No. 24A

In the Supreme Court of the United States

MERRICK GARLAND, ATTORNEY GENERAL, ET AL., APPLICANTS

v.

TEXAS TOP COP SHOP, ET AL.

APPLICATION FOR A STAY OF THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

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PARTIES TO THE PROCEEDING

Applicants are Merrick Garland, Attorney General; Department of the Treasury; Janet Yellen, Secretary of the Treasury; Financial Crimes Enforcement Network (FinCEN); and Andrea Gacki, Director of FinCEN.

Respondents are Texas Top Cop Shop, Inc.; Data Comm for Business, Inc.; Libertarian Party of Mississippi; Mustardseed Livestock, L.L.C.; National Federation of Independent Business, Inc.; and Russell Straayer.

RELATED PROCEEDINGS

United States District Court (E.D. Tex.):

Texas Top Cop Shop, Inc. v. *Garland*, No. 24-cv-478 (Dec. 5, 2024)

United States Court of Appeals (5th Cir.):

Texas Top Cop Shop, Inc. v. *Garland*, No. 24-40792 (Dec. 26, 2024)

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APPLICATION FOR A STAY OF THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General—on behalf of Merrick Garland, Attorney General, et al.—respectfully files this application for a stay of the preliminary injunction issued by the U.S. District Court for the Eastern District of Texas (App., *infra*, 19a-97a), pending the consideration and disposition of the government's appeal to the United States Court of Appeals for the Fifth Circuit and, if the court of appeals affirms in whole or in part, pending the timely filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court.

In 2021, Congress adopted the Corporate Transparency Act (CTA or Act), 31 U.S.C. 5336, to counter financial crimes. Congress found that malign actors often conceal their ownership of corporations and other entities to facilitate illicit activities such as money laundering, tax fraud, human and drug trafficking, and the financing of terrorism. Congress determined that requiring companies to report information about their owners would enable the government to detect and prosecute financial crimes, discourage the use of shell companies to conduct illicit activity, and facilitate

the government's national-security and intelligence efforts.

The CTA accordingly requires covered entities to report to the federal government information about their beneficial owners—*i.e.*, individuals who exercise substantial control over the entity or own or control 25% of its ownership interests. Specifically, covered entities must report their beneficial owners' names, dates of birth, addresses, and unique identifying numbers (*e.g.*, driver's license or passport numbers). An implementing rule provided that covered entities formed before 2024 were required to file initial reports by January 1, 2025.

Respondents—four entities subject to the Act, an individual affiliated with one of those entities, and a membership organization—brought this suit to challenge the Act's constitutionality. The district court granted respondents a preliminary injunction, holding that they were likely to succeed on the merits of their claim that the Act, on its face, exceeds Congress's enumerated powers. Although respondents had sought relief only on their own behalf, the court entered a universal injunction purporting to enjoin the Act itself and prohibiting the enforcement of the Act even against nonparties. A motions panel of the Fifth Circuit stayed that injunction, but days later a merits panel vacated the stay and reinstated the universal injunction without any analysis of the government's likelihood of success on the merits or the relative harms to the parties.

This Court should stay the district court's injunction. The government is likely to succeed on the merits of respondents' claim. The Act's reporting requirements are important to the government in preventing, detecting, and prosecuting crimes such as money laundering, tax fraud, and the financing of terrorism. The requirements therefore fall comfortably within Congress's authority under the Commerce Clause to regulate economic activities (here, the anonymous operation of business entities)

that substantially affect interstate commerce. The requirements are also necessary and proper to effectuate several of Congress's enumerated powers, including the power to regulate interstate and foreign commerce and to collect taxes, as well as Congress's powers with respect to foreign affairs. Even if there might be outlier circumstances in which the Act could be thought to exceed Congress's powers, the Act complies with the Constitution in most of its applications, which suffices to defeat respondents' facial challenge.

Indeed, the district court issued its universal injunction after two other district courts had held that the Act is likely constitutional and had denied preliminary-injunction motions raising substantially similar constitutional claims. See *Community Ass'ns Institute* v. *Yellen*, No. 24-cv-1597, 2024 WL 4571412, at *10 (E.D. Va. Oct. 24, 2024); *Firestone* v. *Yellen*, No. 24-cv-1034, 2024 WL 4250192, at *14 (D. Or. Sept. 20, 2024). A third district court denied a preliminary-injunction motion because the plaintiffs had failed to show irreparable harm. See ECF No. 25, at 50, *Small Business Ass'n* v. *Yellen*, No. cv-314 (W.D. Mich. Apr. 29, 2024). Although one district court held that the Act violates the Constitution, it issued an injunction that covers only the plaintiffs in that case, see *NSBU* v. *Yellen*, 721 F. Supp. 3d 1260, 1289 (N.D. Ala. 2024), and the Eleventh Circuit expedited briefing and argument to facilitate appellate review before the January 1, 2025, reporting deadline, see C.A. Doc. 26 at 2, *NSBU* v. *United States Department of the Treasury*, No. 24-10736 (Apr. 22, 2024).

The equities also heavily favor the issuance of a stay. The district court's universal injunction irreparably harms the federal government in multiple ways. It prevents the government from executing a duly enacted Act of Congress, impedes efforts to prevent financial crime and protect national security, undermines the United States' ability to press other countries to improve their own anti-money laundering

regimes, and severely disrupts the ongoing implementation of the Act. By contrast, the Act imposes only minimal burdens on respondents.

At a minimum, this Court should narrow the district court's vastly overbroad injunction. A court of equity may grant relief only to the parties before it. The district court violated that principle by issuing a universal injunction purporting to enjoin the Act itself and forbidding the enforcement of the Act even against non-parties. Several Members of this Court have recognized that such universal relief contradicts Article III and established equitable principles and have urged clarification of these principles in an appropriate case—but the Court's antecedent determination on a threshold procedural issue or the merits in prior cases has obviated the need to resolve the remedial question. Because the lower courts need guidance on the propriety of universal injunctions, this Court may additionally wish to treat this application as a petition for a writ of certiorari before judgment presenting the question whether the district court erred in entering preliminary relief on a universal basis.

STATEMENT

1. On January 1, 2021, Congress enacted an omnibus statute known as the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116–283, 134 Stat. 3388. That statute's provisions include the Anti-Money Laundering Act of 2020 (Anti-Money Laundering Act or AMLA), Div. F, 134 Stat. 4547, which in turn includes the CTA, Tit. LXIV, 134 Stat. 4604.

In the CTA, Congress found that "malign actors seek to conceal their ownership" of corporations and similar entities "to facilitate illicit activity, including money laundering, the financing of terrorism, proliferation financing, serious tax fraud, human and drug trafficking, counterfeiting, piracy, securities fraud, financial fraud, and acts of foreign corruption, harming the national security interests of the United

States." § 6402(3), 134 Stat. 4604. Congress further found that "money launderers and others involved in commercial activity intentionally conduct transactions through corporate structures in order to evade detection, and may layer such structures, much like Russian nesting 'Matryoshka' dolls, across various secretive jurisdictions." § 6402(4), 134 Stat. 4604. Congress determined that new federal reporting requirements were needed to "protect vital United States national security interests," "protect interstate and foreign commerce," "counter money laundering, the financing of terrorism, and other illicit activity," and "bring the United States into compliance with international anti-money laundering and countering the financing of terrorism standards." § 6402(5)(B)-(E), 134 Stat. 4604. The information collected under the Act, Congress explained, would provide investigators with "insight into the flow of illicit funds through [corporate] structures" and would "discourage the use of shell corporations as a tool to disguise and move illicit funds." AMLA § 6002(5)(A)-(B), 134 Stat. 4547.

The Act accordingly imposes federal reporting requirements upon any "reporting company," a term defined to include any "corporation, limited liability company, or other similar entity" that is created (or, in the case of a foreign entity, registered to do business) "by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe." 31 U.S.C. 5336(a)(11)(A). The Act makes some exceptions to those reporting requirements. See 31 U.S.C. 5336(a)(11)(B). For example, the requirements do not apply to entities, such as banks and credit unions, that are already subject to other reporting regimes. See 31 U.S.C. 5336(a)(11)(B)(iii) and (iv). And the requirements do not apply to certain domestic entities that are no longer engaged in business. See 31 U.S.C. 5336(a)(11)(B)(xxiii).

A reporting company must report information about its "beneficial owner[s]"

and (for certain companies) its "applicant[s]." 31 U.S.C. 5336(b)(2)(A). A beneficial owner is an individual who "(i) exercises substantial control over the entity; or (ii) owns or controls not less than 25 percent of the ownership interests of the entity." 31 U.S.C. 5336(a)(3)(A); see 31 U.S.C. 5336(a)(3)(B) (establishing certain exceptions). An "applicant" is an individual who files documents to register the entity. See 31 U.S.C. 5336(a)(2). For each beneficial owner and applicant, a reporting company must report the individual's name, date of birth, address, and unique identifying number (such as a driver's license number). See 31 U.S.C. 5336(a)(1) and (b)(2)(A). A reporting company must submit an updated report when ownership information changes. See 31 U.S.C. 5336(b)(1)(D). A person who willfully violates the reporting requirements is subject to civil and criminal penalties. See 31 U.S.C. 5336(h).

The Act empowers the Financial Crimes Enforcement Network (FinCEN), a bureau of the Department of the Treasury, to adopt regulations implementing its provisions. See 31 U.S.C. 5336(b). In 2022, FinCEN adopted a rule establishing deadlines by which reporting companies must submit initial reports. See *Beneficial Ownership Information Reporting Requirements*, 87 Fed. Reg. 59,498 (Sept. 30, 2022) (Reporting Rule). The rule provided that entities created or registered before 2024 must comply by January 1, 2025; entities created or registered during 2024 must comply within 90 days after formation or registration; and entities created or registered after 2024 must comply within 30 days after formation or registration. See 31 C.F.R. 1010.380(a)(1).

2. Respondents include four entities that claim to be subject to the Act's reporting requirements: Texas Top Cop Shop, Inc. (a firearms dealer); Data Comm for Business, Inc. (an information-technology company); Mustardseed Livestock, LLC (a company that runs a dairy farm); and the Libertarian Party of Mississippi (a polit-

ical party). See App., *infra*, 27a-29a.[1] Respondents also include Russell Straayer (a beneficial owner of Data Comm) and the National Federation of Independent Business (NFIB) (an organization suing on behalf of its members). See *id.* at 28a, 30a. Respondents filed this suit in the U.S. District Court for the Eastern District of Texas, claiming that the Act's reporting requirements exceed Congress's enumerated powers and violate the First and Fourth Amendments. See *id.* at 32a.

The district court issued a universal preliminary injunction prohibiting the enforcement of the Act's reporting requirements and FinCEN's corresponding Reporting Rule. See App., *infra*, 19a-97a. The court concluded that respondents were likely to succeed on the merits of their claim that the Act, on its face, exceeds Congress's enumerated powers. See *id.* at 50a-91a. The court rejected the government's argument that the Act falls within Congress's power under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, reasoning that the statute does not regulate economic activity. See App., *infra*, 53a-71a. The court also rejected the government's argument that the Act is authorized by the Necessary and Proper Clause, U.S. Const. Art. I, § 8, Cl. 18, reasoning that the statute has an insufficient link to Congress's enumerated powers. See *id.* at 71a-91a. Having held that the Act exceeds Congress's enumerated powers, the court found it unnecessary to address respondents' First and Fourth Amendment claims. See *id.* at 91a.

The district court next concluded that the equities supported injunctive relief. See App., *infra*, 41a-50a, 91a-96a. It determined that respondents faced irreparable harm because they would incur compliance costs under the Act. See *id.* at 41a-50a.

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[1] The CTA's reporting requirements do not apply to tax-exempt political organizations. See 31 U.S.C. 5336(a)(11)(B)(xix)(II). But the Mississippi Libertarian Party claims, for reasons that remain unclear, that it "is not classified" as a political organization under federal law. App., *infra*, 29a.

And it concluded that "the threatened injury to [respondents] outweighs any potential harm to [the government]." *Id.* at 91a.

Although respondents had sought relief from enforcement of the statute only on their own behalf, the district court concluded that a "nationwide injunction is appropriate." App., *infra*, 93a. The court emphasized that the Act and the Reporting Rule "apply nationwide" and that "NFIB's membership extends across the country." *Id.* at 95a. "Given the extent of the violation," the court concluded that "the injunction should [also] apply nationwide." *Ibid.* The court purported to enjoin the Act itself, stating: "[T]he CTA, 31 U.S.C. § 5336[,] is hereby enjoined." *Id.* at 97a. Invoking a provision of the Administrative Procedure Act (APA), 5 U.S.C. 705, the court also entered a universal "stay of the Reporting Rule's compliance deadline pending further order of the Court." *Id.* at 96a.

The government appealed to the Fifth Circuit. See App., *infra*, 11a. The district court denied the government's motion to stay the preliminary injunction pending appeal. See *id.* at 10a-18a. The court "acknowledge[d]" "concerns with nationwide injunctions," but again concluded that the nationwide scope of its injunction was appropriate "under the facts and circumstances of this case." *Id.* at 14a-15a.

2. A motions panel of the Fifth Circuit granted the government's motion to stay the preliminary injunction pending appeal. See App., *infra*, 3a-9a.

The motions panel determined that the government was likely to succeed on the merits of respondents' claim. See App., *infra*, 5a-7a. The court explained that the "ownership and operation of a business" are economic activities and that "a reporting requirement for entities engaged in these economic activities falls within 'more than a century of the Supreme Court's Commerce Clause jurisprudence.'" *Id.* at 5a (brackets and citation omitted). The court also explained that respondents' fa-

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES ET AL. *v.* TEXAS ET AL.

CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22–58. Argued November 29, 2022—Decided June 23, 2023

In 2021, the Secretary of Homeland Security promulgated new immigration-enforcement guidelines (Guidelines for the Enforcement of Civil Immigration Law) that prioritize the arrest and removal from the United States of noncitizens who are suspected terrorists or dangerous criminals or who have unlawfully entered the country only recently, for example. The States of Texas and Louisiana claim that the Guidelines contravene two federal statutes that they read to require the arrest of certain noncitizens upon their release from prison (8 U. S. C. §1226(c)) or entry of a final order of removal (§1231(a)(2)). The District Court found that the States would incur costs due to the Executive's failure to comply with those alleged statutory mandates, and that the States had standing to sue based on those costs. On the merits, the District Court found the Guidelines unlawful and vacated them. The Fifth Circuit declined to stay the District Court's judgment, and this Court granted certiorari before judgment.

Held: Texas and Louisiana lack Article III standing to challenge the Guidelines. Pp. 3–14.

(a) Under Article III, a plaintiff must have standing to sue. This bedrock constitutional requirement has its roots in the separation of powers. So the threshold question here is whether the States have standing to maintain this suit. Based on this Court's precedents and longstanding historical practice, the answer is no.

To establish standing, a plaintiff must show an injury in fact caused by the defendant and redressable by a court order. The District Court found that the States would incur additional costs due to the challenged arrest policy. And monetary costs are an injury. But this Court has stressed that the alleged injury must also "be legally and judicially cognizable." *Raines* v. *Byrd,* 521 U. S. 811, 819. That requires that

Syllabus

the dispute is "traditionally thought to be capable of resolution through the judicial process." *Ibid*. Here, the States cite no precedent, history, or tradition of federal courts entertaining lawsuits of this kind. On the contrary, this Court has previously ruled that a plaintiff lacks standing to bring such a suit "when he himself is neither prosecuted nor threatened with prosecution." See *Linda R. S.* v. *Richard D.,* 410 U. S. 614, 619. The *Linda R. S.* Article III standing principle remains the law today, and the States have pointed to no case or historical practice holding otherwise. Pp. 3–6.

(b) There are good reasons why federal courts have not traditionally entertained lawsuits of this kind. For one, when the Executive Branch elects *not* to arrest or prosecute, it does not exercise coercive power over an individual's liberty or property, and thus does not infringe upon interests that courts often are called upon to protect. Moreover, such lawsuits run up against the Executive's Article II authority to decide "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law." *TransUnion LLC* v. *Ramirez*, 594 U. S. ___, ___. The principle of Executive Branch enforcement discretion over arrests and prosecutions extends to the immigration context. Courts also generally lack meaningful standards for assessing the propriety of enforcement choices in this area, which are invariably affected by resource constraints and regularly changing public-safety and public-welfare needs. That is why this Court has recognized that federal courts are generally not the proper forum for resolving claims that the Executive Branch should make more arrests or bring more prosecutions. Pp. 6–9.

(c) This holding does not suggest that federal courts may never entertain cases involving the Executive Branch's alleged failure to make more arrests or bring more prosecutions. First, the Court has adjudicated selective-prosecution claims under the Equal Protection Clause in which a plaintiff typically seeks to prevent his or her own prosecution. Second, the standing analysis might differ when Congress elevates *de facto* injuries to the status of legally cognizable injuries redressable by a federal court. Third, the standing calculus might change if the Executive Branch wholly abandoned its statutory responsibilities to make arrests or bring prosecutions. Fourth, a challenge to an Executive Branch policy that involves both arrest or prosecution priorities *and* the provision of legal benefits or legal status could lead to a different standing analysis. Fifth, policies governing the continued detention of noncitizens who have already been arrested arguably might raise a different standing question than arrest or prosecution policies. But this case presents none of those scenarios. Pp. 9–12.

(d) The discrete standing question raised by this case rarely arises because federal statutes that purport to require the Executive Branch

to make arrests or bring prosecutions are rare. This case is different from those in which the Federal Judiciary decides justiciable cases involving statutory requirements or prohibitions on the Executive, because it implicates the Executive Branch's enforcement discretion and raises the distinct question of whether the Federal Judiciary may in effect order the Executive Branch to take enforcement actions. The Court's decision does not indicate any view on whether the Executive is complying with its statutory obligations. Nor does the Court's narrow holding signal any change in the balance of powers between Congress and the Executive. Pp. 12–14.

606 F. Supp. 3d 437, reversed.

KAVANAUGH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SOTOMAYOR, KAGAN, and JACKSON, JJ., joined. GORSUCH, J., filed an opinion concurring in the judgment, in which THOMAS and BARRETT, JJ., joined. BARRETT, J., filed an opinion concurring in the judgment, in which GORSUCH, J., joined. ALITO, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 22–58

UNITED STATES, ET AL., PETITIONERS *v.*
TEXAS, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 23, 2023]

JUSTICE KAVANAUGH delivered the opinion of the Court.

In 2021, after President Biden took office, the Department of Homeland Security issued new Guidelines for immigration enforcement. The Guidelines prioritize the arrest and removal from the United States of noncitizens who are suspected terrorists or dangerous criminals, or who have unlawfully entered the country only recently, for example. Texas and Louisiana sued the Department of Homeland Security. According to those States, the Department's new Guidelines violate federal statutes that purportedly require the Department to arrest *more* criminal noncitizens pending their removal.

The States essentially want the Federal Judiciary to order the Executive Branch to alter its arrest policy so as to make more arrests. But this Court has long held "that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 619 (1973). Consistent with that fundamental Article III principle, we conclude that the States lack Article III standing to bring this suit.

I

In 2021, Secretary of Homeland Security Mayorkas promulgated new "Guidelines for the Enforcement of Civil Immigration Law." The Guidelines prioritize the arrest and removal from the United States of noncitizens who are suspected terrorists or dangerous criminals, or who have unlawfully entered the country only recently, for example.

Texas and Louisiana sued the Department of Homeland Security, as well as other federal officials and agencies. According to those States, the Guidelines contravene two federal statutes that purportedly require the Department to arrest more criminal noncitizens pending their removal. First, the States contend that for certain noncitizens, such as those who are removable due to a state criminal conviction, §1226(c) of Title 8 says that the Department "shall" arrest those noncitizens and take them into custody when they are released from state prison. Second, §1231(a)(2), as the States see it, provides that the Department "shall" arrest and detain certain noncitizens for 90 days after entry of a final order of removal.

In the States' view, the Department's failure to comply with those statutory mandates imposes costs on the States. The States assert, for example, that they must continue to incarcerate or supply social services such as healthcare and education to noncitizens who should be (but are not being) arrested by the Federal Government.

The U. S. District Court for the Southern District of Texas found that the States would incur costs as a result of the Department's Guidelines. Based on those costs, the District Court determined that the States have standing. On the merits, the District Court ruled that the Guidelines are unlawful, and vacated the Guidelines. 606 F. Supp. 3d 437, 502 (SD Tex. 2022); see 5 U. S. C. §706(2). The U. S. Court of Appeals for the Fifth Circuit declined to stay the District Court's judgment. 40 F. 4th 205 (2022). This Court granted certiorari before judgment. 597 U. S. ___ (2022).

II

Article III of the Constitution confines the federal judicial power to "Cases" and "Controversies." Under Article III, a case or controversy can exist only if a plaintiff has standing to sue—a bedrock constitutional requirement that this Court has applied to all manner of important disputes. See, *e.g., TransUnion LLC* v. *Ramirez*, 594 U. S. ___, ___ (2021) (slip op., at 7); *California* v. *Texas*, 593 U. S. ___, ___ (2021) (slip op., at 4); *Carney* v. *Adams*, 592 U. S. ___, ___–___ (2020) (slip op., at 4–5); *Hollingsworth* v. *Perry*, 570 U. S. 693, 704 (2013); *Clapper* v. *Amnesty Int'l USA*, 568 U. S. 398, 408 (2013); *Raines* v. *Byrd*, 521 U. S. 811, 818 (1997); *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 559–560 (1992); *Allen* v. *Wright*, 468 U. S. 737, 750 (1984); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208, 215 (1974); *United States* v. *Richardson*, 418 U. S. 166, 171 (1974).

As this Court's precedents amply demonstrate, Article III standing is "not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 476 (1982). The principle of Article III standing is "built on a single basic idea—the idea of separation of powers." *Allen*, 468 U. S., at 752. Standing doctrine helps safeguard the Judiciary's proper—and properly limited—role in our constitutional system. By ensuring that a plaintiff has standing to sue, federal courts "prevent the judicial process from being used to usurp the powers of the political branches." *Clapper*, 568 U. S., at 408.

A

According to Texas and Louisiana, the arrest policy spelled out in the Department of Homeland Security's 2021 Guidelines does not comply with the statutory arrest mandates in §1226(c) and §1231(a)(2). The States want the Federal Judiciary to order the Department to alter its arrest policy so that the Department arrests *more* noncitizens.[1]

The threshold question is whether the States have standing under Article III to maintain this suit. The answer is no.

To establish standing, a plaintiff must show an injury in fact caused by the defendant and redressable by a court order. See *Lujan*, 504 U. S., at 560–561. The District Court found that the States would incur additional costs because the Federal Government is not arresting more noncitizens. Monetary costs are of course an injury. But this Court has "also stressed that the alleged injury must be legally and judicially cognizable." *Raines*, 521 U. S., at 819. That "requires, among other things," that the "dispute is traditionally thought to be capable of resolution through the judicial process"—in other words, that the asserted injury is traditionally redressable in federal court. *Ibid.* (internal quotation marks omitted); accord *Valley Forge*, 454 U. S., at 472. In adhering to that core principle, the Court has examined "history and tradition," among other things, as "a meaningful guide to the types of cases that Article III empowers federal courts to consider." *Sprint Communications Co.* v. *APCC Services, Inc.*, 554 U. S. 269, 274 (2008); see *TransUnion LLC*, 594 U. S., at ___–___ (slip op., at 8–9).

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[1] The States may want the Department to arrest *all* of the noncitizens it is now arresting plus other noncitizens—or instead to arrest *some* of the noncitizens it is now arresting plus other noncitizens. Either way, the States seek a court order that would alter the Department's arrest policy so that the Department arrests more noncitizens.

The States have not cited any precedent, history, or tradition of courts ordering the Executive Branch to change its arrest or prosecution policies so that the Executive Branch makes more arrests or initiates more prosecutions. On the contrary, this Court has previously ruled that a plaintiff lacks standing to bring such a suit.

The leading precedent is *Linda R. S.* v. *Richard D.*, 410 U. S. 614 (1973). The plaintiff in that case contested a State's policy of declining to prosecute certain child-support violations. This Court decided that the plaintiff lacked standing to challenge the State's policy, reasoning that in "American jurisprudence at least," a party "lacks a judicially cognizable interest in the prosecution . . . of another." *Id.,* at 619. The Court concluded that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Ibid.*

The Court's Article III holding in *Linda R. S.* applies to challenges to the Executive Branch's exercise of enforcement discretion over whether to arrest or prosecute. See *id.,* at 617, 619; *Castle Rock* v. *Gonzales*, 545 U. S. 748, 760–761, 767, n. 13 (2005); cf. *Sure-Tan, Inc.* v. *NLRB*, 467 U. S. 883, 897 (1984) (citing *Linda R. S.* principle in immigration context and stating that the petitioners there had "no judicially cognizable interest in procuring enforcement of the immigration laws" by the Executive Branch). And importantly, that Article III standing principle remains the law today; the States have pointed to no case or historical practice holding otherwise. A "telling indication of the severe constitutional problem" with the States' assertion of standing to bring this lawsuit "is the lack of historical precedent" supporting it. *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 505 (2010) (internal quotation marks omitted); see also *Raines*, 521 U. S., at 826 ("Not only do appellees lack support from precedent, but historical practice appears

to cut against them as well").

In short, this Court's precedents and longstanding historical practice establish that the States' suit here is not the kind redressable by a federal court.

B

Several good reasons explain why, as *Linda R. S.* held, federal courts have not traditionally entertained lawsuits of this kind.

To begin with, when the Executive Branch elects *not* to arrest or prosecute, it does not exercise coercive power over an individual's liberty or property, and thus does not infringe upon interests that courts often are called upon to protect. See *Lujan*, 504 U. S., at 561–562. And for standing purposes, the absence of coercive power over the plaintiff makes a difference: When "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed" to establish standing. *Id.,* at 562 (emphasis deleted).[2]

Moreover, lawsuits alleging that the Executive Branch has made an insufficient number of arrests or brought an insufficient number of prosecutions run up against the Executive's Article II authority to enforce federal law. Article II of the Constitution assigns the "executive Power" to the President and provides that the President "shall take Care that the Laws be faithfully executed." U. S. Const., Art. II, §1, cl. 1; §3. Under Article II, the Executive Branch possesses authority to decide "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law." *TransUnion LLC*, 594 U. S., at ___ (slip op., at 13); see *Lujan*, 504 U. S., at 576–578; *Allen*, 468

[2] By contrast, when "the plaintiff is himself an object of the action (or forgone action) at issue," "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U. S., at 561–562.

