] feel no necessity to confine themselves to 'any fixed or established rules, but will determine, according to what appears to them, the reason and the spirit of the constitution.'" McDowell, *Equity and the Constitution*, 43 (quoting Brutus No. 11, Jan. 31, 1788, in 2 *The Complete Anti-Federalist* 420 (Herbert J. Soring ed., 1981)).

Alexander Hamilton responded in turn by noting that rules, practices, and precedents would limit judges' discretion in equity: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." *The Federalist No. 78*, at 529 (Alexander Hamilton) (Jacob Cooke ed., 1961). Thus, "[t]he great and primary use of a court of equity is to give relief in extraordinary cases" and "the principles by which that relief is governed are now reduced to a regular system." *The Federalist No. 83*, at 569 (Alexander Hamilton) (Jacob Cooke ed., 1961) (emphasis removed). Hamilton's acknowledgement of the necessity of "strict rules and precedents" is consistent with William Blackstone's concerns that failure to limit equitable power "would have become too arbitrary to have been endured in a country like this, which boasts of being governed in all respect by law and not by will." 3 William Blackstone, *Commentaries on the Laws of England* 440 (1768).

Justice Thomas has noted that, "it should come as no surprise that there is no early record of the exercise of broad remedial powers." *Jenkins*, 515 U.S. at 130 (Thomas, J., concurring). And "there were no 'structural injunctions' issued by the federal courts, nor were there any examples of continuing judicial supervision and management of governmental institutions." *Id.* Courts, therefore, "should exercise the power to impose equitable remedies only sparingly, subject to clear rules guiding its use." *Id.* at 131. The passage of the Judiciary Act of 1789, along with subsequent procedural laws, ensured separation of the procedures of equity pleadings and pleadings at law, indicating that the law's authors "saw

this procedural distinction as necessary if equity was to be kept from becoming a dangerous source of unfettered judicial discretion." McDowell, *supra* at 47. Equitable remedies should therefore operate "on a plaintiff-specific basis." *CASA*, 606 U.S. at 863 (2025) (Thomas, J., concurring).

Both the robust debate regarding the judiciary's potential abuse of its equitable authority, and the passage of the Judiciary Act underscore the importance of carefully weighing the implications of invocating any equitable power—especially vacatur.

Finally, proponents of vacatur have advanced an additional argument to support its constitutionality. Under the appellate-determination model, vacatur of agency action stems from a court's power to vacate a lower court order, rather than from equitable or legal authority. *Lifelink*, slip op. at 54 (citation omitted) ("[s]ection 706(2) codifies a standalone remedy based on the well-established practice of an appellate court's vacatur of a lower court's order"). The appellate-determination model is disanalogous, however, because vacatur of agency action, at base, occurs between branches of government—whereas the former operates solely within the judiciary. *Id.* at 56. This "runs counter to vacatur as a remedy of any sort" because it "operates against a judicial proceeding, not against any particular party." *Id.*; *see Am. Ass'n of Univ. Profs. v. U.S. Dep't of Just.*, 175 F.4th 413, 420 n.1 (2d Cir. 2026) (Menashi, J., dissenting).

These various constitutional questions ought to be addressed by this Court.

CONCLUSION

For the foregoing reasons, *Amicus* requests this Court grant certiorari in this case.

Respectfully submitted,

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