U. S., at 760–761. The Executive Branch—not the Judiciary—makes arrests and prosecutes offenses on behalf of the United States. See *United States* v. *Nixon*, 418 U. S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); *Printz* v. *United States*, 521 U. S. 898, 922–923 (1997) (Brady Act provisions held unconstitutional because, among other things, they transferred power to execute federal law to state officials); *United States* v. *Armstrong*, 517 U. S. 456, 464 (1996) (decisions about enforcement of "the Nation's criminal laws" lie within the "special province of the Executive" (internal quotation marks omitted)); *Buckley* v. *Valeo*, 424 U. S. 1, 138 (1976) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed'" (quoting U. S. Const., Art. II, §3)); see also *United States* v. *Cox*, 342 F. 2d 167, 171 (CA5 1965).

That principle of enforcement discretion over arrests and prosecutions extends to the immigration context, where the Court has stressed that the Executive's enforcement discretion implicates not only "normal domestic law enforcement priorities" but also "foreign-policy objectives." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 490–491 (1999). In line with those principles, this Court has declared that the Executive Branch also retains discretion over whether to remove a noncitizen from the United States. *Arizona* v. *United States*, 567 U. S. 387, 396 (2012) ("Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all").

In addition to the Article II problems raised by judicial review of the Executive Branch's arrest and prosecution policies, courts generally lack meaningful standards for assessing the propriety of enforcement choices in this area. After all, the Executive Branch must prioritize its

enforcement efforts. See *Wayte* v. *United States*, 470 U. S. 598, 607–608 (1985). That is because the Executive Branch (i) invariably lacks the resources to arrest and prosecute every violator of every law and (ii) must constantly react and adjust to the ever-shifting public-safety and public-welfare needs of the American people.

This case illustrates the point. As the District Court found, the Executive Branch does not possess the resources necessary to arrest or remove all of the noncitizens covered by §1226(c) and §1231(a)(2). That reality is not an anomaly—it is a constant. For the last 27 years since §1226(c) and §1231(a)(2) were enacted in their current form, all five Presidential administrations have determined that resource constraints necessitated prioritization in making immigration arrests.

In light of inevitable resource constraints and regularly changing public-safety and public-welfare needs, the Executive Branch must balance many factors when devising arrest and prosecution policies. That complicated balancing process in turn leaves courts without meaningful standards for assessing those policies. Cf. *Heckler* v. *Chaney*, 470 U. S. 821, 830–832 (1985); *Lincoln* v. *Vigil*, 508 U. S. 182, 190–192 (1993). Therefore, in both Article III cases and Administrative Procedure Act cases, this Court has consistently recognized that federal courts are generally not the proper forum for resolving claims that the Executive Branch should make more arrests or bring more prosecutions. See *Linda R. S.*, 410 U. S., at 619; cf. *Heckler*, 470 U. S., at 831 (recognizing the "general unsuitability for judicial review of agency decisions to refuse enforcement"); *ICC* v. *Locomotive Engineers*, 482 U. S. 270, 283 (1987) ("it is entirely clear that the refusal to prosecute cannot be the subject of judicial review").[3]

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[3]Also, the plaintiffs here are States, and federal courts must remain mindful of bedrock Article III constraints in cases brought by States

All of those considerations help explain why federal courts have not traditionally entertained lawsuits of this kind. By concluding that Texas and Louisiana lack standing here, we abide by and reinforce the proper role of the Federal Judiciary under Article III. The States' novel standing argument, if accepted, would entail expansive judicial direction of the Department's arrest policies. If the Court green-lighted this suit, we could anticipate complaints in future years about alleged Executive Branch under-enforcement of any similarly worded laws—whether they be drug laws, gun laws, obstruction of justice laws, or the like. We decline to start the Federal Judiciary down that uncharted path. Our constitutional system of separation of powers "contemplates a more restricted role for Article III courts." *Raines*, 521 U. S., at 828.

C

In holding that Texas and Louisiana lack standing, we do not suggest that federal courts may never entertain cases involving the Executive Branch's alleged failure to make more arrests or bring more prosecutions.

First, the Court has adjudicated selective-prosecution claims under the Equal Protection Clause. In those cases, however, a party typically seeks to prevent his or her own prosecution, not to mandate additional prosecutions

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against an executive agency or officer. To be sure, States sometimes have standing to sue the United States or an executive agency or officer. See, *e.g., New York* v. *United States*, 505 U. S. 144 (1992). But in our system of dual federal and state sovereignty, federal policies frequently generate indirect effects on state revenues or state spending. And when a State asserts, for example, that a federal law has produced only those kinds of indirect effects, the State's claim for standing can become more attenuated. See *Massachusetts* v. *Laird*, 400 U. S. 886 (1970); *Florida* v. *Mellon*, 273 U. S. 12, 16–18 (1927); cf. *Lujan*, 504 U. S., at 561–562. In short, none of the various theories of standing asserted by the States in this case overcomes the fundamental Article III problem with this lawsuit.

against other possible defendants. See, *e.g., Wayte*, 470 U. S., at 604; *Armstrong*, 517 U. S., at 459, 463.

Second, as the Solicitor General points out, the standing analysis might differ when Congress elevates *de facto* injuries to the status of legally cognizable injuries redressable by a federal court. See Brief for Petitioners 20, n. 3; cf. *TransUnion LLC*, 594 U. S., at ___–___ (slip op., at 10–11); *Federal Election Comm'n* v. *Akins*, 524 U. S. 11, 20 (1998); *Raines*, 521 U. S., at 820, n. 3; *Lujan*, 504 U. S., at 578; *Linda R. S.*, 410 U. S., at 617, n. 3. For example, Congress might (i) specifically authorize suits against the Executive Branch by a defined set of plaintiffs who have suffered concrete harms from executive under-enforcement and (ii) specifically authorize the Judiciary to enter appropriate orders requiring additional arrests or prosecutions by the Executive Branch.

Here, however, the relevant statutes do not supply such specific authorization. The statutes, even under the States' own reading, simply say that the Department "shall" arrest certain noncitizens. Given the "deep-rooted nature of law-enforcement discretion," a purported statutory arrest mandate, without more, does not entitle any particular plaintiff to enforce that mandate in federal court. *Castle Rock*, 545 U. S., at 761, 764–765, 767, n. 13; cf. *Heckler*, 470 U. S., at 835. For an arrest mandate to be enforceable in federal court, we would need at least a "stronger indication" from Congress that judicial review of enforcement discretion is appropriate—for example, specific authorization for particular plaintiffs to sue and for federal courts to order more arrests or prosecutions by the Executive. *Castle Rock*, 545 U. S., at 761. We do not take a position on whether such a statute would suffice for Article III purposes; our only point is that no such statute is present in this case.[4]

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[4]As the Solicitor General noted, those kinds of statutes, by infringing

Third, the standing calculus might change if the Executive Branch wholly abandoned its statutory responsibilities to make arrests or bring prosecutions. Under the Administrative Procedure Act, a plaintiff arguably could obtain review of agency non-enforcement if an agency "has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler*, 470 U. S., at 833, n. 4 (internal quotation marks omitted); see *id.,* at 839 (Brennan, J., concurring); cf. 5 U. S. C. §706(1). So too, an extreme case of non-enforcement arguably could exceed the bounds of enforcement discretion and support Article III standing. But the States have not advanced a *Heckler*-style "abdication" argument in this case or argued that the Executive has entirely ceased enforcing the relevant statutes. Therefore, we do not analyze the standing ramifications of such a hypothetical scenario.

Fourth, a challenge to an Executive Branch policy that involves both the Executive Branch's arrest or prosecution priorities *and* the Executive Branch's provision of legal benefits or legal status could lead to a different standing analysis. That is because the challenged policy might implicate more than simply the Executive's traditional enforcement discretion. Cf. *Department of Homeland Security* v. *Regents of Univ. of Cal.*, 591 U. S. ___, ___–___ (2020) (slip op., at 11–12) (benefits such as work authorization and Medicare eligibility accompanied by non-enforcement meant that the policy was "more than simply a non-enforcement policy"); *Texas* v. *United States*, 809 F. 3d 134, 154 (CA5 2015) (*Linda R. S.* "concerned only nonprosecution," which is distinct from "both nonprosecution and the conferral of benefits"), aff'd by an equally divided Court, 579 U. S. 547 (2016). Again, we need

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on the Executive's enforcement discretion, could also raise Article II issues. See Tr. of Oral Arg. 24–25.

not resolve the Article III consequences of such a policy.

Fifth, policies governing the continued detention of noncitizens who have already been arrested arguably might raise a different standing question than arrest or prosecution policies. Cf. *Biden* v. *Texas*, 597 U. S. ___ (2022). But this case does not concern a detention policy, so we do not address the issue here.[5]

D

The discrete standing question raised by this case rarely arises because federal statutes that purport to *require* the Executive Branch to make arrests or bring prosecutions are rare—not surprisingly, given the Executive's Article II authority to enforce federal law and the deeply rooted history of enforcement discretion in American law. Indeed, the States cite no similarly worded federal laws. This case therefore involves both a highly unusual provision of federal law and a highly unusual lawsuit.

To be clear, our Article III decision today should in no way be read to suggest or imply that the Executive possesses some freestanding or general constitutional authority to disregard statutes requiring or prohibiting executive action. Moreover, the Federal Judiciary of course routinely and appropriately decides justiciable cases involving statutory requirements or prohibitions on the Executive.

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[5]This case concerns only arrest and prosecution policies, and we therefore address only that issue. As to detention, the Solicitor General has represented that the Department's Guidelines do not affect continued detention of noncitizens already in federal custody. See Brief for Petitioners 24; Tr. of Oral Arg. 40 (Solicitor General: "the Guidelines govern only decisions about apprehension and removal, whether to charge a non-citizen in the first place. . . . the Guidelines don't have anything to do with continued detention"); Guidelines Memorandum, App. 111 ("This memorandum provides guidance for the apprehension and removal of noncitizens"); *id.,* at 113 ("We will prioritize for apprehension and removal noncitizens who are a threat to our national security, public safety, and border security").

See, *e.g., American Hospital Assn.* v. *Becerra*, 596 U. S. ___, ___–___ (2022) (slip op., at 9–14); *Weyerhaeuser Co.* v. *United States Fish and Wildlife Serv.*, 586 U. S. ___, ___–___ (2018) (slip op., at 8–15); *Zivotofsky* v. *Clinton*, 566 U. S. 189, 196–201 (2012); *Hamdan* v. *Rumsfeld*, 548 U. S. 557, 592–595, 613–615, 635 (2006); *id.,* at 636–646 (Kennedy, J., concurring); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 637–638, 640 (1952) (Jackson, J., concurring).

This case is categorically different, however, because it implicates only one discrete aspect of the executive power—namely, the Executive Branch's traditional discretion over whether to take enforcement actions against violators of federal law. And this case raises only the narrow Article III standing question of whether the Federal Judiciary may in effect order the Executive Branch to take enforcement actions against violators of federal law—here, by making more arrests. Under this Court's Article III precedents and the historical practice, the answer is no.[6]

It bears emphasis that the question of whether the federal courts have jurisdiction under Article III is distinct from the question of whether the Executive Branch is complying with the relevant statutes—here, §1226(c) and §1231(a)(2). In other words, the question of reviewability is different from the question of legality. We take no position on whether the Executive Branch here is complying with its legal obligations under §1226(c) and §1231(a)(2). We hold

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[6]As part of their argument for standing, the States also point to *Massachusetts* v. *EPA*, 549 U. S. 497 (2007). Putting aside any disagreements that some may have with *Massachusetts* v. *EPA*, that decision does not control this case. The issue there involved a challenge to the denial of a statutorily authorized petition for rulemaking, not a challenge to an exercise of the Executive's enforcement discretion. *Id.,* at 520, 526; see also *id.,* at 527 (noting that there are "key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action" and that "an agency's refusal to initiate enforcement proceedings is not ordinarily subject to judicial review").

only that the federal courts are not the proper forum to resolve this dispute.

On that point, even though the federal courts lack Article III jurisdiction over this suit, other forums remain open for examining the Executive Branch's arrest policies. For example, Congress possesses an array of tools to analyze and influence those policies—oversight, appropriations, the legislative process, and Senate confirmations, to name a few. Cf. *Raines*, 521 U. S., at 829; *Lincoln*, 508 U. S., at 193. And through elections, American voters can both influence Executive Branch policies and hold elected officials to account for enforcement decisions. In any event, those are political checks for the political process. We do not opine on whether any such actions are appropriate in this instance.

The Court's standing decision today is narrow and simply maintains the longstanding jurisprudential status quo. See *Linda R. S.*, 410 U. S., at 619. The Court's decision does not alter the balance of powers between Congress and the Executive, or change the Federal Judiciary's traditional role in separation of powers cases.

* * *

In sum, the States have brought an extraordinarily unusual lawsuit. They want a federal court to order the Executive Branch to alter its arrest policies so as to make more arrests. Federal courts have not traditionally entertained that kind of lawsuit; indeed, the States cite no precedent for a lawsuit like this. The States lack Article III standing because this Court's precedents and the "historical experience" preclude the States' "attempt to litigate this dispute at this time and in this form." *Raines*, 521 U. S., at 829. And because the States lack Article III standing, the District Court did not have jurisdiction. We reverse the judgment of the District Court.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 22–58

UNITED STATES, ET AL., PETITIONERS *v.*
TEXAS, ET AL.

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

[June 23, 2023]

JUSTICE GORSUCH, with whom JUSTICE THOMAS and JUSTICE BARRETT join, concurring in the judgment.

The Court holds that Texas and Louisiana lack Article III standing to challenge the Department of Homeland Security's Guidelines for the Enforcement of Civil Immigration Law. I agree. But respectfully, I diagnose the jurisdictional defect differently. The problem here is redressability.

I

Article III vests federal courts with the power to decide "Cases" and "Controversies." Standing doctrine honors the limitations inherent in this assignment by ensuring judges attend to actual harms rather than abstract grievances. "If individuals and groups could invoke the authority of a federal court to forbid what they dislike for no more reason than they dislike it, we would risk exceeding the judiciary's limited constitutional mandate and infringing on powers committed to other branches of government." *American Legion* v. *American Humanist Assn.*, 588 U. S. ___, ___ (2019) (GORSUCH, J., concurring in judgment) (slip op., at 3).

To establish standing to sue in federal court, a plaintiff must show that it has suffered a concrete and particularized injury, one that is both traceable to the defendant and redressable by a court order. See *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992). If a plaintiff fails

at any step, the court cannot reach the merits of the dispute. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 102–104 (1998). This is true whether the plaintiff is a private person or a State. After all, standing doctrine derives from Article III, and nothing in that provision suggests a State may have standing when a similarly situated private party does not. See *Massachusetts* v. *EPA*, 549 U. S. 497, 536–538 (2007) (ROBERTS, C. J., dissenting).

The Court holds that Texas and Louisiana lack standing to challenge the Guidelines because "a party lacks a judicially cognizable interest in the prosecution . . . of another." *Ante*, at 5 (internal quotation marks omitted). To be sure, the district court found that the Guidelines have led to an increase in the number of aliens with criminal convictions and final orders of removal who are released into the States. 606 F. Supp. 3d 437, 459–463, 467 (SD Tex. 2022). The district court also found that, thanks to this development, the States have spent, and continue to spend, more money on law enforcement, incarceration, and social services. *Id.,* at 463–465, 467. Still, the Court insists, "[s]everal good reasons explain why" these harms are insufficient to afford the States standing to challenge the Guidelines. *Ante*, at 6.

I confess to having questions about each of the reasons the Court offers. Start with its observation that the States have not pointed to any "historical practice" of courts ordering the Executive Branch to change its arrest or prosecution policies. *Ante*, at 5, 6. The Court is right, of course, that "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." *TransUnion LLC* v. *Ramirez*, 594 U. S. ___, ___ (2021) (slip op., at 8) (internal quotation marks omitted). But, again, the district court found that the Guidelines impose "significant costs" on the States. 606 F. Supp. 3d, at 495. The Court today does not set aside this finding as clearly erroneous. Nor does anyone dispute that even one dollar's worth of harm is traditionally enough to "qualify as

concrete injur[y] under Article III." *TransUnion*, 594 U. S., at ___ (slip op., at 9); see also *Uzuegbunam* v. *Preczewski*, 592 U. S. ___, ___ (2021) (slip op., at 11). Indeed, this Court has allowed other States to challenge other Executive Branch policies that indirectly caused them monetary harms. See, *e.g., Department of Commerce* v. *New York*, 588 U. S. ___, ___–___ (2019) (slip op., at 9–10). So why are these States now forbidden from doing the same?

Next, the Court contends that, "when the Executive Branch elects *not* to arrest or prosecute, it does not exercise coercive power over an individual's liberty or property." *Ante*, at 6. Here again, in principle, I agree. But if an exercise of coercive power matters so much to the Article III standing inquiry, how to explain decisions like *Massachusetts* v. *EPA*? There the Court held that Massachusetts had standing to challenge the federal government's decision not to regulate greenhouse gas emissions from new motor vehicles. See 549 U. S., at 516–526. And what could be less coercive than a decision not to regulate? In *Massachusetts* v. *EPA*, the Court chose to overlook this difficulty in part because it thought the State's claim of standing deserved "special solicitude." *Id.,* at 520. I have doubts about that move. Before *Massachusetts* v. *EPA*, the notion that States enjoy relaxed standing rules "ha[d] no basis in our jurisprudence." *Id.*, at 536 (ROBERTS, C. J., dissenting). Nor has "special solicitude" played a meaningful role in this Court's decisions in the years since. Even so, it's hard not to wonder why the Court says nothing about "special solicitude" in this case. And it's hard not to think, too, that lower courts should just leave that idea on the shelf in future ones.

Finally, the Court points to the fact that Article II vests in the President considerable enforcement discretion. *Ante*, at 6–8. So much so that "courts generally lack meaningful standards for assessing the propriety of [the Executive Branch's] enforcement choices." *Ante*, at 7. But almost as

soon as the Court announces this general rule, it adds a caveat, stressing that "[t]his case concerns only arrest and prosecution policies." *Ante,* at 12, n. 5. It's a curious qualification. Article II does not have an Arrest and Prosecution Clause. It endows the President with the "executive Power," §1, cl. 1, and charges him with "tak[ing] Care" that federal laws are "faithfully executed," §3. These provisions give the President a measure of discretion over the enforcement of *all* federal laws, not just those that can lead to arrest and prosecution. So if the Court means what it says about Article II, can it mean what it says about the narrowness of its holding? There's another curious qualification in the Court's opinion too. "[T]he standing calculus might change," we are told, "if the Executive Branch wholly abandoned its statutory responsibilities to make arrests or bring prosecutions." *Ante*, at 11. But the Court declines to say more than that because "the States have not advanced" such an argument. *Ibid.* Is that true, though? The States have pleaded a claim under the Take Care Clause. App. 106. Is that not an abdication argument? Did they fail to plead it properly? Or is the Court simply ignoring it?

II

As I see it, the jurisdictional problem the States face in this case isn't the lack of a "judicially cognizable" interest or injury. *Ante,* at 5 (internal quotation marks omitted). The States proved that the Guidelines increase the number of aliens with criminal convictions and final orders of removal released into the States. They also proved that, as a result, they spend more money on everything from law enforcement to healthcare. The problem the States face concerns something else altogether—a lack of redressability.

To establish redressability, a plaintiff must show from the outset of its suit that its injuries are capable of being remedied "'by a favorable decision.'" *Lujan*, 504 U. S., at 561; see also *id.,* at 570, n. 5 (plurality opinion). Ordinarily,

to remedy harms like those the States demonstrated in this suit, they would seek an injunction. The injunction would direct federal officials to detain aliens consistent with what the States say the immigration laws demand. But even assuming an injunction like that would redress the States' injuries, that form of relief is not available to them.

It is not available because of 8 U. S. C. §1252(f)(1). There, Congress provided that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of" certain immigration laws, including the very laws the States seek to have enforced in this case. If there were any doubt about how to construe this command, we resolved it in *Garland* v. *Aleman Gonzalez*, 596 U. S. ___ (2022). In that case, we held that §1252(f)(1) "prohibits lower courts from . . . order[ing] federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." *Id.,* at ___ (slip op., at 5). Put simply, the remedy that would ordinarily have the best chance of redressing the States' harms is a forbidden one in this case.

The district court thought it could sidestep §1252(f)(1). Instead of issuing an injunction, it purported to "vacate" the Guidelines pursuant to §706(2) of the Administrative Procedure Act (APA), 5 U. S. C. §706(2). 606 F. Supp. 3d, at 498–501, and n. 71. Vacatur, as the district court understood it, is a distinct form of relief that operates directly on agency action, depriving it of legal force or effect. See *id.*, at 499–500. And vacatur, the district court reasoned, does not offend §1252(f)(1), because it does not entail an order directing any federal official to do anything. See *id.,* at 501, n. 71. The States embrace this line of argument before us. Brief for Respondents 43–47; Tr. of Oral Arg. 75–82.

It's a clever workaround, but it doesn't succeed. Start with perhaps the simplest reason. Assume for the moment the district court was right that §1252(f)(1) does not bar vacatur orders and that §706(2) authorizes courts to issue

them. Even so, a vacatur order still does nothing to redress the States' injuries. The Guidelines merely advise federal officials about how to exercise their prosecutorial discretion when it comes to deciding which aliens to prioritize for arrest and removal. A judicial decree rendering the Guidelines a nullity does nothing to change the fact that federal officials possess the same underlying prosecutorial discretion. Nor does such a decree require federal officials to change how they exercise that discretion in the Guidelines' absence. It's a point even the States have acknowledged. Tr. of Oral Arg. 82–83; see also *id.,* at 75–77, 125.

Faced with that difficulty, the States offer this reply. As a practical matter, they say, we can expect federal officials to alter their arrest and prosecution priorities in light of a judicial opinion reasoning that the Guidelines are unlawful. See *id.,* at 80, 82–83. But this doesn't work either. Whatever a court may say in an opinion does no more to compel federal officials to change how they exercise their prosecutorial discretion than an order vacating the Guidelines. Nor do we measure redressability by asking whether a court's legal reasoning may inspire or shame others into acting differently. We measure redressability by asking whether a court's judgment will remedy the plaintiff's harms. As this Court recently put it: "It is a federal court's judgment, not its opinion, that remedies an injury; thus it is the judgment, not the opinion, that demonstrates redressability." *Haaland* v. *Brackeen*, 599 U. S. ___, ___ (2023) (slip op., at 32). If the rule were otherwise, and courts could "simply assume that everyone . . . will honor the legal rationales that underlie their decrees, then redressability [would] *always* exist." *Franklin* v. *Massachusetts*, 505 U. S. 788, 825 (1992) (Scalia, J., concurring in part and concurring in judgment).

Perhaps sensing they have run into yet another roadblock, the States try one last way around it. Fleetingly, they direct us to the parenthetical in §1252(f)(1): "(other than the Supreme Court)." That language, they say, allows

this Court to invoke the All Writs Act, 28 U. S. C. §1651, to fashion its own injunction. And the possibility that this Court might award them relief, the States suggest, makes their injuries redressable after all. See Brief for Respondents 47; cf. *post,* at 12 (ALITO, J., dissenting).

It's an argument that yields more questions than answers. The parenthetical the States cite is a "curious" provision, one that "does not appear to have an analogue elsewhere in the United States Code." *Biden* v. *Texas*, 597 U. S. ___, ___ (2022) (BARRETT, J., dissenting) (slip op., at 4). Even assuming it permits this Court to award an injunction when a case comes to us on review, it does not obviously solve the States' redressability problem. Normally, after all, a plaintiff must establish redressability from the outset of the suit. See *Lujan*, 504 U. S., at 561; see also *id.,* at 570, n. 5 (plurality opinion). Not only that, a plaintiff must show a favorable decision is "'likely'" to provide effectual relief. *Id.,* at 561. When the States filed this suit, however, the possibility that it might find its way to this Court was speculative at best. See *id.*, at 570, n. 5 (plurality opinion) (rejecting an argument that redressability could depend on "the fortuity that [a] case has made its way to *this* Court").

Nor is that the only complication. Ordinarily, to win an injunction from any court, a party must satisfy several factors. See *eBay Inc.* v. *MercExchange, L. L. C.*, 547 U. S. 388, 391 (2006). The States relegate any mention of these factors to a short, formulaic paragraph tacked onto the end of their brief. See Brief for Respondents 48. Worse, the only injunction they seek is one barring "implementation and enforcement" of the Guidelines—essentially an injunction imitating a vacatur order. *Id.*, at 47. And as we have seen, an order like that would leave officials with their prosecutorial discretion intact. See *supra,* at 6. So, even if this Court were to take the unusual step of issuing and superintending its own injunction, giving the States the very order they seek is hardly sure to redress the injuries they assert.

III

Beyond these redressability problems may lie still another. Recall the essential premise on which the district court proceeded—that the APA empowers courts to vacate agency action. The federal government vigorously disputes this premise, arguing that the law does not contemplate this form of relief. The reasons the government offers are plenty and serious enough to warrant careful consideration.

A

Traditionally, when a federal court finds a remedy merited, it provides party-specific relief, directing the defendant to take or not take some action relative to the plaintiff. If the court's remedial order affects nonparties, it does so only incidentally. See, *e.g., Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 931 (1975) ("[N]either declaratory nor injunctive relief can directly interfere with the enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs."); *Alemite Mfg. Corp.* v. *Staff*, 42 F. 2d 832 (CA2 1930) (L. Hand, J.) ("[A] court of equity . . . cannot lawfully enjoin the world at large."); see also *Trump* v. *Hawaii*, 585 U. S. ___, ___ (2018) (THOMAS, J., concurring) (slip op., at 6). This tracks the founding-era understanding that courts "render a judgment or decree upon the rights of the litigant[s]." *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 718 (1838). It also ensures that federal courts respect the limits of their Article III authority to decide cases and controversies and avoid trenching on the power of the elected branches to shape legal rights and duties more broadly. After all, the "judicial Power" is the power to "decide cases for parties, not questions for everyone." S. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 421 (2017).

Despite these foundational principles, in recent years a number of lower courts have asserted the authority to issue

decrees that purport to define the rights and duties of sometimes millions of people who are not parties before them. Three years ago, I reflected on the rise of the "universal injunctio[n]" and raised questions about its consistency with the separation of powers and our precedents. *Department of Homeland Security* v. *New York*, 589 U. S. ___, ___ (2020) (opinion concurring in grant of stay) (slip op., at 3). I observed, too, that "the routine issuance of universal injunctions" has proven "unworkable, sowing chaos for litigants, the government, courts, and all those affected by these [sometimes] conflicting" decrees. *Ibid*.

Matters have not improved with time. Universal injunctions continue to intrude on powers reserved for the elected branches. They continue to deprive other lower courts of the chance to weigh in on important questions before this Court has to decide them. They continue to encourage parties to engage in forum shopping and circumvent rules governing class-wide relief. Recent events have highlighted another problem too. Sometimes, the government may effectively submit to a universal decree running against it in order to avoid "the usual and important requirement, under the [APA], that a regulation originally promulgated using notice and comment . . . may only be repealed through notice and comment." *Arizona* v. *City and County of San Francisco*, 596 U. S. ___, ___ (2022) (ROBERTS, C. J., concurring) (slip op., at 2). It is a strategy that amounts to little more than "'rulemaking-by-collective-acquiescence.'" *Ibid.*; see also *Danco Laboratories, LLC* v. *Alliance for Hippocratic Medicine*, 598 U. S. ___, ___ (2023) (ALITO, J., dissenting from grant of application for stays) (slip op., at 3); *Arizona* v. *Mayorkas*, 598 U. S. ___, ___–___ (2023) (statement of GORSUCH, J.) (slip op., at 1–4).

Today's case presents a variation on the theme. The district court ordered "wholesale vacatur" of the Guidelines, rendering them inoperable with respect to any person anywhere. 606 F. Supp. 3d, at 499, 502. As authority for its

course, the district court cited §706(2) of the APA. That provision does not say anything about "vacating" agency action ("wholesale" or otherwise). Instead, it authorizes a reviewing court to "set aside" agency action. Still, from those two words alone, the district court thought the power to nullify the Guidelines with respect to anyone anywhere surely follows. See 606 F. Supp. 3d, at 498–500.

Color me skeptical. If the Congress that unanimously passed the APA in 1946 meant to overthrow the "bedrock practice of case-by-case judgments with respect to the parties in each case" and vest courts with a "new and far-reaching" remedial power, it surely chose an obscure way to do it. *Arizona* v. *Biden*, 40 F. 4th 375, 396 (CA6 2022) (Sutton, C. J., concurring). At the very least, it is worth a closer look.

B

Begin with the words "set aside" in isolation. If they might suggest to some a power to "vacate" agency action in the sense of rendering it null and void, just as naturally they might mean something else altogether. They might simply describe what a court usually does when it finds a federal or state statute unconstitutional, or a state law preempted by a federal one. Routinely, a court will disregard offensive provisions like these and proceed to decide the parties' dispute without respect to them. In *Dennis* v. *United States*, 341 U. S. 494 (1951), for example, Justice Frankfurter observed that "[w]e are to set aside the judgment of those whose duty it is to legislate only if" the Constitution requires it. *Id.*, at 525 (concurring opinion). Justice Frankfurter hardly meant to suggest the Court had the power to erase statutes from the books. See *id.*, at 525–526. Instead, he used the phrase to mean that a court should disregard—refuse to apply—an unconstitutional law. It is a usage that was common at the time of the APA's adoption and that remains so today. See Webster's New International Dictionary 2291 (2d ed. 1954) (defining "set aside" as

"to put to one side; discard; dismiss" and "to reject from consideration; overrule"); Webster's New World College Dictionary 1329 (5th ed. 2016) (defining "set aside" as "to set apart" and "to discard; dismiss; reject").

There are many reasons to think §706(2) uses "set aside" to mean "disregard" rather than "vacate." For one thing, at the time of the APA's adoption, conventional wisdom regarded agency rules as "quasi-legislative" in nature. See *Humphrey's Executor* v. *United States*, 295 U. S. 602, 624, 628 (1935); see also D. Currie & F. Goodman, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum, 75 Colum. L. Rev. 1, 40 (1975). And federal courts have never enjoyed the power to "vacate" legislation. Instead, they possess "little more than the negative power to disregard an unconstitutional enactment." *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923). Reading "set aside" to mean "disregard" ensures parallel judicial treatment of statutes and rules.

For another thing, the term "set aside" appears in §706 of the APA. That section is titled "Scope of review," a title it has borne since the law's enactment in 1946. 60 Stat. 243. And ordinarily, when we think about the scope of a court's review, we do not think about the remedies the court may authorize after reaching its judgment on the merits. Instead, we think about the court's decisional process leading up to that judgment. Understanding "set aside" as a command to disregard an unlawful rule in the decisional process fits perfectly within this design. Understanding the phrase as authorizing a remedy does not.

What follows in §706 appears to confirm the point. The statute begins by providing that, "[t]o 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 and applicability of the terms of an agency action." Exactly as

expected, we find an instruction about the decisional process—one requiring the court to apply "de novo review on questions of law" as it considers the parties' arguments in the course of reaching its judgment. *Kisor* v. *Wilkie*, 588 U. S. ___, ___ (2019) (GORSUCH, J., concurring in judgment) (slip op., at 15) (internal quotation marks omitted). Nothing here speaks to remedies.

The remaining statutory language is more of the same. Section 706 goes on to instruct that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be," among other things, "arbitrary," "capricious," "contrary to constitutional right," "in excess of" statutory authority, or "unsupported by substantial evidence." §706(2). Looking at the provision as a whole, rather than focusing on two words in isolation, we see further evidence that it governs a court's scope of review or decisional process. The statute tells judges to resolve the cases that come to them without regard to deficient agency action, findings, or conclusions—an instruction entirely consistent with the usual "negative power" of courts "to disregard" that which is unlawful. *Mellon*, 262 U. S., at 488.

Other details are telling too. Consider the latter part of §706(2)'s directive to "set aside agency action, findings, and conclusions." The APA defines "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U. S. C. §551(13). A court can disregard any of those things. But what would it even mean to say a court must render null and void an agency's failure to act? Notice, too, the language about "findings." Often, judges disregard factual findings unsupported by record evidence and resolve the case at hand without respect to them. See Fed. Rule Civ. Proc. 52(a)(6) ("Findings of fact . . . must not be set aside unless clearly erroneous."). None of that means we may pretend to rewrite history and scrub any trace of faulty findings from the record.

Consider as well the larger statutory context. Section 702 restricts judicial review to "person[s]" who have "suffer[ed] legal wrong because of agency action, or [been] adversely affected or aggrieved by agency action." The provision also instructs that "any mandatory or injunctive decree shall specify the Federal officer or officers . . . personally responsible for compliance." Here, it seems, Congress nodded to traditional standing rules and remedial principles. Yet under the district court's reading, we must suppose 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.

Then there is §703. That is where the APA most clearly discusses remedies. Section 703 authorizes aggrieved persons to bring "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus." Conspicuously missing from the list is vacatur. And what exactly would a "form of legal action" seeking vacatur look like anyway? Would it be a creature called a "writ of vacatur"? Nobody knows (or bothers to tell us). Nor is it 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. Cf. J. Harrison, Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies, 37 Yale J. Reg. Bull. 37, 37, 45–46 (2020).

The district court's reading of "set aside" invites still other anomalies. Section 706(2) governs all proceedings under the APA. Any interpretation of "set aside" therefore must make sense in the context of an enforcement proceeding, an action for a declaratory judgment, a suit for an injunction, or habeas. See §703. This poses a problem for the district court's interpretation, for no one thinks a court adjudicating a declaratory action or a habeas petition "vacates" agency action along the way. See Brief for United

States 41–42; Harrison, 37 Yale J. Reg. Bull., at 46. The anomaly dissipates, however, if we read §706(2) as instructing courts about when they must disregard agency action in the process of deciding a case.

Imagine what else it would mean if §706(2) really did authorize vacatur. Ordinary joinder and class-action procedures would become essentially irrelevant in administrative litigation. Why bother jumping through those hoops when a single plaintiff can secure a remedy that rules the world? See Bray, 131 Harv. L. Rev., at 464–465. Surely, too, it is odd that leading scholars who wrote extensively about the APA after its adoption apparently never noticed this supposed remedy. See J. Harrison, Vacatur of Rules Under the Administrative Procedure Act, 40 Yale J. Reg. Bull. 119, 127–128 (2023) (discussing scholarship of Professors Kenneth Culp Davis and Louis Jaffe); see also Department of Justice, Attorney General's Manual on the Administrative Procedure Act 108 (1947) (offering the Executive Branch's view that §706 simply "restates the present law as to the scope of judicial review"). These are not people who would have missed such a major development in their field.

C

As always, there are arguments on the other side of the ledger, and the States tee up several. They first reply that §706(2) must allow vacatur of agency action because the APA models judicial review of agency action on appellate review of judgments, and appellate courts sometimes vacate judgments. Brief for Respondents 40. But just because "Congress may sometimes refer to collateral judicial review of executive action as 'an appeal' . . . does not make it an 'appeal' akin to that taken from the district court to the court of appeals." *Garland* v. *Ming Dai*, 593 U. S. ___, ___ (2021) (slip op., at 9). Nor does any of that tell us in which respects the APA models judicial review of agency action on appellate review of lower court judgments. According to one

scholar, the "salient" similarities between appellate review and judicial review of agency action concern the standards of review—in both types of proceedings, a reviewing court engages in a more rigorous review of legal questions and a more deferential review of factual findings. T. Merrill, Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law, 111 Colum. L. Rev. 939, 940–941 (2011). None of that has to do with remedies; once again, it concerns a court's scope of review or decisional process.

The States next invoke §706(1) and §705. The former provides that courts shall "compel agency action unlawfully withheld or unreasonably delayed." The latter says courts "may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." The States insist that "[i]t would be illogical" for the APA to authorize these remedies but not vacatur. Brief for Respondents 40. Is it so clear, though, that §706(1) and §705 authorize remedies? Section 706(1) does seem to contemplate a remedy. But it's one §703 mentions—mandatory injunctions. So §706(1) might not authorize a remedy as much as confirm the availability of a traditional remedy to address agency *in*action. The same could be said about §705; it might just confirm courts' authority to issue traditional equitable relief pending judicial review. Cf. *Sampson* v. *Murray*, 415 U. S. 61, 69, n. 15 (1974) (explaining that §705 was "primarily intended to reflect existing law").

The States also direct us to scholarship that in turn purports to identify a few instances of federal courts "setting aside" agency action in the years leading up to the APA. See Brief for Respondents 41; see also Brief for State of Florida as *Amicus Curiae* 17. It is not obvious, however, that these few cases stand for so much. In two of them, this Court *upheld* the agency action in question and thus had no occasion to opine on appropriate relief. See *Houston* v.

St. Louis Independent Packing Co., 249 U. S. 479, 486–487 (1919); *The Assigned Car Cases*, 274 U. S. 564, 584 (1927). In a third case, the plaintiff sought "to enjoin enforcement of" an order of the Federal Communications Commission. *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407, 408 (1942). That is a claim for traditional equitable relief, and indeed, the Court held that the complaint "state[d] a cause of action in equity" and remanded for further proceedings. *Id.,* at 425. A fourth case, involving an order of the Interstate Commerce Commission, seems of a piece. There, a district court held the Commission's order invalid and "restrain[ed] . . . enforcement" of it. *Baltimore & Ohio R. Co.* v. *United States*, 5 F. Supp. 929, 936 (ND Ohio 1933). This Court affirmed. See *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454 (1935). True, this Court described the case as an "appeal from [a] decree . . . setting aside" the Commission's order. *Id.,* at 455. But the fact that the lower court had only restrained enforcement of the order goes to show that "set aside" did not then (and does not now) necessarily translate to "vacate."

At the end of the day, the States fall back on other lower court decisions. "For more than 30 years," they say, "vacatur has been the ordinary result when the D. C. Circuit determines that agency regulations are unlawful." Brief for Respondents 42 (internal quotation marks omitted). Doubtless, to the extent those decisions are carefully reasoned, they merit respectful consideration. But, equally, they do not bind us. Cf. *post,* at 14, n. 7 (ALITO, J., dissenting) (observing that this Court has only ever "assumed" that the APA authorizes vacatur).

In raising questions about the district court's claim that §706(2) authorizes vacatur of agency action, I do not pretend that the matter is open and shut. Thoughtful arguments and scholarship exist on both sides of the debate. Nor do I mean to equate vacatur of agency action with universal injunctions. Despite some similarities, courts can at

least arguably trace their authority to order vacatur to language in a statute and practice in some lower courts. But the questions here are serious ones. And given the volume of litigation under the APA, this Court will have to address them sooner or later. Until then, we would greatly benefit from the considered views of our lower court colleagues.

D

Suppose my doubts about vacatur are unfounded. Suppose the APA really does authorize both traditional forms of equitable relief (in §703) and a more expansive equitable power to vacate agency action (in §706). Even if that were true, a district court should "think twice—and perhaps twice again—before granting" such sweeping relief. *Arizona* v. *Biden*, 40 F. 4th, at 396 (Sutton, C. J., concurring).

After all, this Court has long instructed that equitable relief "must be limited to the inadequacy that produced [the] injury in fact." *Gill* v. *Whitford*, 585 U. S. ___, ___ (2018) (slip op., at 14) (internal quotation marks omitted). Any remedy a judge authorizes must not be "more burdensome [to the defendant] than necessary to redress the complaining parties." *Califano* v. *Yamasaki*, 442 U. S. 682, 702 (1979). And faithful application of those principles suggests that an extraordinary remedy like vacatur would demand truly extraordinary circumstances to justify it. Cf. S. Bray & P. Miller, Getting Into Equity, 97 N. D. L. Rev. 1763, 1797 (2022) ("[I]n equity it all connects—the broader and deeper the remedy the plaintiff wants, the stronger the plaintiff's story needs to be.").

The temptations a single district judge may face when invited to vacate agency rules are obvious. Often, plaintiffs argue that everyone deserves to benefit from their effort to litigate the case and the court's effort to decide it. Judges may think efficiency and uniformity favor the broadest possible relief. But there are serious countervailing considerations. As with universal injunctions, 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. Vacatur can also sweep up nonparties who may not wish to receive the benefit of the court's decision. Exactly that happened here. Dozens of States, counties, and cities tell us they did not seek and do not want the "benefit" of the district court's vacatur order in this case. See Brief for New York et al. as *Amici Curiae* 1–2; Brief for 21 Cities, Counties, and Local Government Organizations as *Amici Curiae* 2–3.

More importantly still, universal relief, whether by way of injunction or vacatur, strains our separation of powers. It exaggerates the role of the Judiciary in our constitutional order, allowing individual judges to act more like a legislature by decreeing the rights and duties of people nationwide. This Court has warned that "[f]ew exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts [courts] in the role of a Council of Revision, conferring on [themselves] the power to invalidate laws at the behest of anyone who disagrees with them." *Arizona Christian School Tuition Organization* v. *Winn*, 563 U. S. 125, 145–146 (2011). At a minimum, then, district courts must carefully consider all these things before doling out universal relief. And courts of appeals must do their part, too, asking whether party-specific relief can adequately protect the plaintiff's interests. If so, an appellate court should not hesitate to hold that broader relief is an abuse of discretion. Cf. *Kentucky* v. *Biden*, 57 F. 4th 545, 556–557 (CA6 2023) (Larsen, J.).

*

In our system of government, federal courts play an important but limited role by resolving cases and controversies. Standing doctrine honors this limitation at the front

end of every lawsuit. It preserves a forum for plaintiffs seeking relief for concrete and personal harms while filtering out those with generalized grievances that belong to a legislature to address. Traditional remedial rules do similar work at the back end of a case. They ensure successful plaintiffs obtain meaningful relief. But they also restrain courts from altering rights and obligations more broadly in ways that would interfere with the power reserved to the people's elected representatives. In this case, standing and remedies intersect. The States lack standing because federal courts do not have authority to redress their injuries. Section 1252(f)(1) denies the States any coercive relief. A vacatur order under §706(2) supplies them no effectual relief. And such an order itself may not even be legally permissible. The States urge us to look past these problems, but I do not see how we might. The Constitution affords federal courts considerable power, but it does not establish "government by lawsuit." R. Jackson, The Struggle for Judicial Supremacy 286–287 (1941).

SUPREME COURT OF THE UNITED STATES

No. 22–58

UNITED STATES, ET AL., PETITIONERS *v.*
TEXAS, ET AL.

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

[June 23, 2023]

JUSTICE BARRETT, with whom JUSTICE GORSUCH joins, concurring in the judgment.

I agree with the Court that the States lack standing to challenge the Federal Government's Guidelines for the enforcement of immigration law. But I reach that conclusion for a different reason: The States failed to show that the District Court could order effective relief. JUSTICE GORSUCH ably explains why that is so. *Ante*, p. 1 (opinion concurring in judgment). And because redressability is an essential element of Article III standing, the District Court did not have jurisdiction.

The Court charts a different path. In its view, this case can be resolved based on what it calls the "fundamental Article III principle" that "'a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.'" *Ante*, at 1 (quoting *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 619 (1973)). In other words, the Court says, the States have not asserted a "'judicially cognizable interest'" in this case. *Ante*, at 5. Respectfully, I would not take this route.

I

To begin with, I am skeptical that *Linda R. S.* suffices to resolve this dispute. First, the Court reads that decision

too broadly. Consider the facts. The "mother of an illegitimate child" sued in federal court, "apparently seek[ing] an injunction running against the district attorney forbidding him from declining prosecution" of the child's father for failure to pay child support. 410 U. S., at 614–616. She objected, on equal protection grounds, to the State's view that "fathers of illegitimate children" were not within the ambit of the relevant child-neglect statute. *Id.*, at 616.

We agreed that the plaintiff "suffered an injury stemming from the failure of her child's father to contribute support payments." *Id.*, at 618. But if the plaintiff "were granted the requested relief, it would result only in the jailing of the child's father." *Ibid.* Needless to say, the prospect that prosecution would lead to child-support payments could, "at best, be termed only speculative." *Ibid.* For this reason, we held that the plaintiff lacked standing. Only then, after resolving the standing question on redressability grounds, did we add that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Id.*, at 619. In short, we denied standing in *Linda R. S.* because it was speculative that the plaintiff's requested relief would redress her asserted injury, not because she failed to allege one. See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 79, n. 24 (1978).

Viewed properly, *Linda R. S.* simply represents a specific application of the general principle that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish" given the causation and redressability issues that may arise. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 562 (1992). That is true for the States here. I see little reason to seize on the case's bonus discussion of whether "a private citizen" has a "judicially cognizable interest in the prosecution or nonprosecution of another" to establish a broad rule of Article III standing. *Linda R. S.*, 410 U. S., at 619.

Second, even granting the broad principle the Court takes from *Linda R. S.*, I doubt that it applies with full force in this case. Unlike the plaintiff in *Linda R. S.*, the States do not seek the prosecution of any particular individual—or even any particular class of individuals. See *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 624 (1989) ("[F]ederal standing 'often turns on the nature and source of the claim asserted'"). In fact, they *disclaim* any interest in the prosecution or nonprosecution of noncitizens. See Brief for Respondents 15; Tr. of Oral Arg. 124–125. They acknowledge that 8 U. S. C. §1226(c)(1)'s detention obligation "only applies until" the Government makes "a decision whether or not to prosecute." Tr. of Oral Arg. 100. And they readily concede that if the Government decides not to prosecute, any detention obligation imposed by §1226(c)(1) "immediately ends." *Ibid.* The States make similar concessions with respect to §1231(a)(2). They maintain, for example, that §1231(a)(2) applies "only where the United States has used its prosecutorial discretion to bring a notice to appear, to prosecute that all the way to a final . . . order of removal." *Id.*, at 130. But if the Government for any reason "choose[s] to discontinue proceedings," the alleged detention obligation does not attach. *Id.*, at 131.

The upshot is that the States do not dispute that the Government can prosecute whomever it wants. They seek, instead, the temporary detention of certain noncitizens during elective removal proceedings of uncertain duration. And the States' desire to remove the Guidelines' influence on the Government's admittedly broad discretion to enforce immigration law meaningfully differs from the *Linda R. S.* plaintiff's desire to channel prosecutorial discretion toward a particular target. Given all of this, I would not treat *Linda R. S.* as the "leading precedent" for resolving this case. *Ante*, at 5. In my view, the Court is striking new ground rather than applying settled principles.

II

In addition to its reliance on *Linda R. S.*, the Court offers several reasons why "federal courts have not traditionally entertained lawsuits of this kind." *Ante*, at 6. I am skeptical that these reasons are rooted in Article III standing doctrine.

Take, for example, the Court's discussion of *Castle Rock* v. *Gonzales*, 545 U. S. 748 (2005). *Ante*, at 10. There, we reasoned that given "[t]he deep-rooted nature of law-enforcement discretion," a "true mandate of police action would require some stronger indication" from the legislature than, for example, the bare use of the word "'shall'" in a statutory directive. *Castle Rock*, 545 U. S., at 761. The Court today concludes that "no such statute is present in this case." *Ante*, at 10. But *Castle Rock* is not a case about Article III standing. It addressed "whether an individual who has obtained a state-law restraining order has a constitutionally protected property interest" under the Fourteenth Amendment "in having the police enforce the restraining order when they have probable cause to believe it has been violated." 545 U. S., at 750–751. I see no reason to opine on *Castle Rock*'s application here, especially given that the parties (correctly) treat *Castle Rock* as relevant to the *merits* of their statutory claims rather than to the States' *standing* to bring them. See Brief for Petitioners 8; Brief for Respondents 30.

The Court also invokes "the Executive's Article II authority to enforce federal law." *Ante*, at 6. I question whether the President's duty to "take Care that the Laws be faithfully executed," Art. II, §3, is relevant to the standing analysis. While it is possible that Article II imposes justiciability limits on federal courts, it is not clear to me why any such limit should be expressed through Article III's definition of a cognizable injury. Moreover, the Court works the same magic on the Take Care Clause that it does on *Castle Rock*: It takes an issue that entered the case on the merits

and transforms it into one about standing. See *ante*, at 4 (opinion of GORSUCH, J.)

The Court leans, too, on principles set forth in *Heckler* v. *Chaney*, 470 U. S. 821 (1985). *Ante*, at 8, 11. But, again, *Heckler* was not about standing. It addressed a different question: "the extent to which a decision of an administrative agency to exercise its 'discretion' not to undertake certain enforcement actions is subject to judicial review under the Administrative Procedure Act." 470 U. S., at 823; see also 5 U. S. C. §701(a)(2) (the APA's judicial-review provisions do not apply "to the extent" that "agency action is committed to agency discretion by law"). *Heckler* held that "an agency's decision not to take enforcement action should be presumed immune from judicial review under" the APA. 470 U. S., at 832. But such a decision "is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.*, at 832–833. Whatever *Heckler*'s relevance to cases like this one, it does not establish a principle of Article III standing. And elevating it to the status of a constitutional rule would transform it from a case about statutory provisions (that Congress is free to amend) to one about a constitutional principle (that lies beyond Congress's domain). Although the Court notes that *Heckler* involved the APA, its conflation of *Heckler* with standing doctrine is likely to cause confusion. See *ante*, at 8 (analogizing "Article III cases" to "Administrative Procedure Act cases").

* * *

The Court weaves together multiple doctrinal strands to create a rule that is not only novel, but also in tension with other decisions. See *ante,* at 2–4 (opinion of GORSUCH, J.). In my view, this case should be resolved on the familiar ground that it must be "'likely,' as opposed to merely 'speculative,'" that any injury "will be 'redressed by a favorable

decision.'" *Lujan*, 504 U. S., at 561. I respectfully concur only in the judgment.

SUPREME COURT OF THE UNITED STATES

No. 22–58

UNITED STATES, ET AL., PETITIONERS *v.*
TEXAS, ET AL.

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

[June 23, 2023]

JUSTICE ALITO, dissenting.

The Court holds Texas lacks standing to challenge a federal policy that inflicts substantial harm on the State and its residents by releasing illegal aliens with criminal convictions for serious crimes. In order to reach this conclusion, the Court brushes aside a major precedent that directly controls the standing question, refuses to apply our established test for standing, disregards factual findings made by the District Court after a trial, and holds that the only limit on the power of a President to disobey a law like the important provision at issue is Congress's power to employ the weapons of inter-branch warfare—withholding funds, impeachment and removal, etc. I would not blaze this unfortunate trail. I would simply apply settled law, which leads ineluctably to the conclusion that Texas has standing.

This Court has long applied a three-part test to determine whether a plaintiff has standing to sue. Under that test, a plaintiff must plead and ultimately prove that it has been subjected to or imminently faces an injury that is: (1) "concrete and particularized," (2) "fairly traceable to the challenged action," and (3) "likely" to be "redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992) (internal quotation marks and alterations omitted). Under that familiar test, Texas clearly has

standing to bring this suit.[1]

Nevertheless, the United States (the defendant in this case) has urged us to put this framework aside and adopt a striking new rule. At argument, the Solicitor General was asked whether it is the position of the United States that the Constitution does not allow any party to challenge a President's decision not to enforce laws he does not like. What would happen, the Solicitor General was asked, if a President chose not to enforce the environmental laws or the labor laws? Would the Constitution bar an injured party from bringing suit? She responded:

> "*That's correct under this Court's precedent*, but the framers intended political checks in that circumstance. You know, if—if an administration did something that extreme and said we're just not going to enforce the law at all, then the President would be held to account by the voters, and Congress has tools at its disposal as well." Tr. of Oral Arg. 50 (emphasis added).

Thus, according to the United States, even if a party clearly meets our three-part test for Article III standing, the Constitution bars that party from challenging a President's decision not to enforce the law. Congress may wield what the Solicitor General described as "political . . . tools"—which presumably means such things as withholding funds, refusing to confirm Presidential nominees, and impeachment and removal—but otherwise Congress and the American people must simply wait until the President's term in office expires.

The Court—at least for now—does not fully embrace this

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[1] In a case with multiple plaintiffs, Article III permits us to reach the merits if any plaintiff has standing. *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 52, n. 2 (2006). Because Texas clearly meets our test for Article III standing, it is not necessary to consider whether the other plaintiff, the State of Louisiana, also satisfies that test.

radical theory and instead holds only that, with some small and equivocal limitations that I will discuss, no party may challenge the Executive's "arrest and prosecution policies." *Ante*, at 12, n. 5. But the Court provides no principled explanation for drawing the line at this point, and that raises the concern that the Court's only reason for framing its rule as it does is that no more is needed to dispose of *this* case. In future cases, Presidential power may be extended even further. That disturbing possibility is bolstered by the Court's refusal to reject the Government's broader argument.

As I will explain, nothing in our precedents even remotely supports this grossly inflated conception of "executive Power," U. S. Const., Art. II, §1, which seriously infringes the "legislative Powers" that the Constitution grants to Congress, Art. I, §1. At issue here is Congress's authority to control immigration, and "[t]his Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo* v. *Bell*, 430 U. S. 787, 792 (1977). In the exercise of that power, Congress passed and President Clinton signed a law that commands the detention and removal of aliens who have been convicted of certain particularly dangerous crimes. The Secretary of Homeland Security, however, has instructed his agents to disobey this legislative command and instead follow a different policy that is more to his liking. And the Court now says that no party injured by this policy is allowed to challenge it in court.

That holding not only violates the Constitution's allocation of authority among the three branches of the Federal Government; it also undermines federalism. This Court has held that the Federal Government's authority in the field of immigration severely restricts the ability of States to enact laws or follow practices that address harms resulting from illegal immigration. See *Arizona* v. *United States*,

567 U. S. 387, 401 (2012). If States are also barred from bringing suit even when they satisfy our established test for Article III standing, they are powerless to defend their vital interests. If a President fails or refuses to enforce the immigration laws, the States must simply bear the consequences. That interpretation of executive authority and Article III's case or controversy requirement is deeply and dangerously flawed.

I

The Court's opinion omits much that is necessary to understand the significance of its decision, and I therefore begin by summarizing the relevant statutory provisions, the challenged Department of Homeland Security (DHS) action, and the District Court's findings of fact regarding the injury faced by the State of Texas as the result of what DHS has done.

A

The relevant statutory provisions have figured in several prior decisions, and in those cases we have recounted how they came to be enacted and have clearly described what they require. These provisions were part of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA), which was adopted "against a backdrop of wholesale failure by the [Immigration and Naturalization Service] to deal with increasing rates of criminal activity by aliens." *Demore* v. *Kim*, 538 U. S. 510, 518 (2003).[2] Congress concluded that a central cause of that failure was the Attorney General's "broad discretion to conduct individualized bond hearings and to release criminal aliens from custody during their removal proceedings." *Id.*, at 519. To remedy this problem, Congress "*subtract[ed]* some of that

[2]The Immigration and Naturalization Service was merged into DHS in 2003.

discretion when it comes to the arrest and release of criminal aliens." *Nielsen* v. *Preap*, 586 U. S. ___, ___ (2019) (slip op., at 15) (emphasis in original).

Two such limits are important here. First, 8 U. S. C. §1226(c) directs the Government to "take into custody any alien" inadmissible or deportable on certain criminal or terrorist grounds "when the alien is released" from criminal custody, including when such an alien is released on "parole, supervised release, or probation." Second, §1231(a) imposes a categorical detention mandate. Section 1231(a)(2) provides that the Government "shall detain [an] alien" "[d]uring the removal period," which often begins either when an "order of removal becomes administratively final" or when an "alien is released from detention or confinement" not arising from immigration process, §1231(a)(1)(B). This requirement is reinforced by the direction that "[u]nder no circumstance during the removal period shall the [Government] release an alien" found inadmissible or deportable under almost any of the grounds relevant under §1226(c). §1231(a)(2). And §1231(a)(1)(A) commands that the Government "shall remove the alien" within the removal period.

All of our recent decisions interpreting these provisions confirm that, for covered aliens, *shall* means *shall*; it does not mean "may." See *Johnson* v. *Guzman Chavez*, 594 U. S. ___, ___–___, and n. 2 (2021) (slip op., at 2–3, and n. 2); *Nielsen*, 586 U. S., at ___–___ (slip op., at 16–17). Until quite recently, that was the Government's understanding as well. See *Biden* v. *Texas*, 597 U. S. ___, ___–___ (2022) (slip op., at 8–9) (ALITO, J., dissenting).

Actions taken by Congress when IIRIRA was enacted underscore this conclusion. Because the provisions described above left the Executive with no discretion to refrain from arresting and detaining covered aliens, even during the time immediately after IIRIRA's enactment when the Executive was still "expand[ing] its capacities" to enforce the

new law, Congress passed "transition rules [that] delayed the onset of the Secretary's obligation to begin making arrests as soon as covered aliens were released from criminal custody." *Nielsen*, 586 U. S., at ___ (slip op., at 21). If the Executive had possessed the discretion to decline to enforce the new mandates in light of "resource constraints," see *ante*, at 8, those transition rules would have been entirely "superfluous." *Nielsen*, 586 U. S., at ___ (slip op., at 21).

Despite this clear text and background, the majority now claims that the President's "enforcement discretion" survived these mandates, *ante*, at 7, but there is no basis for that conclusion. Certainly it is not supported by the cases it cites. They either underscore the *general* rule that the Executive possesses enforcement discretion, see *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 490–491 (1999), or pair that general rule with the observation that the *States* cannot limit the Government's discretion in pursuing removal, see *Arizona*, 567 U. S., at 396, 409. Nothing in those decisions is inconsistent with Congress's power to displace executive discretion, and the fact that "five Presidential administrations" sometimes neglected the mandates is likewise irrelevant. See *ante*, at 8. As I have stressed before, the Executive cannot "acquire authority forbidden by law through a process akin to adverse possession," *Biden* v. *Texas*, 597 U. S., at ___ (dissenting opinion) (slip op., at 15), and that is true even if the adverse possession is bipartisan.

B

The events that gave rise to this case began on January 20, 2021, when the Acting Secretary of DHS issued a memorandum with "enforcement priorities" for the detention and removal of aliens found to be in this country illegally. This memorandum prioritized: (1) aliens "whose apprehension" implicated "national security," (2) aliens not present "before November 1, 2020," and (3) aliens due to be released

from criminal confinement who had both been "convicted of an 'aggravated felony' " and were "determined to pose a threat to public safety." 606 F. Supp. 3d 437, 454 (SD Tex. 2022) (internal quotation marks omitted); see §1101(a)(43) (defining "aggravated felony"). This prioritization was inconsistent with the §1226(c) arrest mandate, which extends to all aliens convicted of any crime within a long list of statutory categories. 606 F. Supp. 3d, at 454–455.

In February, Immigrations and Customs Enforcement (ICE), an arm of DHS, issued a second memorandum that slightly modified the earlier priorities and stated that "'pre-approval'" would generally be required "for enforcement actions" against persons outside these priority groups. *Id.*, at 455–456. This memorandum was also inconsistent with the relevant statutes.

After some litigation regarding these two memoranda, a new DHS Secretary issued a Final Memorandum instructing that even aliens in priority groups need not necessarily be apprehended and removed. App. 113–115. Rather, the Final Memorandum directed DHS personnel to consider non-statutory "aggravating and mitigating factors" in deciding whether to detain an alien. *Id.*, at 114–115. It further stated that DHS "personnel should not rely on the fact of [a qualifying] conviction" when exercising "prosecutorial discretion." *Id.*, at 115. Thus, the Final Memorandum did not simply *permit* deviations from the statutory mandates; it flatly *contradicted* those mandates by stating that qualifying convictions were insufficient grounds for initiating arrest, detention, and removal.

C

Texas and Louisiana challenged this Final Memorandum in federal court under the Administrative Procedure Act (APA). After a 2-day bench trial, the District Court found in favor of the States and made detailed findings of fact that bear on the issue of standing.

Much of the District Court's analysis of that issue focused on the Final Memorandum's effect on the "detainer" system, 606 F. Supp. 3d, at 459–463, and it is therefore important to understand how that system works in relation to the relevant statutory provisions. When an alien in state custody for a criminal offense is identified as falling within a category of aliens whose apprehension and detention is required by §§1226(a) and (c), the Government should lodge a "detainer" with the State so that the Government can take the alien into custody when he or she is released by the State. Then, when an alien is about to be released, a cooperative State will notify DHS so that it can be ready to assume its obligation under §§1226(a) and (c) to take the alien into federal custody. When that occurs, the State is spared the burdens it would have to bear if the alien, after release, had been placed under state law on probation, parole, or supervised release. But if DHS rescinds a detainer before such an alien is released (or never lodges a detainer in the first place), those burdens fall on the State.

After reviewing the parties' evidence, the District Court found that in the first month after the substantive policy change brought about by the January 2021 DHS memorandum, ICE had rescinded 141 detainers in Texas.[3] Ninety-five of the criminal aliens whose detainers were rescinded were then released on a form of state supervision. Seventeen of them went on to violate their terms of supervision, and four committed new crimes. *Id.*, at 459.

The court then examined what had taken place during just the time "since the Final Memorandum became effective" and found that "because of the Final Memorandum," "ICE ha[d] continued to rescind detainers placed on criminal aliens in [Texas's] custody," and the court identified 15

[3]This figure excludes instances where a detainer was withdrawn but then reissued, or where an alien previously subject to a withdrawn detainer was taken into federal custody.

specific cases in which this had occurred. *Id.*, at 460. Rejecting the Government's claim that these dropped detainers were necessary in light of "limited resources," the court found that "the Government . . . persistently underutilized existing detention facilities" during the relevant time and that the average daily detained population in April 2022 was less than 40% of the 3-year high in August 2019. *Id.*, at 453, 481, 488.

Based on these findings of fact and historical data, the District Court identified four categories of costs that Texas had suffered and would continue to bear as a result of the relevant DHS actions. First, the court calculated the dollars-and-cents cost that Texas had to bear in order to supervise criminal aliens who were released in violation of §§1226(a), (c). *Id.*, at 463. Second, it noted the costs associated with criminal recidivism. *Id.*, at 464. Third, it found that some juvenile offenders who "are not detained by ICE because of the Final Memorandum" will attend Texas public schools (and at least one juvenile due to be released will do so). *Ibid.* Fourth, it concluded that the hundreds of millions of dollars that Texas annually spends on healthcare for illegal aliens would increase when some criminal aliens not detained "because of the Final Memorandum" make use of those services. *Id.*, at 465.

Concluding that these costs established Texas's injury for standing purposes, the District Court went on to hold that the Final Memorandum was contrary to law and that Texas had therefore established a violation of the APA.[4] As I will explain, it is a common practice for courts in APA cases to set aside an improper final agency action, and that is what

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[4]The District Court also concluded that the Final Memorandum was "arbitrary and capricious," and had not undergone "notice and comment," resulting in separate APA violations. 606 F. Supp. 3d, at 492, 495. Because the majority's standing analysis applies equally to any APA violation, I focus only on the contrary-to-law claim and express no opinion on these further claims.

the District Court did here. It vacated the Final Memorandum pending further action by DHS, *id.*, at 499, but it declined to issue injunctive or declaratory relief, *id.*, at 501–502.

The Government asked the Court of Appeals to stay the District Court's order vacating the Final Memorandum, but that court refused to do so and observed that the Government had not "come close" to showing "'clear error'" in the District Court's factual findings on the injuries that Texas had already incurred and would continue to incur because of the Final Memorandum. 40 F. 4th 205, 216–217 (CA5 2022).

II

Before I address the Court's inexplicable break from our ordinary standing analysis, I will first explain why Texas easily met its burden to show a concrete, particularized injury that is traceable to the Final Memorandum and redressable by the courts. *Lujan*, 504 U. S., at 560–561.

A

Injury in fact. The District Court's factual findings, which must be accepted unless clearly erroneous, quantified the cost of criminal supervision of aliens who should have been held in DHS custody and also identified other burdens that Texas had borne and would continue to bear going forward. These findings sufficed to establish a concrete injury that was specific to Texas. *TransUnion LLC* v. *Ramirez*, 594 U. S. ___, ___ (2021) (slip op., at 9); see *ante*, at 4 (conceding that such costs are "of course an injury").

Traceability. The District Court found that each category of cost would increase "*because of* the Final Memorandum," rather than decisions that DHS personnel would make irrespective of the directions that memorandum contains. 606 F. Supp. 3d, at 460, 464, 465 (emphasis added).

The majority does not hold—and in my judgment, could

not plausibly hold—that these findings are clearly erroneous. Instead, it observes only that a "State's claim for standing can become more attenuated" when based on the "indirect effects" of federal policies "on state revenues or state spending." *Ante*, at 9, n. 3. But while it is certainly true that indirect injuries may be harder to prove, an indirect financial injury that *is* proved at trial supports standing. And that is what happened here. As JUSTICE GORSUCH notes, just a few years ago, we found in a very important case that a State had standing based in part on indirect financial injury. *Ante*, at 3 (opinion concurring in judgment) (citing *Department of Commerce* v. *New York*, 588 U. S. ___, ___–___ (2019) (slip op., at 9–10)). There is no justification for a conflicting holding here.

In any event, many of the costs in this case are not indirect. When the Federal Government refuses or fails to comply with §§1226(a) and (c) as to criminal aliens, the *direct* result in many cases is that the State must continue its supervision. As noted, the District Court made specific findings about the financial cost that Texas incurred as a result of DHS's failure to assume custody of aliens covered by §§1226(a) and (c). And the costs that a State must bear when it is required to assume the supervision of criminal aliens who should be kept in federal custody are not only financial. Criminal aliens whom DHS unlawfully refuses to detain may be placed on state probation, parole, or supervised release, and some will commit new crimes and end up in a state jail or prison. Probation, parole, and corrections officers are engaged in dangerous work that can put their lives on the line.

Redressability. A court order that forecloses reliance on the memorandum would likely redress the States' injuries. If, as the District Court found, DHS personnel rescind detainers "because of" the Final Memorandum, then vacating that memorandum would likely lead to those detainers' remaining in place.

B

While the majority does not contest redressability, JUSTICE GORSUCH's concurrence does, citing two reasons. But the first is contrary to precedent, and the second should not be addressed in this case.

The first asserted reason is based on the inability of the lower courts to issue a broad injunction forbidding enforcement of the Final Memorandum. See §1252(f)(1).[5] In this case, the District Court did not issue injunctive relief. Instead, it vacated the Final Memorandum, and JUSTICE GORSUCH argues that this relief did not redress Texas's injuries because it does not "require federal officials to change how they exercise [their prosecutorial] discretion in the [Final Memorandum's] Guidelines' absence." *Ante*, at 6. There are two serious problems with this argument.

First, §1252(f)(1) bars injunctive relief by courts "*other than* the Supreme Court." (Emphasis added.) As a result, redress in the form of an injunction *can* be awarded by this Court. According to the Court's decision last Term in *Biden* v. *Texas*, our authority to grant such relief "le[ft] no doubt" as to our jurisdiction even if §1252(f)(1) precluded the lower courts from setting aside an administrative action under the APA. 597 U. S., at ___ (slip op., at 10). We have not been asked to revisit this holding, see *id.*, at ___–___ (BARRETT, J., dissenting) (slip op., at 3–4), and I would not do so here.

Second, even if *Biden* v. *Texas* could be distinguished and

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[5] Section 1252(f)(1) reads in full:

"Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated."

no injunctive relief can be awarded by any court, setting aside the Final Memorandum satisfies the redressability requirement. Our decision in *Franklin* v. *Massachusetts*, 505 U. S. 788 (1992), settles that question. There, the Court held that a declaratory judgment regarding the lawfulness of Executive Branch action satisfied redressability because "it [was] substantially likely that the President and other executive . . . officials would abide by an authoritative interpretation" of the law "even though they would not be directly bound by such a determination." *Id.*, at 803 (opinion of O'Connor, J.).[6] Here, we need not speculate about how DHS officers would respond to vacatur of the Final Memorandum because the District Court found that the DHS personnel responsible for detainers were rescinding them "because of" the Final Memorandum. 606 F. Supp. 3d, at 460. This point was effectively conceded by the Government's application for an emergency stay pending our decision in this case. The Government argued that the Final Memorandum was needed to guide prosecutorial discretion, Application 38–39, and if the District Court's order were ineffectual, that would not be true. For these reasons, the harm resulting from the Final Memorandum is redressed by setting aside the Final Memorandum.

As to the concurrence's second argument—that the APA's "set aside" language may not permit vacatur—the concurrence acknowledges that this would be a sea change in administrative law as currently practiced in the lower courts. *Ante*, at 16 (opinion of GORSUCH, J.); see, *e.g.*, *Data Marketing Partnership, LP* v. *United States Dept. of Labor*, 45

[6] While only four of eight Justices finding standing in *Franklin* formally joined this explanation, see 505 U. S., at 824, n. 1 (Scalia, J., concurring in part and concurring in judgment), the Court subsequently ratified this reasoning. See *Utah* v. *Evans*, 536 U. S. 452, 460, 463–464 (2002).

F. 4th 846, 859 (CA5 2022) ("The default rule is that vacatur is the appropriate remedy" under the APA); *United Steel* v. *Mine Safety and Health Admin.*, 925 F. 3d 1279, 1287 (CADC 2019) ("The ordinary practice is to vacate unlawful agency action").[7] We did not grant review on this very consequential question, and I would not reach out to decide it in a case in which *Biden* v. *Texas* resolves the issue of redressability.

To be clear, I would be less troubled than I am today if JUSTICE GORSUCH's concurrence had commanded a majority. At least then, Congress would be free to amend §1252(f). But the majority reaches out and redefines our understanding of the *constitutional* limits on otherwise-available lawsuits. It is to this misunderstanding that I now turn.

III

The majority adopts the remarkable rule that injuries from an executive decision not to arrest or prosecute, even in a civil case, are generally not "cognizable." *Ante*, at 4 (internal quotation marks omitted). Its reasoning has three failings. First, it fails to engage with contrary precedent that is squarely on point. Second, it lacks support in the cases on which it relies. Third, the exceptions (or possible exceptions) that it notes do nothing to allay concern about the majority's break from our established test for Article III standing. I address each of these problems in turn.

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[7] Our decision three years ago in *Department of Homeland Security* v. *Regents of Univ. of Cal.*, 591 U. S. ___ (2020), appears to have assumed that the APA authorizes this common practice. We held that the rescission of the Deferred Action for Childhood Arrivals program had to be "vacated" because DHS had violated the procedures required by the APA. *Id.*, at ___ (slip op., at 2). If the court in that case had lacked the authority to set aside the rule adopting the program, there would have been no need to examine the sufficiency of DHS's procedures.

A

Prior to today's decision, it was established law that plaintiffs who suffer a traditional injury resulting from an agency "decision not to proceed" with an enforcement action have Article III standing. *Federal Election Comm'n* v. *Akins*, 524 U. S. 11, 19 (1998). The obvious parallel to the case before us is *Massachusetts* v. *EPA*, 549 U. S. 497 (2007), which has been called "the most important environmental law case ever decided by the Court." R. Lazarus, The Rule of Five: Making Climate History at the Supreme Court 1 (2020). In that prior case, Massachusetts challenged the Environmental Protection Agency's failure to use its civil enforcement powers to regulate greenhouse gas emissions that allegedly injured the Commonwealth. Massachusetts argued that it was harmed because the accumulation of greenhouse gases would lead to higher temperatures; higher temperatures would cause the oceans to rise; and rising sea levels would cause the Commonwealth to lose some of its dry land. The Court noted that Massachusetts had a "quasi-sovereign interes[t]" in avoiding the loss of territory and that our federalist system had stripped the Commonwealth of "certain sovereign prerogatives" that it could have otherwise employed to defend its interests. *Massachusetts*, 549 U. S., at 519–520. Proclaiming that Massachusetts' standing claim was entitled to "special solicitude," the Court held that the Commonwealth had standing. *Id.*, at 520.

The reasoning in that case applies with at least equal force in the case at hand. In *Massachusetts* v. *EPA*, the Court suggested that allowing Massachusetts to protect its sovereign interests through litigation compensated for its inability to protect those interests by the means that would have been available had it not entered the Union. In the present case, Texas's entry into the Union stripped it of the power that it undoubtedly enjoyed as a sovereign nation to

police its borders and regulate the entry of aliens. The Constitution and federal immigration laws have taken away most of that power, but the statutory provisions at issue in this case afford the State at least *some* protection—in particular by preventing the State and its residents from bearing the costs, financial and non-financial, inflicted by the release of certain dangerous criminal aliens. Our law on standing should not deprive the State of even that modest protection. We should not treat Texas less favorably than Massachusetts. And even if we do not view Texas's standing argument with any "special solicitude," we should at least refrain from treating it with special hostility by failing to apply our standard test for Article III standing.

Despite the clear parallel with this case and the States' heavy reliance on *Massachusetts* throughout their briefing, the majority can only spare a passing footnote for that important precedent. *Ante*, at 13, n. 6; see Brief for Respondents 11, 12, 14, 16–18, 23; see also Brief for Arizona and 17 Other States as *Amici Curiae* 7–12. It first declines to say *Massachusetts* was correctly decided and references the "disagreements that some may have" with that decision. *Ante*, at 13, n. 6. But it then concludes that *Massachusetts* "does not control" since the decision itself refers to "'key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action,'" with the latter "'not *ordinarily* subject to judicial review.'" *Ante*, at 13, n. 6 (quoting 549 U. S., at 527) (emphasis added).

The problem with this argument is that the portion of M*assachusetts* to which the footnote refers deals not with its key Article III holding, but with the scope of review that is "ordinarily" available under the statutory scheme. Importantly, *Massachusetts* frames its statement about declining enforcement as restating the rule of *Heckler* v. *Chaney*, 470 U. S. 821 (1985). See 549 U. S., at 527. And

as the Court acknowledges when it invokes *Heckler* directly, that decision is not about standing; it is about the interpretation of the statutory exception to APA review for actions "committed to agency discretion by law." 5 U. S. C. §701(a)(2); see 470 U. S., at 823; *ante*, at 11. And even in that context, *Heckler* expressly contemplates that any "presumption" of discretion to withhold enforcement can be rebutted by an express statutory limitation of discretion—which is exactly what we have here. 470 U. S., at 832–833.

So rather than answering questions about this case, the majority's footnote on *Massachusetts* raises more questions about *Massachusetts* itself—most importantly, has this monumental decision been quietly interred? Cf. *ante*, at 3 (GORSUCH, J., concurring in judgment).

Massachusetts v. *EPA* is not the only relevant precedent that the Court brushes aside. "[I]t is well established that [this Court] has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *Summers* v. *Earth Island Institute*, 555 U. S. 488, 499 (2009). Yet in case after case, with that obligation in mind, we have not questioned the standing of States that brought suit under the APA to compel civil enforcement.

In *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, 591 U. S. ___ (2020), two States sued under the APA and sought to compel the Department of Health and Human Services to cease exercising regulatory enforcement discretion that exempted certain religious employers from compliance with a contraceptive-coverage mandate. *Id.*, at ___–___ (slip op., at 11–12). The issue of the States' standing was discussed at length in the decision below, see *Pennsylvania* v. *President United States*, 930 F. 3d 543, 561–565 (CA3 2019), and in this Court, no Justice suggested that the Constitution foreclosed standing simply because the States were complaining of "the Execu-

tive Branch's . . . enforcement choices" regarding third parties. *Ante*, at 7.

Just last Term in *Biden* v. *Texas*, two States argued that their spending on the issuance of driver's licenses and the provision of healthcare for illegal immigrants sufficed to establish Article III standing and thus enabled them to sue to compel enforcement of a detain-or-return mandate. See *Texas* v. *Biden*, 20 F. 4th 928, 970–971 (CA5 2021). The Court of Appeals held that the States had standing, *ibid.*, and the majority in this Court, despite extended engagement with other jurisdictional questions, never hinted that Article III precluded the States' suit. 597 U. S., at ___–___ (slip op., at 8–12).

If the new rule adopted by the Court in this case is sound, these decisions and others like them were all just wasted ink. I understand that what we have called "'drive-by jurisdictional rulings'" are not precedents, see *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 511 (2006), but the Court should not use a practice of selective silence to accept or reject prominently presented standing arguments on inconsistent grounds.

B

Examination of the precedents the majority invokes only underscores the deficiencies in its analysis.[8] The majority says that the "leading precedent" supporting its holding is *Linda R. S.* v. *Richard D.*, 410 U. S. 614 (1973). *Ante*, at 5. But as JUSTICE BARRETT notes, this Court has *already* definitively explained that the suit to compel prosecution in *Linda R. S.* was rejected "because of the unlikelihood that

[8]The Court also appeals to "historical experience" and "longstanding historical practice." *Ante*, at 6, 14 (internal quotation marks omitted). I do not take this to be an argument independent from the case law cited, since no history is discussed apart from those cases (all but one from after 1964).

the relief requested would redress appellant's claimed injury." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 79, n. 24 (1978); see *ante*, at 2 (opinion concurring in judgment).

The Court notes in a quick parenthetical that the "*Linda R. S.* principle" was once "cit[ed] . . . in [the] immigration context" in *Sure-Tan, Inc.* v. *NLRB*, 467 U. S. 883, 897 (1984), *ante*, at 5. But *Sure-Tan*'s single "[c]f." cite to *Linda R. S.* provides the Court no help. 467 U. S., at 897. *Sure-Tan* only rejected (quite reasonably) any standalone "cognizable interest in procuring enforcement of the immigration laws" by a party who lacked any "*personal* interest." *Ibid.* (emphasis added). And it did so, not as part of a standing analysis, but as part of its explanation for rejecting two employers' attempt to assert that seeking to have employees deported as retaliation for union activity was "an aspect of their First Amendment right 'to petition the Government for a redress of grievances.'" *Id.*, at 896.

After these two inapposite precedents, the majority's authority gets even weaker. I agree with JUSTICE BARRETT that neither *Heckler*, nor *Castle Rock* v. *Gonzales*, 545 U. S. 748 (2005), has real relevance here. *Ante*, at 4–5. *Castle Rock* considered the "deep-rooted nature of law-enforcement discretion" as a tool for interpreting a statute, not as a constitutional standing rule. 545 U. S., at 761. And as explained above, *Heckler* is not about standing and only states a presumptive rule. The Court's remaining authorities are likewise consistent with the understanding that prosecution decisions are "*generally* committed to an agency's absolute discretion" unless the relevant law rebuts the "presumption." *Heckler*, 470 U. S., at 831 (emphasis added). For example, *TransUnion* states that it is only when "unharmed plaintiffs" are before the Court that Article III forecloses interference with the "discretion of the Executive Branch." 594 U. S., at ___ (slip op., at 13) (emphasis deleted).

In sum, all of these authorities point, not to the majority's new rule, but to the same ordinary questions we ask in every case—whether the plaintiff has a concrete, traceable, and redressable injury.

C

Despite the majority's capacious understanding of executive discretion, today's opinion assures the reader that the decision "do[es] not suggest that federal courts may never entertain cases involving the Executive Branch's alleged failure to make more arrests or bring more prosecutions," despite its otherwise broad language covering the "exercise of enforcement discretion over whether to arrest or prosecute." *Ante*, at 5, 9. The majority lists five categories of cases in which a court would—or at least might—have Article III jurisdiction to entertain a challenge to arrest or prosecution policies, but this list does nothing to allay concern about the Court's new path. The Court does not identify any characteristics that are shared by all these categories and that distinguish them from cases in which it would not find standing. In addition, the Court is unwilling to say that cases in four of these five categories are actually exempted from its general rule, and the one remaining category is exceedingly small. I will discuss these categories one by one.

First, the majority distinguishes "selective-prosecution" suits by a plaintiff "to prevent his or her own prosecution," *ante*, at 9. But such claims are ordinarily brought as defenses in ongoing prosecutions, as in the cases the Court cites, and are rarely brought in standalone actions where a plaintiff must prove standing. This category is therefore little more than a footnote to the Court's general rule.

Second, the majority grants that "the standing analysis *might* differ when Congress elevates *de facto* injuries to the status of legally cognizable injuries," and it hypothesizes a situation in which Congress "(i) specifically authorize[s]

suits against the Executive Branch by a defined set of plaintiffs who have suffered concrete harms from executive under-enforcement and (ii) specifically authorize[s] the Judiciary to enter appropriate orders requiring additional arrests or prosecutions by the Executive Branch." *Ante,* at 10 (emphasis added). It is puzzling why the presence or absence of such a statute should control the question of standing under the Constitution. We have said that the enactment of a statute may help us to determine in marginal cases whether an injury is sufficiently concrete and particularized to satisfy the first prong of our three-part standing test. *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 341 (2016). But once it is posited that a plaintiff has personally suffered a "*de facto*" injury, *i.e.*, an injury in fact, it is hard to see why the presence or absence of a statute authorizing suit has a bearing on the question whether the court has Article III jurisdiction as opposed to the question whether the plaintiff has a cause of action. In the end, however, none of this may matter because the majority suggests that such a statute might be unconstitutional. *Ante*, at 10, and n. 4.

Third, the majority tells us that the standing outcome "*might* change" if the Federal Government "*wholly* abandoned its statutory responsibilities," but that statement is both equivocal and vague. *Ante*, at 11 (emphasis added). Under what circumstances might the Court say that the Federal Government has "wholly abandoned" its enforcement duties? Suppose the Federal Government announced that it would obey 80% of the immigration laws or 70% of the environmental laws. Would the Court say that it had "wholly abandoned" enforcement of these bodies of law? What would happen if the Final Memorandum in this case had directed DHS agents not to arrest anyone convicted of any covered crime other than murder? DHS would still be enforcing the arrest mandate as to one of the many covered crimes. Would this only-murder policy qualify as complete abandonment? And why should the ability of a particular

party to seek legal redress for an injury turn on the number of others harmed by the challenged enforcement policy? Standing is assessed plaintiff by plaintiff. The majority has no answers, and in the end, it cannot even bring itself to commit to this complete-abandonment exception. It says only that "the standing calculus *might*" or "arguably *could*" change. *Ibid.* (emphasis added).

Fourth, the Court says that a plaintiff might have standing to challenge an "Executive Branch's arrest or prosecution priorities *and* the Executive Branch's provision of legal benefits or legal status . . . because the challenged policy might implicate more than simply the Executive's traditional enforcement discretion." *Ibid.* Exactly what this means is not easy to ascertain. One possibility is that the majority is talking about a complaint that asserts separate claims based on the grant or denial of benefits, the grant or denial of legal status, and harms resulting from non-enforcement of a statutory mandate. In that event, standing with respect to each claim would have to be analyzed separately. Another possibility is that the majority is referring to a claim asserting that non-enforcement of a statutory requirement requiring the arrest or prosecution of third parties resulted in the plaintiff's loss of benefits or legal status. Such a situation is not easy to imagine, and the majority cites no case that falls within this category. But if such a case were to arise, there is no reason why it should not be analyzed under our standard three-pronged test.

Fifth, and finally, the majority states that "policies governing the continued detention of noncitizens who have already been arrested *arguably might* raise a different standing question than arrest or prosecution policies." *Ante*, at 12 (emphasis added). The majority provides no explanation for this (noncommittal) distinction, and in any event, as the majority acknowledges, the States in this case challenged noncompliance with the §1231(a)(2) detention mandate in addition to the §1226(c) arrest requirement. *Ante*, at 2, 13.

The Court points to what it sees as a "represent[ation]" by the Solicitor General that the Final Memorandum does not affect "continued detention of noncitizens already in federal custody." *Ante*, at 12, n. 5. But as JUSTICE BARRETT notes, the Government argued that when it chooses not to remove someone under the Final Memorandum's guidance, its mandatory detention obligation ends—meaning it *is* asserting discretion over continued detention. *Ante*, at 3 (opinion concurring in judgment).

In any event, arrest policy cannot be divided from detention policy in this case. When a person is arrested, he or she is detained for at least some period of time, and under the detainer system involved here, "arrest" often simply means transferring an immigrant from state custody to federal custody. As best I can tell, the majority's distinction between arrest and detention is made solely to avoid the obvious inference that our decision last Term in *Biden* v. *Texas* should have dismissed the case for lack of standing, without analyzing "the Government's detention obligations." 597 U. S., at ___ (slip op., at 14).

In sum, with the exception of cases in the first (very small) category (civil cases involving selective-prosecution claims), the majority does not identify any category of cases that it would definitely except from its general rule. In addition, category two conflates the question of constitutional standing with the question whether the plaintiff has a cause of action; category three is hopelessly vague; category four is incomprehensible; and category five actually encompasses the case before us.

IV

The Court declares that its decision upholds "[o]ur constitutional system of separation of powers," *ante*, at 9, but as I said at the outset, the decision actually damages that system by improperly inflating the power of the Executive and cutting back the power of Congress and the authority of the

Judiciary. And it renders States already laboring under the effects of massive illegal immigration even more helpless.

Our Constitution gives the President important powers, and the precise extent of some of them has long been the subject of contention, but it has been widely accepted that "the President's power reaches 'its lowest ebb' when he contravenes the express will of Congress, 'for what is at stake is the equilibrium established by our constitutional system.'" *Zivotofsky* v. *Kerry*, 576 U. S. 1, 61 (2015) (ROBERTS, C. J., dissenting) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 637–638 (1952) (Jackson, J., concurring)).

That is the situation here. To put the point simply, Congress enacted a law that requires the apprehension and detention of certain illegal aliens whose release, it thought, would endanger public safety. The Secretary of DHS does not agree with that categorical requirement. He prefers a more flexible policy. And the Court's answer today is that the Executive's policy choice prevails unless Congress, by withholding funds, refusing to confirm Presidential nominees, threatening impeachment and removal, etc., can win a test of strength. Relegating Congress to these disruptive measures radically alters the balance of power between Congress and the Executive, as well as the allocation of authority between the Congress that enacts a law and a later Congress that must go to war with the Executive if it wants that law to be enforced.[9]

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[9] The majority suggests that any law that constrains an Executive's "enforcement discretion" is "highly unusual," and notes that the States cite no "similarly worded federal laws" that "*require* the Executive Branch to make arrests or bring prosecutions" in other, non-immigration contexts. *Ante*, at 12. But there is nothing peculiar about Congress's reserving its mandates for an area—immigration—where it both exercises particularly broad authority, *Fiallo* v. *Bell*, 430 U. S. 787, 792 (1977), and identifies a unique "wholesale failure" by the enforcement authority, *Demore* v. *Kim*, 538 U. S. 510, 518 (2003).

What the majority has done is to apply Oliver Wendell Holmes's bad-man theory of the law to the separation of powers. Under Holmes's theory, as popularly understood, the law consists of those things that a bad man cannot get away with.[10] Similarly, the majority's understanding of the "executive Power" seems to be that a President can disobey statutory commands unless Congress, by flexing its muscles, forces capitulation. That is not the Constitution's conception of "the executive Power." Art. II, §1. The Constitution, instead, requires a President to "take Care that the Laws be *faithfully* executed." §3 (emphasis added).

Neither the Solicitor General nor the majority has cited any support for the proposition that a President has the power to disobey statutes that require him to take enforcement actions, and there is strong historical evidence to the contrary.[11] The majority's conception of Presidential authority smacks of the powers that English monarchs claimed prior to the "Glorious Revolution" of 1688, namely, the power to suspend the operation of existing statutes, and to grant dispensations from compliance with statutes.[12] After James II was deposed, that changed. The English Bill of Rights of 1689 emphatically rejected "the pretended Power of Suspending of Laws or the Execution of Laws by Rega[l] Authority without Consent of Parl[i]ament" and

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[10] See O. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 459–460 (1897).

[11] See Z. Price, Enforcement Discretion and Executive Duty, 67 Vand. L. Rev. 671, 689–696 (2014); R. Delahunty & J. Yoo, Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause, 91 Texas L. Rev. 781, 797–804 (2013) (Delahunty & Yoo, Dream On); see also E. Biber, Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction, 26 Va. Env. L. J. 461, 472–474 (2008).

[12] See R. Reinstein, The Limits of Executive Power, 59 Am. U. L. Rev. 259, 277–281 (2009) (Reinstein, Limits).

"the pretended Power of Dispensing with Laws or the Execution of Laws by Rega[l] Authorit[y] as it ha[s] bee[n] assumed and exercised of late."[13]

By the time of the American Revolution, British monarchs had long abandoned the power to resist laws enacted by Parliament,[14] but the Declaration of Independence charged George III with exercising those powers with respect to colonial enactments. One of the leading charges against him was that he had "forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, . . . ha[d] utterly neglected to attend to them."[15]

By 1787, six State Constitutions contained provisions prohibiting the suspension of laws,[16] and at the Constitutional Convention, a proposal to grant the President suspending authority was unanimously defeated.[17] Many

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[13] An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (Bill of Rights), 1 W. & M., Sess. 2, c. 2 (1689).

[14] The last time a British monarch withheld assent to a bill enacted by Parliament was in 1708. 18 HL J. 506 (Mar. 11, 1708).

[15] Declaration of Independence ¶4; In 1774, Jefferson had addressed the subject of this charge, explaining that British monarchs "for several ages past" had "declined the exercise of this power in that part of [the] empire called Great Britain" but had resumed the practice in the American Colonies and had "rejected laws of the most salutary tendency," such as one forbidding the importation of slaves. T. Jefferson, A Summary View of the Rights of British America (1774), https://avalon.law.yale.edu/18th_century/jeffsumm.asp. See G. Wills, Inventing America: Jefferson's Declaration of Independence 69 (1978).

[16] See generally S. Calabresi, S. Agudo, & K. Dore, State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition? 85 S. Cal. L. Rev. 1451, 1534–1535 (2012) (reporting that six State Constitutions had such provisions in 1787, rising to eight by 1791).

[17] 1 The Records of the Federal Convention of 1787, pp. 103–104 (M. Farrand ed. 1966). See generally R. Beeman, Plain, Honest Men: The

scholars have concluded that the Take Care Clause was meant to repudiate that authority.[18] See 1 Works of James Wilson 399, 440 (R. McCloskey ed. 1967) (describing Clause as providing that the President holds "authority, not to make, or alter, or dispense with the laws, but to execute and act the laws").

Early decisions are inconsistent with the understanding of Executive Power that appears to animate the majority. In 1806, Justice Patterson, while presiding over a criminal trial, rejected the argument that the President could authorize the defendant to violate the law. *United States* v. *Smith*, 27 F. Cas. 1192, 1201 (No. 16,342) (CC NY 1806). He concluded:

> "The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government. In this particular, the law is paramount." *Id.*, at 1230.

In *Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524 (1838), the full Court rejected the President's claim that he had the authority to disregard a statutory duty to pay certain sums to a government contractor: "To contend that the obligations imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is

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Making of the American Constitution 140 (2009) (describing debate over the executive veto).

[18] See, *e.g.*, Delahunty & Yoo, Dream On 803–804 (2013); Reinstein, Limits 281; S. Prakash, The Essential Meaning of Executive Power, 2003 U. Ill. L. Rev. 701, 726, n. 113 (2003); C. May, Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative 16 and n. 58 (1998); R. Reinstein, An Early View of Executive Powers and Privilege: The Trial of Smith and Ogden, 2 Hastings Const. L. Q. 309, 320–321, n. 50 (1975).

a novel construction of the constitution, and is entirely inadmissible." *Id.*, at 613. This Court made the obvious connection to the separation of powers: "vesting in the President a dispensing power" would result in "clothing the President with a power entirely to control the legislation of congress, and paralyze the administration of justice." *Ibid.*; see also *Office of Personnel Management* v. *Richmond*, 496 U. S. 414, 435 (1990) (White, J., concurring) (citing *Kendall* to explain that the "Executive Branch does not have the dispensing power on its own" and "should not be granted such a power by judicial authorization").

The original understanding of the scope of the Executive's prosecutorial discretion was not briefed in this case, and I am reluctant to express a firm position on the question. But it is indisputable that we have been provided with no historical support for the position taken by the Solicitor General or the majority.

* * *

This sweeping Executive Power endorsed by today's decision may at first be warmly received by champions of a strong Presidential power, but if Presidents can expand their powers as far as they can manage in a test of strength with Congress, presumably Congress can cut executive power as much as it can manage by wielding the formidable weapons at its disposal. That is not what the Constitution envisions.

I end with one final observation. The majority suggests that its decision rebuffs an effort to convince us to "'usurp'" the authority of the other branches, but that is not true. *Ante*, at 3. We exercise the power conferred by Article III of the Constitution, and we must be vigilant not to exceed the limits of our constitutional role. But when we have jurisdiction, we have a "virtually unflagging obligation" to exercise that authority. *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 817 (1976). Because

the majority shuns that duty, I must respectfully dissent.

Proposed Legislative Limits on Nationwide Injunctions

Joel S. Nolette Mar 28, 2025

Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. We welcome responses to the views presented here. To join the debate, please email us at info@fedsoc.org.

In litigation against the federal government, judicial orders known as nationwide injunctions—sometimes referred to as "universal injunctions" or "nonparty injunctions"—generally prohibit the executive branch from enforcing the challenged policy or action against anyone, whether a party in the case or not. Once a relative rarity in federal litigation, federal district courts have granted this remedy increasingly since the turn of the millennium, especially since the beginning of the first Trump administration.

With the increasing prevalence of nationwide injunctions has come increased attention—and increased debate across the ideological spectrum. During the Biden administration, the U.S. Solicitor General asked the U.S. Supreme Court to address whether this remedy is permissible, but the Court thus far has sidestepped the question (though several Justices have written separately over the past few years to question the lawfulness of nationwide injunctions). But the issue may be coming to a head now, in the first few months of the second Trump administration. Several federal district courts have already entered nationwide injunctions against some of the administration's executive actions that have been challenged in court. The President and his deputies have been railing

against the practice in the media. And in several applications for emergency relief from those injunctions, the Acting Solicitor General has already asked the Supreme Court to take up the question of their legality.

In the meantime, Congress could act to scale back the use of nationwide injunctions and mitigate or even moot the prospect of Supreme Court intervention. The Constitution grants Congress the authority to create "inferior Courts" to the Supreme Court, and inherent within this broader authority is the narrower power generally to regulate and limit the jurisdiction of those courts and the remedies they may grant in cases before them.

Efforts to do just that are making their way through Congress. This past February, Representative Darrell Issa introduced a bill, titled the "No Rogue Rulings Act," that would generally prohibit federal district courts from entering "any order providing for injunctive relief" except insofar as such relief is "applicable only to limit the actions of a party to the case before such district court with respect to the party seeking injunctive relief from such district court." In other words, the bill would still allow federal courts to enter injunctions, but only if they are limited in their scope to the parties in the case. That bill, as amended, has already been voted out of the House Judiciary Committee; and the House Majority Leader has declared his intent to bring the bill to the House floor the week of March 31. Meanwhile, in the Senate on March 24, Senator Josh Hawley introduced companion legislation, titled the "Nationwide Injunction Abuse Prevention Act of 2025," that prohibits federal district courts from issuing injunctions unless they are "applicable only to" either "a party to the case before the district court" or "the judicial district of the district court."

Time will tell whether there are enough votes in each chamber to enact such a measure into law at this time. And even if there are, carveouts to the general prohibition in the bills could still leave room for the Supreme Court to address whether nonparty injunctions are ever constitutionally permissible. For instance, the House bill as amended in committee allows for three-judge district courts to enter nationwide injunctions in cases brought by two or more states located in different federal circuits; Senator Hawley's proposed bill allows for injunctions that apply to the judicial district of the issuing court in addition to injunctions that are more narrowly limited to the parties in the case; and similar, additional, or alternative carveouts could imaginably be adopted before

final passage (for example, last Congress, Senator Mazie Hirono introduced a bill that would give the federal district court in DC exclusive original jurisdiction over lawsuits seeking nationwide injunctions).

Regardless, unless or until the Supreme Court addresses the issue squarely, supporters and opponents of the nationwide injunction should keep an eye on whether and how Congress acts to limit federal district court authority in this space.

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Vacatur, Nationwide Injunctions, and the Evolving APA

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VACATUR, NATIONWIDE INJUNCTIONS, AND THE EVOLVING APA

*Ronald M. Levin**

The courts' growing use of universal or nationwide injunctions to invalidate agency rules that they find to be unlawful has given rise to concern that such injunctions circumvent dialogue among the circuits, promote forum shopping, and leave too much power in the hands of individual judges. Some scholars, joined by the Department of Justice, have argued that such judicial decisions should be limited through restrictive interpretations of the Administrative Procedure Act (APA).

This Article takes issue with these authorities. It argues that the courts' use of the APA to vacate a rule as a whole—as opposed to merely enjoining application of the rule to an individual plaintiff—serves vital functions in maintaining judicial control over agency discretion. The Article goes on to argue that such relief is consistent with the language and legislative background of the APA. However, courts have discretion as to whether they will make use of this remedy in individual cases.

Starting from these premises, the Article surveys factors that can militate for or against universal relief in particular circumstances. It also suggests possible doctrinal adaptations and structural reforms that could contribute to preventing overuse of universal injunctions.

* William R. Orthwein Distinguished Professor of Law, Washington University in St. Louis. I am grateful for comments on an earlier draft of this Article by Mila Sohoni, Alan Morrison, Samuel Bray, colleagues who attended a faculty workshop at Washington University School of Law, and participants in the Symposium that gave rise to the articles published in this Issue of the *Notre Dame Law Review*.

INTRODUCTION

The permissibility and proper role of so-called universal or nationwide injunctions[1] in constitutional and administrative law is a prominent source of controversy these days. There is already a considerable literature on the policy issues raised by such decrees. To simplify the question greatly, injunctions that apply nationwide can provide a particularly powerful judicial response to statutes and rules that are found to be unlawful,[2] but they can also give rise to concerns about the enormous power that such decrees afford to individual judges, sometimes to the detriment of the opportunity of other courts to weigh in on the same issue. The potential availability of such injunctions can also distort the litigation process by augmenting plaintiffs' incentives to file their actions in a forum that is likely to favor their positions.[3]

Some of the disputants in this ongoing debate have used the perceived ills of the universal injunction as a jumping-off point for raising far-reaching questions about the fundamental structure of the judicial review regime established by the Administrative Procedure Act.[4] Those questions will be the initial focus of this Article. I have written on this

1 Some authorities prefer the term "universal injunctions" because, in their view, the emphasis should not be on geographical reach, but instead on the court's effort to resolve the issues raised in the case for all situations in which they might arise. *E.g.*, Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 349–53 (2018). On the other hand, the term "nationwide injunction" is relatively concrete and easily grasped and corresponds more closely with general usage. In this Article, I use the two terms interchangeably and do not intend any distinction between them.

2 For commentaries supportive of universal relief against rules under at least some circumstances, see, for example, Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018); Doug Rendleman, *Preserving the Nationwide National Government Injunction to Stop Illegal Executive Branch Activity*, 91 U. COLO. L. REV. 887 (2020).

3 For commentaries critical of universal relief, see, for example, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29 (2019).

4 5 U.S.C. §§ 701–706 (2018).

subject before, both individually[5] and in collaboration with Mila Sohoni.[6] Here I will review and elaborate on that work as it pertains to current controversies. I will then use this analysis as a foundation for exploring broader policy issues and reform proposals regarding universal relief.

This inquiry will require an examination of two types of remedies that courts frequently invoke when they have determined that an administrative rule is unlawful.[7] The injunction—whether or not nationwide in scope—is one of these. The other is vacatur—a judicial order declaring that the rule shall no longer have legal effect. These two remedies are technically distinct, because an injunction binds the defendant and is enforceable through contempt, whereas a vacatur binds only the agency to which it is directed. In functional terms, however, a vacatur can have roughly the same effects as a nationwide injunction.

The capacity of the universal relief debate to generate controversy over fundamental APA issues became glaringly apparent during an oral argument in the Supreme Court in November 2022. In *United States v. Texas*,[8] the Court is currently reviewing the legality of guidelines issued by the Department of Homeland Security to set priorities for detention and removal enforcement under the immigration laws.[9] The district court in this case had found that the guidelines violated the APA and had ordered that the guidelines be vacated throughout the country.[10] At argument, Solicitor General Elizabeth Prelogar (SG) took the position that a judicial decree under the APA may not vacate or enjoin an agency rule on a universal basis; normally, she suggested,

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5 Ronald M. Levin, *The National Injunction and the Administrative Procedure Act*, REGUL. REV. (Sept. 18, 2018) [hereinafter Levin, *National Injunction*], https://www.theregreview.org/2018/09/18/levin-national-injunction-administrative-procedure-act/ [https://perma.cc/2L6A-4ED6].

6 Ronald M. Levin & Mila Sohoni, *Universal Remedies, Section 706, and the APA*, YALE J. ON REGUL.: NOTICE & COMMENT (July 19, 2020), https://www.yalejreg.com/nc/universal-remedies-section-706-and-the-apa-by-ronald-m-levin-mila-sohoni [https://perma.cc/NT7D-XCGQ].

7 This Article focuses on judicial review of agency rules that have been adopted through notice-and-comment rulemaking, but the universal relief debate has also extended to judicial review of other pronouncements that technically are rules. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring) (presidential proclamation); Texas v. United States, 809 F.3d 134, 187–88 (5th Cir. 2015) (agency memorandum), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016). Most of the analysis in this Article applies equally to these pronouncements.

8 United States v. Texas, No. 22-58 (U.S. argued Nov. 29, 2022).

9 *See* Application for a Stay of the Judgment Entered by the United States District Court for the Southern District of Texas at 1–2, United States v. Texas, 143 S. Ct. 51 (2022) (mem.) (No. 22A17 (22-58)).

10 *See* Texas v. United States, 40 F.4th 205, 213 (5th Cir. 2022) (per curiam), *cert. granted*, 143 S. Ct. 51 (2022) (mem.).

it should only provide relief for the benefit of the prevailing challenger.[11] Chief Justice Roberts responded with considerable consternation, as did other members of the Court who, like the Chief Justice, had previously served as judges on the D.C. Circuit. "[Y]our position on vacatur," Chief Justice Roberts said,

> sounded to me to be fairly radical and inconsistent with, for example, you know, with those of us who were on the D.C. Circuit, you know, five times before breakfast, that's what you do in an APA case. And all of a sudden you're telling us that, no, you can't vacate it, you do something different. Are you overturning that whole established practice under the APA?[12]

When the SG confirmed that she thought that "the lower courts, including the D.C. Circuit, have . . . been getting this one wrong,"[13] Roberts replied with a "[w]ow."[14] The SG went on to assert that the lower courts had not been paying attention to the text, context, and history of the APA.[15] Justice Kavanaugh, another D.C. Circuit veteran, met her assertion directly. He noted that he had served on that court with very eminent judges who paid a lot of attention to those factors.[16] He added that the SG's claim was "a pretty radical rewrite, as the Chief Justice says, of what's been standard administrative law practice."[17] Justice Jackson joined in their criticism.[18]

In the wake of these unsympathetic, if not hostile, reactions from what Justice Kagan jokingly called the "D.C. Circuit cartel,"[19] it seemed clear that the Court was not likely to accept the SG's view in this case. Indeed, as some of their colleagues observed, the Court did not really have to reach this issue at all.[20] Nevertheless, the Court did not appear close to agreeing on an explanation as to *why* the SG's arguments were unfounded. Nor did these colloquies shed light on the issue of how, if

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11 Transcript of Oral Argument at 49–50, United States v. Texas, No. 22-58 (U.S. Nov. 29, 2022) [hereinafter Transcript] (Prelogar).

12 *Id.* at 35 (Roberts, C.J.).

13 *Id.* at 36 (Prelogar).

14 *Id.* (Roberts, C.J.).

15 *Id.* (Prelogar).

16 *Id.* at 54–55 (Kavanaugh, J.).

17 *Id.*

18 *See id.* at 66 (Jackson, J.) (suggesting that the SG's view would create a "disconnect" between "the claim that is being made in a case and the remedy that is provided to a successful plaintiff").

19 *Id.* (Kagan, J.); *see* Mark Joseph Stern, *Why Roberts and Kavanaugh Got So Furious at Biden's Solicitor General*, SLATE (Dec. 2, 2022, 4:27 PM), https://slate.com/news-and-politics/2022/12/supreme-court-biden-immigration-masks-debt-relief-elizabeth-prelogar.html [https://perma.cc/DQ3S-7QJ7] (describing Roberts as "audibly angry" and Kavanaugh as "aggrieved and exasperated").

20 *See* Transcript, *supra* note 11, at 120 (Sotomayor, J.); *id.* at 139 (Barrett, J.).

at all, the Court would be able to reconcile longstanding vacatur practice with the objections to nationwide injunctions that some of the other Justices have expressed in past cases.[21] The Court will have to address these issues before long. Hence the need for scholarship to analyze these and related issues.

More specifically, this inquiry will revolve around the interrelationship between two APA provisions. Section 703 provides in relevant part that

> [t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction.[22]

The most immediately relevant language in § 706 provides that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be" in violation of six listed standards of review.[23]

In the *United States v. Texas* case, the SG's line of argument was largely inspired by scholarship by Professor John Harrison, who has written voluminously on the subject during the past few years.[24] Harrison's ideas also find support in the work of Professor Samuel Bray, which has also exerted influence at the Supreme Court level[25] and has contributed historical dimensions to the revisionist turn in legal scholarship on this issue. In this Article I will undertake to provide a counterpoint to the theories expounded by Harrison and Bray. The general thrust of my argument is to agree with the "D.C. Cartel" that the body of caselaw on rulemaking review under the APA is not in need of drastic overhaul. At the same time, I will suggest that some of those Justices' ideas are in need of clarification and refinement.

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21 *See* Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 599–601 (2020) (Gorsuch, J., joined by Thomas, J., concurring in the grant of stay); Trump v. Hawaii, 138 S. Ct. 2392, 2424–29 (2018) (Thomas, J., concurring).

22 5 U.S.C. § 703 (2018).

23 *Id.* § 706.

24 Transcript, *supra* note 11, at 55 (Kavanaugh, J.); *id.* at 119 (Alito, J.); *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) [hereinafter Harrison, *Section 706*]. In addition to that article, which was cited in the government's brief, Brief for the Petitioners at 40–42, United States v. Texas, No. 22-58 (U.S. Sept. 12, 2022), see, for example, John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 YALE J. ON REGUL. BULL. 119 (2023).

25 Bray, *supra* note 3, *cited in Dep't of Homeland Sec.*, 140 S. Ct. at 600 (Gorsuch, J., concurring in the grant of stay); *Trump*, 138 S. Ct. at 2427–29 (Thomas, J., concurring).

Part I of this Article offers a brief introduction to some basic features of the APA system of judicial review of agency rules, emphasizing how interpretation of that Act has evolved over time to accommodate emerging realities. Part II explains why reviewing courts need the option of vacating or enjoining rules on a universal basis. Part III provides a critique of several theories that Harrison and Bray have deployed in order to cast doubt on central premises of that system. Part IV provides what I consider a more balanced and realistic framework for understanding the relationship between §§ 703 and 706. In the course of this discussion, I will try to clear up some contested points, including the apparently mandatory import of the "shall . . . set aside" language of § 706, the permissibility of vacatur, and the interrelationship between § 706 of the APA and general injunctions practice as reflected in § 703.

In Part V I will take up specific applications of my framework, including the manner in which courts can apply it to both vacatur and nationwide injunctions. Finally, Part VI offers some suggestions for reforms that could serve to discourage unnecessary universal relief and ameliorate some of the detrimental effects that such relief can bring about.

I. THE ADMINISTRATIVE PROCEDURE ACT AND ITS INTERPRETATION

I will begin by emphasizing the creativity and flexibility that pervades judicial interpretation of the APA. I have recently written at length about this pattern.[26] Some commentators characterize the Act as a "superstatute" in order to highlight the fact that it is frequently construed in a more open-ended manner than most legislation—a manner that somewhat resembles constitutional interpretation.[27] For example, the Court's interpretation of § 702 allows for standing to sue in a manner that is completely at odds with the text of that provision.[28] Moreover, the Court has recently and unanimously declared that an agency must reply to significant comments that it receives in a rulemaking proceeding,[29] although nothing in the text supports that interpretation.

This flexibility, this rejection of originally contemplated meaning, most definitely applies to the APA's scope of review provision, § 706,

26 Ronald M. Levin, *The Evolving APA and the Originalist Challenge*, 97 CHI.-KENT L. REV. 7, 10–19 (2022) [hereinafter Levin, *Originalist Challenge*].

27 *Id.* at 38–39; *see, e.g.*, William N. Eskridge Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893, 1894 & n.1 (2023).

28 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990); Levin, *Originalist Challenge*, *supra* note 26, at 18–19.

29 Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015).

which is central to this Article's analysis. Many principles that are commonly ascribed to this section differ considerably from the expectations of the Congress that enacted it, such as the requirement of hard-look review and the principle that the facts underlying a rule must have support in the record of the proceeding.[30]

Much of the evolution in the manner in which the APA has been interpreted consists of adaptation to the rise of rulemaking as the principal vehicle for administrative policymaking. As then-Professor Scalia wrote in 1978, "perhaps the most notable development in federal government administration during the past two decades . . . [has been] the constant and accelerating flight away from individualized, adjudicatory proceedings to generalized disposition through rulemaking."[31] This expansion in rulemaking was driven by the growth in the range and complexity of functions that society expects the federal government to perform, and especially the enactment of mass justice programs that cannot be coherently administered without a host of program-wide regulations. Scalia continued: "The increased use of rulemaking has changed the whole structure of administrative law . . . ."[32] In a procedural context, this meant such innovations as an expectation that the factual support for a rule must be based on the administrative record, a duty to disclose scientific data on which a rule depends, and, as I have mentioned, a duty to respond to significant comments submitted during a rulemaking proceeding.[33] None of these expectations was contemplated at the time of the APA's enactment, but they have served to promote rigor, factual investigation, and careful reasoning in the exercise of this important administrative function.

"Another post-APA development of monumental importance," according to Scalia, was "the establishment in 1967 of the principle that rules could be challenged in court directly rather than merely in the context of an adjudicatory enforcement proceeding against a particular individual."[34] Prior to that time it was widely assumed, though not squarely held at the Supreme Court level, that, except in the context of a special statutory review proceeding, a rule could only be challenged as a defense to enforcement proceedings.[35] *Abbott Laboratories*

30 Levin, *Originalist Challenge*, *supra* note 26, at 16–17.

31 Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 376.

32 *Id.* (quoting William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 38–39 (1975)).

33 Levin, *Originalist Challenge*, *supra* note 26, at 12–13.

34 Scalia, *supra* note 31, at 377.

35 Ronald M. Levin, *The Story of the* Abbott Labs *Trilogy: The Seeds of the Ripeness Doctrine*, *in* ADMINISTRATIVE LAW STORIES 430, 442–43 (Peter L. Strauss ed., 2006) [hereinafter Levin, *Trilogy Story*].

v. Gardner[36] was the 1967 case in which the Supreme Court rejected that assumption and held that the "ripeness" of a rule for preenforcement review would depend on a discretionary judgment, turning on the fitness of the rule for immediate review and the degree of hardship that challenging parties would incur if review were postponed.[37] In the wake of *Abbott Labs*, reviewing courts routinely exercised their discretion in most instances to allow preenforcement review. Congress signaled its support for this trend by providing that rules issued in certain regulatory programs, most notably environmental statutes, *must* be challenged within a short period after their issuance.[38] The availability of preenforcement review enables both the agency and affected individuals to know from a relatively early juncture whether a rule will survive judicial review or not; regulated persons do not need to violate the rule and risk penalties in order to test its validity.

Preenforcement review, as it has become entrenched in the post–*Abbott Labs* era, has come to be understood as a challenge to the rule itself, not just to a particular potential application of the rule to the current plaintiff. In other words, to borrow a phrase used by Richard Fallon and Matthew Adler in a different context, the APA creates a cause of action for implementing "rights against rules."[39] This premise has led naturally to the conclusion that when a challenger succeeds in demonstrating on the merits that a rule was adopted unlawfully, the rule itself should be nullified. This result can be accomplished by an *injunction* against its enforcement, but *vacatur* is an alternative, and perhaps simpler and more straightforward mechanism, for putting this goal into practice. I will discuss the practical arguments that favor such relief in the next section, but for now I will simply note that these remedial options have become standard features of modern judicial review of rulemaking.

I should add, however, that the regime of across-the-board relief that I have been describing is not as inflexible as it may seem at first. On its face, the phrase "shall . . . set aside" in § 706 seems to mean that a court not only may, but must, "set aside" a rule that it considers unlawful.[40] However, recent decades have seen the rise of a practice known as "remand without vacatur," whereby a court may allow a rule

36 387 U.S. 136, 148–49 (1967).

37 *Id.*

38 *See generally* Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203 (2011) (discussing interpretive problems under such statutes).

39 Richard H. Fallon, Jr., *Facial Challenges, Saving Constructions, and Statutory Severability*, 99 TEX. L. REV. 215, 239–42 (2020); Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 3 (1998).

40 5 U.S.C. § 706(2) (2018).

to remain in effect during remand proceedings to repair a deficiency in the agency's stated rationale for the rule or the procedure by which it was adopted. Although the use of this device may deprive a victorious plaintiff of some or all of the fruits of its victory, courts have at times permitted remand without vacatur in order to prevent disruption of an administrative program, to protect reliance interests of people who have depended on that program, or for other reasons. Thus, the actual incidence of vacatur (or equivalent injunctive relief) depends in the end on judicial discretion.

The cumulative import of the doctrines just discussed is that judicial review of agency rules has developed into a fairly stable and manageable regime. Yet the growth of nationwide injunctions has threatened to destabilize this settlement. This Article will consider a variety of possible ways in which the system could respond to that challenge.

II. THE NEED FOR UNIVERSAL RELIEF IN JUDICIAL REVIEW OF RULES

Before digging into the details of the doctrinal arguments favoring or opposing the SG's position in *United States v. Texas*, I will explain why the courts' ability to order the nullification of rules on an across-the-board basis is, in many instances, a practical necessity. This is particularly true in an extensively regulated industry governed by a host of complex rules. If the agency is to be able to administer its program in a coherent manner, let alone a well-considered manner, it needs to be able to develop and implement these rules on a uniform, or at least holistically designed, basis. If a single company—say, one pharmaceutical manufacturer, or one airline, or one auto manufacturer, or one pipeline company—seeks judicial review of one of these rules and prevails on the merits, the court cannot award relief only to that company without creating chaos. If the rule is to be revised, it must be revised to apply to all similarly situated companies.

Consider, for example, the leading case on judicial review of rules for abuse of discretion—*Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*[41] In that case, the National Highway Traffic Safety Administration (NHTSA) in the Carter administration had adopted a rule requiring all auto manufacturers to install airbags or passive seatbelts in cars. Later, the Reagan administration took office and rescinded that rule.[42] State Farm brought suit to contest that decision, and the Supreme Court held that the reasoning underlying the agency's rescission decision was flawed.

41 463 U.S. 29 (1983).

42 *See id.* at 38.

Thus, the Court remanded the rescission rule to the agency to be reconsidered.[43] In this situation, it would have been absurd for a reviewing court to have held that the prior passive restraints rule would continue to apply for the benefit of car buyers who held an insurance policy with State Farm, but would remain rescinded for all other car buyers.

Furthermore, a reviewing court is not entitled to specify exactly how the rule should be revised; such a directive would invade the agency's responsibilities to decide how to execute the law.[44] The ultimate rule that results from the remand proceedings might distinguish among various companies or situations, and may provide for waivers in appropriate instances, but these distinctions must be drawn by the responsible agency, subject to judicial oversight.

Thus, the normal remedy in this situation is for the court to order that the rule be vacated and remanded to the agency for further consideration.[45] The rule has to be either remanded or not remanded; it cannot be remanded only with respect to an individual plaintiff. Courts and practitioners have assumed for decades that this remedy is permissible and authorized by the "shall . . . set aside" language in § 706 of the APA.[46]

This reasoning helps explain why principles of injunctive relief developed in common-law contexts, in which atomistic relief for an individual plaintiff is entirely feasible, have had to be liberally adapted to fit the context of administrative law practice. It also helps to explain why, in my view, the SG's position in the *Texas* case is ultimately unrealistic.

Professor Bray, however, has dismissed the argument that the court must be able to grant across-the-board relief. He suggests that the court should, instead, simply prescribe relief for the successful

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43 *Id.* at 57.

44 *See, e.g.*, Negusie v. Holder, 555 U.S. 511, 523–24 (2009); NLRB v. Food Store Emps. Union, Local 347, 417 U.S. 1, 9–10 (1974); Fed. Power Comm'n v. Idaho Power Co., 344 U.S. 17, 20 (1952); Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 364–67 (2003) [herein after Levin, *Vacation*]; Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1555–56 (2014) ("[W]hen a court concludes that an agency's decision is erroneous, the ordinary course is to remand to the agency for additional investigation or explanation (as opposed to the court deciding the issue itself)."); *id.* at 1563–65.

45 Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp., 423 U.S. 326, 331 (1976); Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (citing Harmon v. Thornburgh, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)).

46 *See* Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1138 (2020) (citing numerous cases in which "[t]he Supreme Court has . . . used the term 'set aside' to denote the act of invalidating a regulation[,] . . . affirmed lower court decisions that have invalidated rules universally[, or] . . . stayed agency action universally").

plaintiff and wash its hands of broader issues. It will be up to the agency to decide whether or not to extend similar relief to other persons.[47] Let's put aside the disruptions that would occur between the time of the court's individualized judgment and the months or years that the agency might need to conduct proceedings to adapt to that judgment. More fundamentally, Bray's notion would greatly complicate, and perhaps undermine, the court's ability to oversee the agency's implementation of the remand. This would be particularly true if the rule had to go through multiple remands before the court and the agency arrive at a mutually satisfactory resolution. Consider, for example, the "Deferred Action for Childhood Arrivals" program that the Obama administration adopted in 2012 for the benefit of so-called "Dreamers." Over the course of a decade, litigation contesting the validity of the program has traveled back and forth between court and agency, and the program's legality is still not resolved.[48] That example may be extreme, but instances of multiple remands are not particularly uncommon.[49] A fragmented approach to judicial oversight would mean, on the one hand, that the agency would receive no real guidance as to how it can use its discretionary authority in a manner that would pass muster in a later judicial review proceeding; on the other hand, it would mean that the agency would face little if any accountability on the issue of whether it has used that discretion in a responsible manner.

Detailed judicial scrutiny of the reasoning and fact findings underlying an agency rule has become the norm in our so-called "hard look" era.[50] I see little likelihood that the present Supreme Court, with its skepticism about real or perceived abuses of agency power, would have any interest in abandoning that role.

III. REVISIONIST ACCOUNTS OF § 706 AND INJUNCTIVE RELIEF

The preceding Part argued in broad strokes that the APA must be read to authorize across-the-board nullification of rules in at least some circumstances. In this Part, I will address on a more technical level some of the arguments that have been advanced to challenge that proposition. These arguments contemplate radical departures from current norms, and, as will become apparent, I do not believe that such

47 *See* Bray, *supra* note 3, at 476.

48 *See* Texas v. United States, 50 F.4th 498, 508–12 (5th Cir. 2022) (summarizing this history).

49 *See* Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1743–72 (2011); Christopher J. Walker & James R. Saywell, *Remand and Dialogue in Administrative Law*, 89 GEO. WASH. L. REV. 1198, 1235, 1245–47 (2021).

50 *See* EDWARD STIGLITZ, THE REASONING STATE 72–78, 128–43, 284–87 (2022).

a drastic overhaul of administrative law doctrine is warranted. Subsequent Parts will present what I consider a more helpful and proportionate perspective for coping with the policy challenges posed by universal relief.

One reason for my agreement with the perspective that Chief Justice Roberts and Justice Kavanaugh expressed during the *United States v. Texas* oral argument is that it tallies with my own experience. During the period from 1995 to 1997, I coordinated an extensive dialogue within the American Bar Association (ABA) on the subject of remand without vacatur.[51] It occurred primarily within the Section of Administrative Law and Regulatory Practice, but it also included dialogue with practitioners from other Sections and culminated in the adoption by the House of Delegates of extensive guidelines regarding the proper uses of the device in 1997.[52] Later, in 2013, I participated in deliberations on remand without vacatur within the Administrative Conference of the United States (ACUS), leading up to a Conference recommendation containing a similar set of guidelines.[53] During all of these consultations among practitioners, government attorneys, and academics, I heard extensive debate on the question of whether this practice should be permissible at all—in other words, whether a judicial finding that a rule is unlawful should lead *automatically* to a vacatur of the rule. These two bodies opted for relatively flexible approaches. But I cannot recall a single suggestion by any participant in these debates that vacatur should rarely, if ever, be allowable in the first place, as the SG contended in *United States v. Texas*.[54]

Deeply revisionist though the SG's position was, I recognize that her argument needs to be met on its merits. I will respond in this Part to various arguments on the government's side, as well as in Justice

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51 Ronald M. Levin, *"Vacation" at Sea: Judicial Remands and the APA*, ADMIN. & REGUL. L. NEWS, Spring 1996, at 4, 11 (newsletter item seeking to "draw upon the lessons of experience [by inviting] readers to share their thoughts about the remand without vacation issue").

52 AM. BAR ASS'N, ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION INCLUDING PROCEEDINGS OF THE ONE HUNDRED NINETEENTH ANNUAL MEETING OF THE HOUSE OF DELEGATES 1, 45–46 (1997); *see* Levin, *Vacation*, *supra* note 44, at 387–88 (reprinting the ABA resolution).

53 Adoption of Recommendations and Statement Regarding Administrative Practice and Procedure—Administrative Conference Recommendation 2013-6: Remand Without Vacatur, 78 Fed. Reg. 76,269, 76,272 (Dec. 17, 2013).

54 Respected legal scholarship has shared these organizations' premise. *See, e.g.*, 2 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 11.9, at 1232 (6th ed. 2019) ("Traditionally, a circuit court has vacated agency action upon concluding that the action was arbitrary and capricious . . . ."); Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 568 (1985) ("Traditionally, [when] faced with an arbitrary and capricious . . . decision . . . the court normally vacates the decision and remands the matter to the agency for further proceedings 'consistent with' the court's opinion.").

Gorsuch's questions during the oral argument and in the scholarship of Professors Bray and Harrison.

A. Proposed Reinterpretations of the Statutory Text

On the surface, the textual argument for allowing vacatur looks straightforward. Justice Kavanaugh insisted to the SG that the text of § 706 is clear: "'Set aside' means 'set aside.' That's always been understood to mean . . . the rule's no longer in place. . . . [N]o case has ever said what you're saying anywhere."[55] This straightforward interpretation of § 706 is bolstered by the language of the APA's adjacent provision, § 705, which authorizes a court to stay the effective date of an agency action pending the completion of judicial review.[56] A stay of a rule necessarily applies to the rule as a whole, not merely to named parties.[57] Presumably, the scope of this preliminary relief should not be greater than the scope of the permanent relief that the APA would authorize if the lawsuit were successful.

The SG's principal textual basis for disputing this interpretation rested on the interplay between § 703 and § 706. "It's Section 703 that sets forth the remedies under the APA, not 706, and we think . . . that there was no intent by Congress to create a truly unprecedented, sweeping, non-party-specific remedy . . . ."[58] Justice Gorsuch was similarly minded:

> I think 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, and that nobody at the time, Davis, Jaffe, you know, people who noticed things, noticed this innovation.[59]

I will turn to historical aspects of the problem in the next section; for now, I will stick with textual arguments. On that level, the SG's and Justice Gorsuch's claims have at least three flaws.

First, the idea that § 706 does not address remedies at all looks dubious on its face. Whatever "set aside" means, it surely looks like some sort of authorization for the reviewing court to take action. The

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55 Transcript, *supra* note 11, at 55 (Kavanaugh, J.).

56 5 U.S.C § 705 (2018). As the Court has recognized, Sampson v. Murray, 415 U.S. 61, 68 n.15 (1974), this provision codifies the principles of *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942), which described such stays as "part of [a federal court's] traditional equipment for the administration of justice." *Id.* at 9–10.

57 *See, e.g.*, District of Columbia v. U.S. Dep't of Agric., 444 F. Supp. 3d 1, 48 (D.D.C. 2020).

58 Transcript, *supra* note 11, at 49 (Prelogar).

59 *Id.* (Gorsuch, J.).

inference becomes all the stronger when this statutory language, technically found in § 706(2), is read together with its companion provision, § 706(1), which states that a reviewing court may "compel agency action unlawfully withheld or unreasonably delayed."[60] Thus, § 706 itself 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."[61]

Second, the SG's assertion that § 703 "sets forth the remedies under the APA" greatly overstates the function of that provision in the APA's judicial review chapter. The purpose of the first sentence of that section is simply to identify the forum to which a litigant should bring its APA claim.[62] Expressed in ordinary English, its thrust is that when no special statutory provision for judicial review applies, a person who has a *claim* for injunctive or other types of relief should file it in a "court of competent jurisdiction," that is, a district court. It doesn't purport to define the circumstances in which such a claim would be valid or invalid. Perhaps, given the creativity with which courts have interpreted the APA over the decades, § 703 *could* have been interpreted as a fount of doctrine as to the proper occasions for an injunction (or declaratory judgment, writ of habeas corpus, etc.). But this has never happened in the entire seventy-five-plus years during which the APA has been in effect, and there is no good reason to start now.

The limited purpose that I just mentioned is not trivial. The listing in § 703 of types of relief that may be sought in an APA action is important in the context of proceedings that are not filed under a special statutory review statute. Sections 703 and 706 should be read to harmonize with each other, not conflict, as I will discuss later. But nothing about § 703 negates the remedial provisions that § 706 has almost uniformly been held to contain.

Finally, supposing for the moment that § 703 is regarded as an authoritative declaration that injunctive, declaratory, and habeas relief are APA remedies, can it be read to contain a negative implication that other types of relief are excluded? Not at all. The actual wording of that provision refers to "*any* applicable form of legal action, *including*" the three types of relief just mentioned.[63] "Including" is not a word of negation. On the contrary, it directly suggests that other "forms of legal action" may also be pursued. Moreover, the House and Senate committee reports on the Act glossed the language under discussion

60 5 U.S.C. § 706(1) (2018).

61 *Id.* § 706(2).

62 *See id.* § 703. The remaining sentences allow a litigant to sue the United States in its own name and to contest a rule in agency enforcement proceedings. *Id.*

63 *Id.* (emphasis added).

by referring to the filing of "any relevant form of legal action (such as those for declaratory judgments or injunctions) in any court of competent jurisdiction."[64] The parentheses and the words "such as" cast further doubt on the negative implication that the government and its allies seek to draw. Indeed, the word "traditional" does not appear in the section.

The argument from negative implication also does not seem consistent with the reasoning of *Ford Motor Co. v. NLRB*,[65] a 1939 case with which the drafters of the APA would have been familiar. The judicial review provision of the labor laws authorized a reviewing court to enter "a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."[66] Ford argued that this provision did not authorize the court of appeals to remand a case to the Board for additional factfinding, without ruling on the merits, but a unanimous Supreme Court brushed this argument aside, remarking:

> The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action.[67]

One other textual argument that some advocates have raised is that § 706(2) directs a reviewing court to "hold unlawful and set aside agency *action, findings, and conclusions* found to be [arbitrary, capricious, etc.]."[68] Surely, the argument goes, findings and conclusions are not enjoined; therefore, the term "set aside" as used in § 706(2) must not have operative effect.[69] Actually, though, cases decided during the era in which the APA was adopted did sometimes speak about findings or conclusions being directly at issue.[70] Today we would more likely

64 H.R. REP. NO. 79-1980, at 42 (1946), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 233, 276 (1946); S. REP. NO. 79-752, at 26 (1945), *reprinted in* S. DOC. NO. 79-248, at 185, 212.

65 305 U.S. 364 (1939).

66 *Id.* at 368 (quoting National Labor Relations Act, Pub. L. No. 74-198, § 10(e), 49 Stat. 449, 454 (1935) (codified at 29 U.S.C. § 160(e))).

67 *Id.* at 373. For similar examples, see Levin, *Vacation*, *supra* note 44, at 319–23.

68 5 U.S.C. § 706(2) (2018) (emphasis added).

69 Samuel Bray, *Does the APA Support National Injunctions?*, REASON: THE VOLOKH CONSPIRACY (May 8, 2018, 2:15 PM), https://reason.com/volokh/2018/05/08/does-the-apa-support-national-injunction/ [https://perma.cc/7QCB-YYQV].

70 *See* Frozen Food Express v. United States, 351 U.S. 40, 41–42 (1956) ("findings"); Perkins v. Lukens Steel Co., 310 U.S. 113, 118 (1940) ("findings of fact, conclusions and recommendations"); Rochester Tel. Corp. v. United States, 307 U.S. 125, 127–28 (1939) ("findings").

speak of such pronouncements as declaratory orders or interpretive rules. Then, as now, such cases would be at risk of being dismissed on the basis of defenses such as ripeness, exhaustion, and standing; but the drafters of the APA understandably wrote § 706 to accommodate the subset of these cases that did surmount such threshold obstacles. The "findings and conclusions" language in the provision is virtually never mentioned in modern administrative law cases, but the fact that it has become obsolete does not appear to shed light on the meaning of "set aside" in the statute.[71]

B. History-Based Arguments

As I have mentioned, advocates and commentators who argue that the APA does not authorize vacatur or nationwide relief rely substantially on history. Professor Bray is the leading voice in this aspect of the debate. His article *Multiple Chancellors: Reforming the National Injunction*[72] contains an elaborate review of injunctions in our legal tradition, stretching back to English courts' jurisprudence antedating the Founding of our Constitution. He contends that nationwide injunctions were all but unheard-of until quite recently. That article dealt only briefly with the APA,[73] but a more recent blog commentary does take up that issue directly and seeks to harmonize that Act with his overall thesis.[74]

In the latter commentary, Bray writes:

> First, when the APA was enacted the expectation was that agencies would make policy primarily through adjudication, not through general rulemaking. . . .
>
> Second, "set aside" was a technical term for reversing judgments. This can be seen in Morgan v. Daniels, 153 U.S. 120, 124 (1894). . . . "[S]et aside" as a term for reversing judgments, not for giving national injunctions, is exactly what we would expect if Congress were anticipating a norm of agency policymaking through adjudication.[75]

71 The notion, discussed at length below, that "set aside" as used in § 706 means "disregard" does not make better sense of the "findings and conclusions" language. When the theory of the plaintiff's case is that the agency's rule is arbitrary and capricious because the agency adopted it for illogical or factually groundless reasons, the court surely cannot simply ignore the agency's findings and conclusions, because they are the key to the merits.

72 Bray, *supra* note 3.

73 *See id.* at 438 n.121.

74 *See* Bray, *supra* note 69.

75 *Id.*

Of these two arguments, the latter is the more tenuous. The APA does use terms of art with specialized meanings in some of its provisions,[76] but Bray offers no evidence that the drafters of the APA thought of the phrase "set aside" as a "technical" term with a restrictive meaning. In particular, Bray offers no support for the negative implication that he seeks to draw from the *Morgan* opinion. Nothing in that opinion says that the meaning of the phrase "set aside" should be limited to the context in which the Court used it. On the contrary, Congress used the term "set aside" in a broader sense in a statute that it enacted while the bills to establish an APA were under consideration. This statute empowered an Emergency Court of Appeals to determine the validity of wartime price control regulations, orders, and schedules, and provided that no other court "shall have jurisdiction or power . . . to stay, restrain, enjoin, or *set aside*, in whole or in part, . . . *any provision of any such regulation*, order, or price schedule . . . ."[77]

On the other hand, Bray is essentially correct when he observes that agencies did most of their policymaking through adjudication at the time of the APA's enactment. As I explained above, the blossoming of substantive rulemaking in the 1960s and 1970s was a key turning point in the development of modern administrative law. The question, however, is what conclusions should be drawn from this observation.

In the first place, common practice should not be equated with universal practice. Bray asserts in the same commentary that "the complete absence of national injunctions in the decades before and after the APA makes it highly unlikely that the text was understood by Congress to authorize or require national injunctions."[78] In an earlier article,[79] however, I showed that there was a pre-Act history of cases in which the Court did entertain actions to set aside agency rules.[80] More-

76 *See* Biestek v. Berryhill, 139 S. Ct. 1148, 1154 (2019) (describing "substantial evidence" as a term of art); T-Mobile S., LLC v. City of Roswell, 574 U.S. 293, 301 (2015) (same).

77 Emergency Price Control Act of 1942, Pub. L. No. 77-421, § 204(d), 56 Stat. 23, 33 (terminated 1947) (emphasis added).

78 Bray, *supra* note 69.

79 *See* Levin, *National Injunction*, *supra* note 5.

80 Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407 (1942); Am. Tel. & Tel. Co. v. United States, 299 U.S. 232 (1936); United States v. Balt. & Ohio R.R. Co., 293 U.S. 454 (1935); The Assigned Car Cases, 274 U.S. 564 (1927). In my earlier article, I described *CBS* as a case in which the Court set a rule aside. This was an overstatement, because the Court's opinion arose in a preliminary posture; in a subsequent proceeding, the rule was in fact upheld. Nat'l Broad. Co. v. United States, 319 U.S. 190, 193, 227 (1943). However, the language of the *CBS* opinion leaves little doubt that the Court contemplated nullifying the rule if the broadcasters were to prevail. In any event, the rule involved in *Baltimore & Ohio Railroad* was indeed set aside. *See also* Emily Bremer, *Pre-APA Vacatur: One Data Point*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 21, 2023), https://www.yalejreg.com/nc/pre-apa-

over, the statutory schemes under which these cases arose were recognized in the report of the Attorney General's Committee on Administrative Procedure:

> 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. Review by the courts is had in statutory proceedings which may be instituted within a prescribed time by parties aggrieved by regulations and which result in a certification of the administrative record to the court. *A judgment adverse to a regulation results in setting it aside.*[81]

Since this committee was appointed by President Roosevelt for the exact purpose of building a record for Congress to consider as it drafted administrative procedure legislation, one can infer that Congress was aware of these provisions and would presumably have designed the Act to accommodate them.

I continued this historical analysis in the subsequent column that I wrote in collaboration with Mila Sohoni,[82] and she has addressed the historical record in much more detail in a law review article.[83] I will not try to duplicate her work here, but I will make a complementary point.

During the oral argument in *United States v. Texas*, Justice Barrett put her finger on a key issue:

> [L]et's say that I agree with you and agree with some of the scholarship that says that [vacatur] was not contemplated at the time of the APA's enactment. Why can't remedial authority evolve over time? . . . Remedial authority is a flexible concept, and so maybe the courts of appeals have expanded that concept. Why would that be impermissible?[84]

That is indeed an apt point. Congress probably did not foresee the advent of agencies' widespread reliance on substantive rulemaking, but it may nevertheless have intended to provide the courts with sufficiently broad remedial authority to keep up with emerging challenges. Bray has cited no evidence that Congress intended to limit the

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vacatur-one-data-point/ [https://perma.cc/7E9S-5MXP] (discussing *West v. Chesapeake & Potomac Telephone Company of Baltimore*, 295 U.S. 662 (1935), as another example).

81 ATT'Y GEN.'S COMM. ON ADMIN. PROC., FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, at 116–17 (1941) (emphasis added).

82 Levin & Sohoni, *supra* note 6.

83 Sohoni, *supra* note 46, at 1140–62.

84 Transcript, *supra* note 11, at 59 (Barrett, J.).

scope of § 706 to situations with which it was already familiar.[85] Moreover, as I discussed in Part I of this Article, courts have in a variety of ways taken great liberties with the language of the APA in order to facilitate such evolution. In the case of the "set aside" language of § 706, the language is very broad anyway, as Justice Barrett pointed out.[86] Accordingly, there is all the more reason to interpret it to encompass the power to vacate a rule, which has proved to be an indispensable component of judicial review of rulemaking.[87]

Bray makes some valid policy points about nationwide injunctions, which I will discuss below. But I doubt that tradition can carry the weight that his argument seems to presuppose.

C. Setting Aside as Disregarding

Professor Harrison has developed a different but equally transformative theory for dismissing the straightforward meaning of "set aside." In his view, the term as used in the APA does not, or not always, mean "to nullify." Instead, it can mean simply "set to the side" or "to disregard."[88] He notes that, in a case challenging the constitutionality of a statute, a court does not actually cause the statute to cease to exist;

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85 In a follow-up post, Bray relies on a presumption to cast doubt on the permissibility of such remedial change: "[S]tatutes are read as incorporating traditional remedial principles." Samuel Bray, *Vacatur and* United States v. Texas, REASON: THE VOLOKH CONSPIRACY (Nov. 30, 2022, 2:02 AM) (first citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982); then citing Nken v. Holder, 556 U.S. 418, 433 (2009); and then citing The Hecht Co. v. Bowles, 321 U.S. 321, 330 (1944)), https://reason.com/volokh/2022/11/30/vacatur-and-united-states-v-texas/ [https://perma.cc/AE6J-YLH5]. The difficulty with this argument is that the "traditional remedial principle" discussed in these three cases favored judicial *flexibility* in the face of statutory language that arguably limited the courts' remedial authority. *See infra* notes 113–19 and accompanying text.

86 Transcript, *supra* note 11, at 60 (Barrett, J.). Similarly, when § 703 refers to actions for writs of mandatory injunction, it does not say that such actions must correspond closely to formats that were commonplace in 1946. *See* 5 U.S.C. § 703 (2018).

87 Although Professors Jaffe and Davis, the eminent scholars to whom Justice Gorsuch looked for guidance during the *United States v. Texas* oral argument, apparently did not speak to the vacatur issue at the time of the APA's enactment, there is little if any reason to think that they would have been unsympathetic to *Abbott Laboratories v. Gardner* and the revolution in judicial review doctrine that it brought about. Both were stern critics of the restrictive ripeness principles that *Abbott Labs* overthrew, and the Court relied directly on the writings of both in reaching its holding. Abbott Lab'ys v. Gardner, 387 U.S. 136, 141, 148 n.15, 154 (1967). So did Judge Friendly, in the lower court opinion that set forth the ripeness framework that the Court later adopted in that case. Toilet Goods Ass'n v. Gardner, 360 F.2d 677, 684–87 (2d Cir. 1966), *aff'd in relevant part*, 387 U.S. 167 (1967). *See* Levin, *Trilogy Story*, *supra* note 35, at 442, 457; Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 SAN DIEGO L. REV. 315, 341–42 (2005).

88 Harrison, *Section 706*, *supra* note 24, at 42–43.

rather, it sets the statute to one side[89] and decides the case without regard to it. The popular shorthand that erroneously describes this dynamic as the court "striking down" the statute is sometimes called the "writ-of-erasure fallacy."[90]

The SG's reliance, or partial reliance, on Harrison's argument encountered strong resistance during the oral argument in *United States v. Texas*. Some of the Justices noted that his analysis, a mere law review argument, had no real case support and had not been adequately analyzed in the government's briefs, although these Justices did not engage directly with the particulars of his argument.[91]

Their factual premise about the caselaw was, however, accurate. In the context of constitutional litigation, the "disregard" concept has some continuing visibility in precedents regarding severability, at least nominally, although the Court does not seem to have fully embraced it.[92] In contrast, during the seventy-five-plus years in which the APA has been in effect, courts have never entertained Harrison's theory in an administrative law context. At least, I have not been able to find any such case, and Harrison does not cite to any. Indeed, the author who coined the term "writ-of-erasure fallacy" expressly acknowledges that administrative law cases are different: judicial disapproval of a rule often can and should result in its nullification.[93]

To put the matter more concretely, when a final court judgment orders vacatur of a rule, the agency is supposed to instruct the Office of the Federal Register (OFR) to remove the provision from the Code of Federal Regulations (C.F.R.).[94] In practice, agencies do not always comply with this expectation immediately, due to uncertainties about whether the relevant court decision has become final, deliberation about how to rewrite the underlying regulation when a portion of it has been vacated, etc. At least, however, OFR maintains that agencies do have an obligation to fulfill this task.[95]

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89 *Id.* at 42.

90 Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 933 (2018).

91 Transcript, *supra* note 11, at 55, 119, 139 (Kavanaugh, J., Alito, J., and Barrett, J., respectively).

92 *See* Collins v. Yellen, 141 S. Ct. 1761, 1787–89 (2021); Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2350, 2351 n.8 (2020).

93 Mitchell, *supra* note 90, at 1012–13.

94 Adoption of Recommendations and Statement Regarding Administrative Practice and Procedure—Administrative Conference Recommendation 2013-6: Remand Without Vacatur, 78 Fed. Reg. 76,269, 76,272, 76,273 (Dec. 17, 2013) ("Agencies should . . . . work with the Office of the Federal Register to remove the vacated regulation from the Code of Federal Regulations.").

95 By statute, the *Code of Federal Regulations* (C.F.R.) must contain regulations that are "in effect as to facts arising on or after dates specified by the Administrative Committee [of the Federal Register]." 44 U.S.C. § 1510(a) (2018). OFR interprets this language to mean

We can go on to ask whether anything can be said in favor of Harrison's notion that, in an administrative law context, "set aside" should sometimes be read as "disregard." It certainly does not seem to have any relevance to judicial review of agency adjudicative orders, which, as I have been saying, was the most common use of judicial review in the years immediately following the APA's enactment. I do not think anyone disputes that, when a litigant makes a case that such an order was unlawful, the court will normally respond by setting it aside in the sense of nullifying it.

If Harrison's interpretation of "set aside" is to have any utility in administrative law, it would probably occur in agency proceedings in which the government proposes to apply a regulation to the disadvantage of the respondent in a specific case. It would at least be intelligible to say that if the rule is shown to violate the APA's scope of review standards, the court should "set the rule to the side" and determine the litigant's rights without regard to it, while leaving the rule in place as to everyone else.

However, no such artificial and convoluted construction of the words "set aside" is necessary in order to explain what happens in this situation. The more straightforward way to describe it is to say that the relevant "agency action" being reviewed is not the rule, but rather the agency's adjudicative decision applying the rule. If the petitioner wins on the merits, *that* decision will be set aside—i.e., nullified. Such a judicial order provides all the relief that this party needs. An injunction forbidding the agency to apply the rule to anyone else would appear to contravene the principle that equitable relief should go no further than necessary to provide complete relief to the prevailing party.[96]

Moreover, Harrison's theory is intelligible only when the litigant is in a defensive posture. As such, it would fare even worse in a preenforcement review context. When the object of the judicial review proceeding is to contest the rule itself, it would be entirely incoherent to say that the court should ignore the rule and decide the plaintiff's rights without regard to it. In this sense, Harrison's reading of § 706

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that each agency has a duty to request updates so as to ensure that the regulations in the C.F.R. are, in fact, in effect as of the quarterly revision date specified on the volume. Email from Miriam Vincent, Staff Att'y, Legal Affs. & Pol'y Div., Off. of the Fed. Reg., to author (Feb. 2, 2023) (on file with author) [hereinafter Email from Miriam Vincent]. A proposed amendment to the Administrative Committee's own regulations—published years ago but still pending—would provide that "[w]henever a codified regulation expires after a specified period by law *or by court order*, the issuing agency must submit a rule document for publication in the Federal Register removing the expired regulations." Revision of Regulations, 79 Fed. Reg. 64,133, 64,147 (proposed Oct. 28, 2014) (to amend 1 C.F.R. § 21.6) (emphasis added). The proposed amendment is intended to clarify, not change, existing legal requirements. Email from Miriam Vincent, *supra*.

96 *See* Califano v. Yamasaki, 442 U.S. 682, 702 (1979).

may amount to a reversion to pre–*Abbott Labs* days, when regulated persons were generally unable to contest a rule except by violating it and hoping that they would prevail by defending in the enforcement proceeding (with the likelihood of incurring a penalty if their gamble did not pay off).

It seems unlikely that the Court would be receptive to such a step. As recently as 2021, in *CIC Services, LLC v. IRS*,[97] the Court considered whether the petitioner's APA suit to enjoin enforcement of an Internal Revenue Service reporting requirement was barred by the Anti-Injunction Act.[98] Justice Kagan's opinion for a unanimous Court proceeded on the explicit premise that the petitioner was seeking nullification of an IRS reporting rule, not merely a commitment to "disregard" it.[99] The Court held that the preenforcement challenge could go forward; the petitioner did not need to disobey the Notice, pay the resulting tax penalty, and then contest the requirement in a suit for a refund.[100]

I suppose the government's—not Harrison's—answer to this point would be that, in the preenforcement review, a plaintiff could potentially obtain a declaratory or even injunctive order instructing the agency not to apply its rule to the plaintiff (with the understanding that similarly situated persons would have to bring their own suits to obtain equivalent relief, unless someone qualifies as a class action representative). The problem then becomes that interpreting § 706 to mean that the rule should be "set to the side" would make even such limited relief impossible. A court cannot enjoin the application of a rule to even a single plaintiff if the court must simply "set the rule to the side" and disregard it.

Furthermore, what if the plaintiff's objective is not to be freed from the rule entirely, but instead to obtain a remand so that the rule can be modified? A "disregard" concept of judicial relief seems entirely incapable of accounting for such a remedy. At the extreme, suppose the litigant is a statutory beneficiary who approves of the agency rule as far as it goes, but wants the remand in order to induce the

97 141 S. Ct. 1582, 1586 (2021).

98 26 U.S.C. § 7421 (2018).

99 141 S. Ct. at 1590 ("CIC's complaint asks for injunctive relief from the Notice's reporting rules, not from any impending or eventual tax obligation. Contra the Government's view, a request in an APA action to 'enjoin the enforcement' of an IRS reporting rule is most naturally understood as a request to 'set aside' that rule . . . ."); *id.* at 1592 ("The complaint, and particularly the relief sought, targets the Notice's reporting rule, asking that it be set aside as a violation of the APA. And nothing in that request smacks of artful pleading."). *See generally* Mila Sohoni, *Do You C What I C?*—CIC Services v. IRS *and Remedies Under the APA*, YALE J. ON REGUL.: NOTICE & COMMENT (June 8, 2021), https://www.yalejreg.com/nc/do-you-c-what-i-c-cic-services-v-irs-and-remedies-under-the-apa-by-mila-sohoni/ [https://perma.cc/U2H9-9X9P].

100 141 S. Ct. at 1594.

agency to strengthen it. Under Harrison's theory, such litigants would rarely if ever be able to call the agency to account in court, because, by definition, they would never become the targets of an enforcement action brought by the agency. Moreover, the last thing such a litigant would want is a judicial decision directing the agency that it should henceforth ignore or disregard the rule (either across the board or only with regard to the individual litigant), because that "relief" would leave the litigant worse off than if it had not sued at all.[101]

In sum, Harrison's "disregard" reading of "set aside" has no support in administrative law doctrine, and there does not appear to be any situation in which it would be helpful, let alone worth the disruptions that it could bring about in extant practice. The only credible argument that I can envision being made on behalf of his reading, or other radical theories discussed in this Part, is that they might serve to ameliorate some of the ill effects of vacatur and nationwide injunctions. As I will now proceed to argue, however, I believe that those problems can be addressed in other ways that would be far more consistent with established administrative law norms.

IV. A FLEXIBLE READING OF § 706

Even if the revisionist theories discussed in Part III are "set to the side," significant issues remain as to how to reconcile § 706 with familiar administrative law doctrine. During the *United States v. Texas* oral argument, Justice Gorsuch wondered why one would look for authorization of a particular remedy in a provision that supposedly was about the *scope* of judicial review, and how this supposed support for vacatur could be reconciled with the statute's silence on that point, especially when compared with the specific remedies that § 703 does mention.[102] The "set aside" language seems especially awkward as applied to, for example, a case involving a claim for habeas relief.[103] Moreover, the apparently mandatory tone of the "shall . . . set aside" directive seems too inflexible to accommodate the practical policy concerns that vacatur and nationwide injunctions have elicited.[104]

I believe that the right way to approach these questions is to recognize that § 706 was never designed or intended to be read in an overly literal manner. It was intended to be a declaratory provision,

101 ACUS has identified this fact situation as one that will often warrant remand without vacatur. Adoption of Recommendation and Statement Regarding Administrative Practice and Procedure—Administrative Conference Recommendation 2013-6: Remand Without Vacatur, 78 Fed. Reg. 76,269, 76,272, 76,272 & n.5 (Dec. 17, 2013). Harrison, however, objects to that judicial device. *See infra* note 123 and accompanying text.

102 Transcript, *supra* note 11, at 47–49, 111–13 (Gorsuch, J.).

103 *Id.* at 48–49 (Prelogar).

104 5 U.S.C. § 706 (2018).

supplying a framework for decision but not tying the courts' hands too tightly.[105] As the comparative print issued by the Senate Judiciary Committee during its consideration of the APA bill put it:

> A restatement of the scope of review, as set forth in subsection (e) [now § 706], is obviously necessary lest the proposed statute be taken as limiting or unduly expanding judicial review. . . . It is not possible to specify all instances in which judicial review may operate. Subsection (e), therefore, seeks merely to restate the several categories of questions of law subject to judicial review.[106]

That flexible, open-ended attitude is the spirit with which courts have in fact applied the judicial review provisions of the APA. The content of the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" clause has been determined almost entirely by judicial doctrine.[107] Likewise, the clause that allows consideration of whether an agency action was taken "without observance of procedure required by law" does not specify what procedures are required; courts have filled in gaps themselves (not always by construing positive law prescribed elsewhere).[108] In closely related judicial review provisions (all part of § 10 of the original APA), courts have had to flesh out other undefined terms, including "committed to agency discretion by law"[109] and "final agency action."[110] Some of these interpretations are unsupported by, or even contrary to, the actual wording of the Act. I have already mentioned the provision on standing; another example is the expectation that facts supporting a rule must be substantiated in the administrative record.[111]

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105 *See* Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 134–36 (2021) [hereinafter Levin, *Assault*] (discerning an endorsement of this approach in Justice Kagan's plurality opinion in Kisor v. Wilkie, 139 S. Ct. 2400, 2410–14 (2019)).

106 ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 39 (1946); *see also* Levin, *Assault*, *supra* note 105, at 150–51.

107 5 U.S.C. § 706(2)(A) (2018).

108 *Id.* § 706(2)(D).

109 *Id.* § 701(a)(2).

110 *Id.* § 704.

111 Levin, *Originalist Challenge*, *supra* note 26, at 17. I have recently argued at length that the language of § 706 that directs courts to "decide all relevant questions of law" does not prescribe any specific standard of review and, in particular, does not require de novo, nondeferential review of legal questions. *See* Levin, *Assault*, *supra* note 105. Justice Gorsuch staked out a contrary position in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2432–34 (2019) (Gorsuch, J., concurring in the judgment), and recently reaffirmed it in *Buffington v. McDonough*, 143 S. Ct. 14, 17 (2022) (Gorsuch, J., dissenting from the denial of certiorari), as well as during oral argument in *United States v. Texas*. Transcript, *supra* note 11, at 110 (Gorsuch, J.). Possibly he had not read my article when he made these most recent pronouncements. One point I made in the article is that Jaffe and Davis, in whom Justice Gorsuch placed such confidence in the exchange quoted above, *supra* note 59 and accompanying text, did not share his interpretation of the "questions of law" language. *See* Levin, *Assault*, *supra* note

Getting to the specific issue at hand, I think the phrase "set aside" has the same simple, straightforward meaning that most people—with the exception of a few heretics—have always thought it has; but the sentence should be read as *authorizing* set-aside relief, not as commanding it in every instance.[112]

This assertion may seem counterintuitive, but it finds support in a sizable body of caselaw that stands for the proposition that a statute should not be read to limit a court's remedial discretion unless it does so in unequivocal language.[113] A leading example is *The Hecht Co. v. Bowles*,[114] in which a price control statute stated that when a person is shown to have violated the Act, an injunction to restrain the defendant from future violations "shall be granted without bond."[115] The Court nevertheless held that the court had discretion to decide whether or not to issue the injunction.[116] The Court remarked that "[w]e are dealing here with the requirements of equity practice with a background of several hundred years of history," and "[w]e do not believe that such a major departure from that long tradition as is here proposed should be lightly implied."[117] The drafters of the APA would undoubtedly have been familiar with this 1944 case. The Court has followed *Hecht* on multiple occasions.[118] The holdings have gone both ways in light of the interpretations that the Court places on particular regulatory statutes,[119] but it is fair to say that the Court does not by any means treat the word "shall" as definitive on the question of whether Congress has foreclosed the exercise of equitable discretion.

Remand without vacatur is a modern example of how the concept of remedial discretion has shaped interpretation of the "shall . . . set

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105, at 181–82. I will not belabor this disagreement here, however, because the APA contains an ample supply of other, less controversial examples, as discussed in the above text.

112 Interestingly, the merits issue in *United States v. Texas* also raised a significant question of whether the statutory term "shall" must be interpreted literally, notwithstanding norms of prosecutorial discretion and Congress's failure to appropriate enough funding to enable the agency to do everything that the Immigration and Naturalization Act says it "shall" do. *Cf.* Town of Castle Rock v. Gonzales, 545 U.S. 748, 760–62 (2005) (also reading "shall" nonliterally in light of traditions of enforcement discretion).

113 For extensive discussion, see Levin, *Vacation*, *supra* note 44, at 310–11, 334–42.

114 321 U.S. 321 (1944).

115 *Id.* at 322 (quoting Emergency Price Control Act of 1942, Pub. L. No. 77-421, § 205(a), 56 Stat. 23, 33 (terminated 1947)).

116 *Id.* at 328–31.

117 *Id.* at 329–30.

118 United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 496 (2001) (dictum); Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987); Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982).

119 *See* Miller v. French, 530 U.S. 327, 337–38 (2000) (holding discretion displaced); *Oakland Cannabis*, 532 U.S. at 497–99 (holding that lower court lacked discretion to legalize what Congress has declared to be unlawful).

aside" language of § 706. As the reader will recall, the device allows a court to refrain from vacating an agency rule while remand proceedings to repair a defect in the rule are under way. Defects such as an error in the reasoning supporting the rule or the procedure by which it was adopted often lend themselves to such treatment. According to the leading doctrinal test, the court's decision about whether to invoke the device in a given case should depend on "the seriousness of the order's deficiencies" and "the disruptive consequences of an interim change that may itself be changed."[120] The device is considered inappropriate for situations in which the court has found a defect that cannot possibly be repaired, such as a flat legal prohibition on the agency's chosen policy.

Certainly, there is a reasonable textual argument that the "shall" in § 706 renders remand without vacatur categorically impermissible. Notably, however, that view has not prevailed in administrative practice. Both the ABA and ACUS have endorsed selective use of remand without vacatur and have recommended guidelines for the exercise of discretion in this area.[121] Although some individual judges have questioned the legality of the device, and the Supreme Court has not ruled on it, the consultant's report supporting the ACUS recommendation found that eight courts of appeals have applied the device in review of agency action, and no circuit was identified as having held it to be unlawful.[122] It seems, therefore, that remand without vacatur has become more or less established as a tool that allows courts to calibrate their use of remedial authority in rule review in a nuanced and flexible manner. In the next Part of this Article, I will argue that the courts should aim for a similarly context-sensitive approach to the nationwide injunction issue.[123]

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120 Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (quoting Int'l Union, United Mine Workers v. Fed. Mine Safety & Health Admin., 920 F.2d 960, 967 (D.C. Cir. 1990)).

121 *See supra* notes 52–53 and accompanying text.

122 STEPHANIE J. TATHAM, ADMIN. CONF. OF THE U.S., THE UNUSUAL REMEDY OF REMAND WITHOUT VACATUR 28–29 (2014). For discussion of the caselaw, see *id.* at 21–29, 54–58; Levin, *Vacation*, *supra* note 44, at 377–85.

123 A forthcoming article by Professor Harrison takes a stand against remand without vacatur. John C. Harrison, *Remand Without Vacatur and the Ab Initio Invalidity of Unlawful Regulations in Administrative Law*, BYU L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4101292 [https://perma.cc/4QL4-RST8]. He argues that an illegally adopted rule is void from its inception, so that remand without vacatur amounts to wrongly telling parties that they are obliged to continue to comply with an unlawful rule. In the course of this discussion, he identifies me as author of the leading article on the subject. *Id.* (manuscript at 6) (citing Levin, *Vacation*, *supra* note 44). In light of that characterization (which I appreciate), few will be surprised to learn that I do not agree with Harrison's thesis. Even if one conceives of an action as "void," as opposed to being merely "voidable," the law of remedies is chock-full of doctrines that can sometimes prevent a party

The insight that the availability of set-aside relief under § 706 should depend on equitable principles, instead of being bestowed automatically in every case, suggests that a party's ability to obtain nationwide relief should be largely the same regardless of whether the complaint seeks (a) vacatur or set-aside relief under § 706, or instead (b) an injunction as contemplated by § 703. To be sure, as mentioned earlier, the universal injunction and the vacatur are technically different, but that distinction does not seem to make much difference in practice. The underlying policy considerations are closely related. In the next Part, therefore, I will discuss these two types of relief within a single analytical framework.[124]

V. CRITERIA FOR UNIVERSAL RELIEF

As this Article mentioned at the outset, nationwide or universal injunctions can have a variety of ill effects. They can bestow what seems an inordinate amount of power on individual district judges; they can foreclose "percolation" among multiple courts; and they can increase the incentives for forum shopping, as litigants seek out the most sympathetic court or individual judge to hear the case.[125] These objections have force, and they should carry weight in the courts' balancing of competing considerations.

Professor Bray does not agree that the presence of competing policy considerations in this area warrants a "standard" as opposed to a "rule."[126] He assumes that such a standard would revolve around the Supreme Court's declaration in *Califano v. Yamasaki*[127] that "injunctive

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from receiving relief from such unlawful conduct. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1765 (1991) ("[T]he law of remedies is inherently a 'jurisprudence of deficiency, of what is lost between declaring a right and implementing a remedy.'" (quoting Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 587 (1983))). Common examples include stays of an agency's action pending appeal, stays of a court's mandate after judgment (a common alternative to remand without vacatur), exhaustion of administrative remedies, issue exhaustion, lack of clean hands, laches, and expiration of a statute of limitation. Surely the concept of voidness does not undermine all of these doctrines, and I do not see why remand without vacatur must stand on a different footing.

124 The situation in *United States v. Texas* is complicated by a targeted provision in the immigration laws, 8 U.S.C. § 1252(f)(1) (2018), which prohibits lower courts from awarding injunctive relief under circumstances that may or may not be present in that case. *See generally* Biden v. Texas, 142 S. Ct. 2528, 2538–40 (2022) (discussing § 1252(f)(1)); Garland v. Aleman Gonzalez, 142 S. Ct. 2057 (2022) (same). An issue raised in the present litigation is whether that statute is equally applicable if the relief ordered by the court is characterized as a vacatur rather than an injunction. I do not take a stand on that issue here, because my concern is with principles of general application.

125 *See supra* note 3 and accompanying text.

126 Bray, *supra* note 3, at 480.

127 442 U.S. 682 (1979).

relief should be no more burdensome to the defendant then necessary to provide *complete relief* to the plaintiffs,"[128] which he interprets as implying the converse proposition that a court should provide as broad an injunction as complete relief requires.[129] Such a benchmark, he contends, would not be stable and would be almost wholly indeterminate.[130] Moreover, it would militate strongly in favor of nationwide injunctions.[131] Thus, he prefers a categorical rule that an injunction should be no broader than necessary to protect the *plaintiffs themselves*, as opposed to others.[132]

For reasons already discussed, I do not support Bray's proposed rule on the merits. In addition, the Supreme Court did not say in *Yamasaki* that the complete-relief principle should operate symmetrically, and I agree with Judge Milan Smith, who writes in a thoughtful article that assuring "complete relief" is not an appropriate premise in this area.[133] As Bray himself notes, it neglects a host of factors that properly favor defendants.[134] Thus, a "standards" approach is desirable, although "complete relief" is not a suitable, or at least sufficient, baseline.

This Part undertakes to identify more specifically some prototypical situation in which vacatur or nationwide injunctive relief would normally be warranted or unwarranted. There is substantial literature on this line-drawing issue. I cannot explore it in depth here, but I will mention a few paradigmatic examples by way of illustration.

In line with the discussion earlier in this Article, universal relief should be *favored* where an administrative scheme is so tightly integrated that enjoining the violation of law as to the plaintiff(s) but not similarly situated persons would create unacceptable incoherence in the regulatory program. Similarly, a nationwide injunction will presumably be appropriate where providing relief to some regulated persons or statutory beneficiaries, but not all, would not be feasible. The Ninth Circuit's holding in *Bresgal v. Brock*[135] is illustrative. This case required the Secretary of Agriculture to adopt a nationwide injunction that would prohibit independent labor contractors from engaging in misleading and exploitative conduct toward migrant forest workers.[136] The action had been filed by individual migrant workers, but the court

128 *Id.* at 702 (emphasis added).

129 Bray, *supra* note 3, at 466.

130 *Id.* at 480.

131 *Id.* at 467.

132 *Id.* at 469.

133 Milan D. Smith, Jr., *Only Where Justified: Toward Limits and Explanatory Requirements for Nationwide Injunctions*, 95 NOTRE DAME L. REV. 2013, 2026 (2020).

134 Bray, *supra* note 3, at 468.

135 843 F.2d 1163 (9th Cir. 1987).

136 *Id.* at 1165, 1172.

saw no way in which it could write an injunction that would protect only the named plaintiffs or that would apply only in the Ninth Circuit, especially since these workers sometimes traveled around to different parts of the country, and the contractors wouldn't always know which workers they were dealing with.[137]

On the other hand, several situations in which universal injunctive relief should be *disfavored* can be identified. First, a court should be disinclined to grant universal relief where enjoining a violation within the court's geographical state or region would be feasible and administrable.[138] This premise, the converse of the court's decision in *Bresgal*, is an appropriate concession to the policies that militate against nationwide injunctions, such as the goal of promoting percolation.

Second, a rule should not be vacated under circumstances in which remand without vacatur is now considered appropriate. As discussed above, a large body of caselaw identifying these situations already exists.[139]

Third, a court should not enjoin or vacate a rule that an agency has enforced or applied to the disadvantage of a litigant in an administrative adjudication, if the litigant can be made whole in an appeal from the order in which the agency applied the rule.[140] This standard practice follows directly from the *Yamasaki* principle just mentioned: the reviewing court should not bestow broader relief than is necessary to vindicate the challenger's rights. Note that, although some have thought otherwise, this situation does not entail any narrow interpretation of "set aside"; it focuses on the individual agency action, which the court *does* set aside, in the sense of nullifying it, if the appeal is successful.[141]

The well-known practice of agency nonacquiescence has developed in this context. In subject areas such as Social Security disability benefits or immigration, an agency might refuse to "acquiesce" in one circuit's finding that its rule is invalid, so that it can continue to argue in another circuit that the first holding was mistaken.[142] Such intercircuit nonacquiescence is entirely compatible with "percolation" among

137 *Id.* at 1170–71.

138 *See* E. Bay Sanctuary Covenant v. Barr, 934 F.3d 1026, 1028–30 (9th Cir. 2019) (finding the record insufficiently developed to warrant nationwide relief), *stay granted on other grounds*, 140 S. Ct. 3 (2019); California v. Azar, 911 F. 3d 558 (9th Cir. 2018) (same); City & Cnty. of S.F. v. Trump, 897 F.3d 1225, 1244–45 (9th Cir. 2018) (same).

139 *See supra* note 122 and accompanying text.

140 *See* Baeder v. Heckler, 768 F.2d 547, 553 (3d Cir. 1985); Allan D. Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 N.C. L. Rev. 123 (1977).

141 Levin & Sohoni, *supra* note 6.

142 *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989). In theory, nonacquiescence among courts *within* a single

various courts of appeals, and a litigant who has shopped for a friendly reviewing court will not cut less sympathetic courts out of the debate over whether the rule is valid.

Fourth, a universal injunction or universal vacatur may be inappropriate when a "facial" holding of illegality would be overbroad. Often, in constitutional law, the relevant legal principle would be appropriate as applied to some persons but not others—or might turn out to be, so that the court should not foreclose that possibility in advance. This consideration, however, usually doesn't apply in APA judicial review proceedings (other than those based on a constitutional violation).[143] In a rulemaking proceeding, there are no parties. The agency has *duties* to the public at large, but if it breaches one or more of these duties, such as a failure to allow required notice-and-comment procedure, with respect to one member of the public, it *necessarily* will have committed the same violation with respect to everyone else.

This analysis helps to explain why, in routine administrative law appeals, the *Abbott Labs* ripeness balance is usually (not always) struck in favor of allowing preenforcement review of a rule: the rule is "fit" for immediate review, even if the potential injunction or vacatur would operate universally. However, ripeness is not the only consideration at issue. A court may be better advised to refrain from issuing nationwide injunctive relief for reasons of judicial administration, such as the desire to facilitate percolation or counteract forum shopping. In such a case, it should eschew vacatur and should issue a limited injunction, declaratory relief, etc.

The guideposts just mentioned do not cover all situations by any means, and some of them are too open-ended to provide much guidance. A general admonition to courts to apply current doctrine with sensitivity to the disadvantages of nationwide relief may be helpful, but many would no doubt argue that it is unlikely to be sufficient by itself. In the next Part, therefore, I will take up some possible additional steps that could be taken.

VI. REFORM SUGGESTIONS

The thrust of the foregoing discussion is that the APA should be interpreted to authorize vacatur or other nationwide injunctive relief under at least some circumstances. Perhaps, however, procedural statutes and norms can be revised in a manner that would ameliorate some

circuit can also occur, although that practice is widely criticized as disrespectful of the appellate court's authority. *See* Johnson v. U.S. R.R. Ret. Bd., 969 F.2d 1082, 1091 (D.C. Cir. 1992) (noting broad disapproval of intracircuit nonacquiescence among the circuits).

143 *See* 5 U.S.C. § 706(2)(B) (2018).

of the costs of such relief, in particular its tendency to impede percolation among multiple courts.

A. Presumption Favoring Stays of Vacatur or Universal Injunctions Pending Appeal

The SG's solution of allowing a court to provide injunctive relief only to the individual litigant would seem to mean that a regulation could *never* be vacated or "set aside" as a whole, no matter how many courts have spoken to its validity, until the Supreme Court has reviewed it. That seems excessive, in part because as the number of courts that have addressed an issue increases, the marginal benefit of additional percolation would presumably decline. After three or four circuits have spoken to the issue, the payoff from adding still another appellate voice would seem relatively small. Meanwhile, litigants who are identically situated to the plaintiffs but outside the scope of a plaintiff-only injunction might have a compelling interest that apparently deserves to be protected.

However, I do have a suggestion that might help to reduce the number of situations in which a nationwide injunction issued by a single court effectively prevents any other court from opining on the same issue. The suggestion is that there should be a presumption in favor of staying the effectiveness of a nationwide injunction or vacatur pending any appeal.

That expectation could be built directly into the familiar four-factor test for determining whether a stay should be granted. The test considers probability of success on the merits, the risk of irreparable injury to the plaintiff, the potential harm to other parties, and the public interest.[144] The test does not have to apply the same way in all contexts.[145] In the context of universal relief against a rule, the Supreme Court could interpret the public interest factor as encompassing the public interest in allowing time for multiple courts to address the underlying substantive issue. Over time the Court could build up a body of doctrine amplifying on and refining the presumption favoring a stay in most nationwide injunction cases. It could use that doctrine, to-

144 Nken v. Holder, 556 U.S. 418, 426 (2009) (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)); Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (first citing Munaf v. Geren, 553 U.S. 674, 689–90 (2008); then citing Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542 (1987); and then citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 311–12 (1982)).

145 *Cf.* Sampson v. Murray, 415 U.S. 61, 83–84 (1974) (adapting the standard formula to require an especially strong showing of irreparable injury when a government employee sues to avoid termination).

gether with caselaw on the appropriate province of nationwide injunctions as discussed in the preceding Part, to oversee practice in the lower courts, without necessarily addressing the merits in such cases.

To be sure, I doubt that the Court would want to adhere unbendingly to this presumption.[146] The other three factors would remain part of the stay formula and might be deployed when the probability of the challengers' success is exceptionally high (or low) or the parties' equities are especially compelling. The Court's increasing use of its emergency docket to resolve politically charged issues[147] seems to suggest that it will often be perfectly willing to forgo the potential benefits of percolation in order to achieve what it considers a fair result in such cases. A doctrinal move that depends on patience cannot be effective except when, or to the extent that, the judges who apply it are actually patient.

But the Court would be able to enforce the presumption to the extent it actually does desire broader percolation of issues in cases involving vacatur or nationwide injunctions. In mundane cases, where ideology may exert a relatively small influence, one can imagine the Court taking a stand in favor of curbing abuses of such injunctions.

Relatedly, Judge Smith has recommended that lower courts that impose nationwide injunctions should be expected to write opinions explaining why they resorted to that remedy as opposed to less drastic choices.[148] This is another good suggestion. Such a requirement would facilitate appellate review of those choices. Judge Smith further recommends that the court should hold a special hearing on the matter before going forward.[149] I am not immediately convinced that the benefits of that expectation would usually outweigh its costs in terms of slowing down the process, but others with firsthand experience in this area might disagree.

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146 The presumption could be made inapplicable to cases in which the likelihood of subsequent litigation appears remote, such as where the stakes are low or where all interested stakeholders have been represented in the initial appeal. Contestation of rulings adverse to such previously represented parties might also be foreclosed by issue preclusion. *See, e.g.*, W. Coal Traffic League v. ICC, 735 F.2d 1408, 1410 (D.C. Cir. 1984) (R.B. Ginsburg, J.).

147 Kimberly Strawbridge Robinson, *Supreme Court Conservatives Want More Robust 'Shadow Docket' (1)*, BLOOMBERG L. (July 8, 2022, 12:51 PM), https://news.bloomberglaw.com/us-law-week/supreme-courts-conservatives-want-more-robust-shadow-docket [https://perma.cc/TN8N-PY8X] (noting that the Court had issued sixty-six emergency orders during the past year).

148 Smith, *supra* note 133, at 2036.

149 *Id.*; *see also* Frost, *supra* note 2, at 1116 (endorsing both suggestions).

B. Three-Judge Courts

Judge Gregg Costa of the Fifth Circuit has suggested that Congress should enact legislation to apply to cases that involve a demand for a nationwide injunction and that, under present law, would be tried by a single district judge.[150] He proposes that a three-judge district court, including one circuit judge, should hear these cases instead, and that such a panel's decision should be appealable as a matter of right to the Supreme Court.[151] As he notes, such panels have a long history in federal practice, although the statutory schemes that provided for them have now been almost entirely discontinued.[152] Judge Costa explains that this plan would ensure that a case involving a nationwide injunction will have been reviewed by at least three judges; it may not be precisely equivalent to review by multiple courts but would straightforwardly avoid the single-judge problem.[153] Actually, many rules are already subject to initial court of appeals review, without an initial stop at a district court,[154] so the judge's plan would affect only the fraction that are not.

I would add that judicial review of an administrative rule is well suited to initial consideration by three-judge panels anyway. As the Supreme Court wrote in *Florida Power & Light Co. v. Lorion*:

> The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court. . . . The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry. . . . The factfinding capacity of the district court is thus typically unnecessary to judicial review of agency decisionmaking. Placing initial review in the district court does have the negative effect, however, of requiring duplication of the identical task in the district court and in the court of appeals; both courts are to decide,

150 *See* Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV.: BLOG (Jan. 25, 2018), https://harvardlawreview.org/blog/2018/01/an-old-solution-to-the-nationwide-injunction-problem/ [https://perma.cc/9XWE-FABU]; Alan Morrison, Opinion, *It's Time to Enact a 3-Judge Court Law for National Injunctions*, BLOOMBERG L. (Feb. 6, 2023, 4:00 AM), https://news.bloomberglaw.com/us-law-week/its-time-to-enact-a-3-judge-court-law-for-national-injunctions [https://perma.cc/7DX5-TSJA] (similar proposal).

151 Costa, *supra* note 150.

152 *Id.* For discussion of this history, see, e.g., Michael E. Solimine, *Three-Judge District Courts, Direct Appeals, and Reforming the Supreme Court's Shadow Docket*, 98 IND. L.J. SUPPLEMENT 37, 42–46 (2023).

153 *See* Costa, *supra* note 150.

154 *See* JONATHAN R. SIEGEL, ADMIN. CONF. OF THE U.S., THE ACUS SOURCEBOOK OF FEDERAL JUDICIAL REVIEW STATUTES 52–54 (2022).

> on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review.[155]

The Costa plan has been criticized on the ground that mandatory appeals to the Supreme Court would impose a substantial time burden on that Court to hear cases that it would not otherwise choose to hear.[156] Indeed, this is among the main reasons why previous three-judge court requirements were construed extremely narrowly during their heyday and then virtually abolished.[157]

That problem could be solved, however, by excluding from the enabling legislation the provision for appeal as of right to the Supreme Court. Parties who seek Supreme Court review of the three-judge court's decision could be required to petition for certiorari, and the Court could deny the petition if it so chose. After all, one rationale for mandatory appellate jurisdiction in the former three-judge court schemes was Congress's judgment that the matters subject to that court's jurisdiction would be so pressing and important that their resolution should be expedited by omitting a time-consuming stop at the court of appeals.[158] In the present context, however, the purpose would be the opposite—to *slow down* the resolution of the underlying debate so that, in appropriate instances, other courts would have an opportunity to weigh in on the issue.

Anyway, most of the cases that now present vacaturs for review are mundane administrative appeals. Out of the five cases that the D.C. Circuit vacates before breakfast, at least in Chief Justice Roberts's metaphor, four would probably be too narrow and technical to deserve Supreme Court review; the fifth might or might not. *Denials* of a request for a nationwide injunction (or any injunction) would seem to be, in general, all the more unlikely to be urgent or significant enough to warrant Supreme Court review.

Congress would have to work out some complications if it were to adopt the sort of three-judge panel plan that I have just put on the table for consideration.[159] Although, as I just said, the validity of the rule would almost certainly not depend on factfinding by the district court, other issues raised by the plaintiff or the government might. In

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155 Fla. Power & Light Co. v. Lorion, 470 U.S. 729 743–44 (1985) (citations omitted).

156 DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 288 (5th ed. 2019); Smith, *supra* note 133, at 2035–36.

157 Solimine, *supra* note 152, at 45–46.

158 *See id.* at 41–42 (quoting Stephen I. Vladeck, Opinion, *F.D.R.'s Court-Packing Plan Had Two Parts. We Need to Bring Back the Second.*, N.Y. TIMES (Jan. 7, 2022), https://www.nytimes.com/2022/01/07/opinion/supreme-court-vaccine-mandate.html [https://perma.cc/5A4B-FQL6]).

159 Congress would need to take account of the variety of agency actions that technically are rules. *See supra* note 7.

some cases, the panel could handle all of those issues, but for more complex cases there might have to be a procedure for transferring the case between the three-judge court and a single district judge. Another question would be whether the three-judge district court would be bound by precedents of the circuit in which it sits.[160] Similar issues have arisen under past three-judge plans,[161] and Congress could consult that experience in addressing them.

An even simpler alternative to Judge Costa's plan would be for Congress to provide that when a case presents a substantial question as to whether a nationwide injunction should issue, the case should be immediately transferred to the court of appeals in which the district court sits. Under the reasoning of *Florida Power & Light*, such a case would be functionally suitable for immediate court of appeals review anyway.[162] This procedure would obviate the need for the cumbersome task of assembling a three-judge district court panel. Under this alternative plan, it would be all the clearer that Supreme Court review should occur through certiorari rather than mandatory appeal.

C. Geographical Forum Shopping

It may be argued, however, that even a provision for three-judge panels would leave too much room for geographical forum shopping.[163] It is well known that the circuit courts are not interchangeable. Some are dominated by conservatives and others by liberals,[164] and naturally challengers to a rule that applies nationally tend to bring suit in circuits that they expect will be sympathetic to their cause. Presumably, the current political divergence among the circuits is largely a product of the fact that, these days, partisan differences are closely related to

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160 This question has arisen in the context of the Voting Rights Act, which still requires three-judge district courts for some functions. *Compare* Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413, 419 (2019) ("[C]ircuit precedent is not formally binding on three-judge district courts . . . ."), *with* Michael T. Morley, *Vertical Stare Decisis and Three-Judge District Courts*, 108 GEO. L.J. 699, 766 (2020) (arguing that "a three-judge district court should follow the precedent of its regional court of appeals").

161 *See* 28 U.S.C. § 2284(b)(3) (2018); 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & VIKRAM DAVID AMAR, FEDERAL PRACTICE AND PROCEDURE § 4235, at 218–25 (3d ed. 2007).

162 The Administrative Conference has taken a similar, though more nuanced, position. The Choice of Forum for Judicial Review of Administrative Action (ACUS Recommendation No. 75-3), 1 C.F.R. § 305.75-3, para. 5(b) (1993).

163 *See generally* Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIA. L. REV. 267, 300 (1996).

164 *See* Mark A. Lemley, Red Courts, Blue Courts 1–9 (Feb. 16, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4266445 [https://perma.cc/6PC6-6UGM].

geographical differences. Federal judges in the respective circuits tend to reflect the political orientations of their localities, because local senators and bar committees are deeply involved in their selection, and those actors reflect the political attitudes of the legal communities in which they are located.

Existing statutes do not appear to lend themselves very well to curtailing or ameliorating geographical forum shopping. When two competing petitions are filed in different courts of appeals within a ten-day period to contest the same rule, a lottery is held to decide which circuit will keep the case;[165] but persons who fear geographical forum shopping by opponents of a rule are more likely to be *supporters* of the rule than persons who would prefer to *contest* the rule in a different circuit. Speaking more generally, change-of-venue statutes authorize transfer of a case from one district court to another "[f]or the convenience of parties and witnesses, in the interest of justice,"[166] or from one circuit to another "[f]or the convenience of the parties in the interest of justice,"[167] but "convenience" is not a very apt description of the objective of promoting percolation.

Against this background, the possibility of ameliorative legislation can be considered. Judge Costa suggested that, if Congress wants to neutralize the forum-shopping incentive, it could provide for random selection among circuits.[168] This idea would doubtless curtail or eliminate geographical forum-shopping concerns, but I suspect that the chances that it could be enacted are rather low. Proponents would presumably have to overcome not only political opposition rooted in the fact that the status quo works very well for petitioners who are resorting to geographical forum shopping now, but also a likely reluctance to force a challenger to litigate in a part of the country with which it has no ties. Indeed, the practice of allowing parties that seek to contest government action to bring suit where they reside is intrinsically appealing.

A related proposal has been that all cases of this type should be routed to the District Court for the District of Columbia.[169] Professor Solimine writes that "it makes some sense for the case to be litigated in the national seat of the federal government."[170] He adds that the administrative law expertise of federal judges in the District also militates

165 28 U.S.C. § 2112(a)(1), (3) (2018). For a prominent recent example, see *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA*, 142 S. Ct. 661 (2022).

166 28 U.S.C. § 1404(a) (2018).

167 *Id.* § 2112(a)(5).

168 Costa, *supra* note 150.

169 *See* Solimine, *supra* note 152, at 50–52 (citing such proposals).

170 *Id.* at 50.

in favor of this option.[171] Ultimately, however, he is skeptical about this proposal: "No doubt that it would achieve the worthy goal of limiting forum shopping. But it does so at the cost of prohibiting any percolation in the lower courts, and of violating the general norm of the regional dispersion of venue in the federal courts . . . ."[172] That norm is deeply rooted. Indeed, the present venue statute, permitting venue to be laid in a district where the plaintiff resides,[173] was adopted in 1962 precisely because the prior law, which forced plaintiffs to sue in the District of Columbia district court, was considered too burdensome.[174] A subsequent proposal in the 1980s to unsettle this equilibrium proved to be quite divisive—and this was in an era in which ideological polarization along geographical lines was less prominent than it is today.[175]

There is, however, a variation on this theme that may be more susceptible of structural resolution. As Professor Stephen Vladeck has pointed out,[176] many federal district courts are divided into divisions. In some of these divisions in the Texas district courts, only one judge is assigned to hear all or most of the cases filed in the division. Thus, state officials who bring suit against the United States can strategically choose a division in which to file suit and thereby essentially handpick the judge who will adjudicate their case. They can and often do choose solidly conservative judges to sit in politically charged suits, sometimes culminating in a universal injunction that adopts the state's position nationwide.

It is difficult to conceive of any public policy that could justify allowing such stark judge shopping.[177] The practice is somewhat analogous to a hypothetical system in which an appellant at the court of appeals level were permitted to choose which three members of the court should hear its appeal. That procedure would surely be recognized as improper, and that recognition would not depend on an assumption

171 *Id.*

172 *Id.* at 56.

173 28 U.S.C. § 1391(e)(1)(C) (2018).

174 Clifton B. Cates, III, *Venue in Corporate Suits Against Federal Agencies and Officers*, 60 MINN. L. REV. 81, 83–85 (1975).

175 *See* Federal Venue Provisions Applicable to Suits Against the Government (Recommendation No. 82-3), 47 Fed. Reg. 30706 (July 15, 1982). The recommendation criticized a legislative proposal that would elevate the importance of local impact in the venue determination—but a dissenting statement by twenty ACUS members endorsed the proposal. For background and critique of that proposal, see Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976 (1982).

176 Stephen I. Vladeck, Opinion, *Don't Let Republican 'Judge Shoppers' Thwart the Will of Voters*, N.Y. TIMES (Feb. 5, 2023), https://www.nytimes.com/2023/02/05/opinion/republicans-judges-biden.html [https://perma.cc/8DY4-F37P]; *see also* Alex Botoman, Note, *Divisional Judge-Shopping*, 49 COLUM. HUM. RTS. L. REV. 297, 300–08 (2018).

177 *See* Botoman, *supra* note 176, at 321–24, 328–30.

that any of the circuit's judges, considered individually, would render a biased decision. Rather, it would be improper because an element of randomization in the assignment of judges to significant cases tends to promote stability and moderation in the legal system. Similarly, judge shopping within the divisions of a district court subverts that safeguard. Yet the capacity of the legal system to curtail this practice through motions for change of venue is uncertain at best.[178]

Vladeck suggests that district courts should allocate judges among divisions more evenly, or Congress should require them to do so.[179] Such a reform was actually instituted recently to ameliorate a notorious situation in the realm of patent litigation.[180] A single district court judge in the Waco Division of the Western District of Texas had adopted special rules to attract patent cases. As a result, twenty-five percent of all patent litigation nationwide was pending in that division as of 2022. Following criticism of this situation, including by Chief Justice Roberts, the chief judge of the district ordered that future patent filings in the district must be randomly assigned to any of the district's twelve judges.[181] A similar measure to curb abuses of district allocations affecting suits that seek nationwide injunctions or vacatur of administrative rules would seem to be workable and politically credible.[182]

CONCLUSION

The recent upsurge in courts granting vacatur or universal injunctions does not have to be interpreted as a sign that these tribunals have lost touch with traditional remedial principles. Probably, much of the recent increase can be better explained as a response to the ideologically polarized and politically charged ethos of our times. As Charlton Copeland has written in a thoughtful essay about the political context of the nationwide injunction, "[c]ourts are embedded within a larger

178 *See id.* at 325–28. In *Texas v. United States Department of Homeland Security*, No. 23-CV-00007, 2023 WL 2457480 (S.D. Tex. Mar. 10, 2023), the court denied a motion to transfer, largely on the ground that the parties did not contend that the judge was himself biased. For reasons discussed in the text, that rationale was dubious.

179 Vladeck, *supra* note 176.

180 Samantha Handler, *West Texas Spreads Patent Case Duties, Curbing Judge Albright*, BLOOMBERG L. (July 25, 2022, 7:38 PM), https://news.bloomberglaw.com/ip-law/west-texas-spreads-patent-case-duties-curbing-judge-albright [https://perma.cc/W7MG-25JK].

181 *Id.*

182 *See* Botoman, *supra* note 176, at 337 (proposing that, "in suits challenging the validity of generally applicable state and federal laws and regulations," Congress should "mandate that courts assign these cases across all of the district's judges").

institutional ecosystem made up of Congress, the President, the bureaucracy, and the wider public."[183] More particularly, he hypothesizes that "a key component of the recent increase in nationwide injunction deployment likely was increased partisan polarization in Congress that led to increasingly gridlocked legislative processes, which in turn led to increased presidential unilateral action."[184] Such executive action has often taken the form of bold and creative rulemaking, which typically reflects the priorities of the incumbent administration's party. Leaders of the opposing party and their allies have predictably stepped forward with litigation to contest those rules in court. The high stakes and politically charged subject matter of many of these rules creates a demand for dramatic judicial relief, often in the form of vacatur or nationwide injunction.

Even if the increase in universal relief can be explained in these terms, this development presents practical challenges that the legal system should take seriously. This Article has argued that these challenges do not require a radical rethinking of longstanding APA interpretations, but they do provide reasons for courts and perhaps Congress to explore new directions that grow naturally out of the current regime. Hopefully, some of the Article's suggestions will contribute to progress along these lines.

Author's Postscript: As this Article was almost ready for the printer, the Supreme Court decided United States v. Texas.[185] *In a majority opinion by Justice Kavanaugh, the Court held that the plaintiff states lacked standing to sue; thus, it did not address the remedy issues discussed in this Article.*[186] *In an opinion concurring in the judgment, however, Justice Gorsuch deployed a variety of doubts about the legality and practical disadvantages of vacatur and nationwide injunctions, echoing previous criticisms that this Article has sought to answer.*[187]

183 Charlton C. Copeland, *Seeing Beyond Courts: The Political Context of the Nationwide Injunction*, 91 U. COLO. L. REV. 789, 791 (2020).

184 *Id.* at 796; *see id.* at 808–32 (developing this explanation in great detail). I have recently examined congressional gridlock, with extensive documentation, in a different context. Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. (forthcoming 2024) (manuscript at 49–55), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4304404 [https://perma.cc/7ZV6-F5ZG].

185 No. 22-58, 2023 WL 4139000 (U.S. June 23, 2023).

186 *Id.* at *4.

187 *Id.* at *13–17 (Gorsuch, J., concurring in the judgment).

Trump finds new target in crusade against judges: Nationwide injunctions

By **Melissa Quinn**
March 22, 2025 / 7:00 AM EDT / CBS News

Washington — President Trump has made no secret of his disapproval of a federal judge who temporarily blocked his administration's efforts to deport Venezuelan migrants suspected of being gang members under a 1789 law.

While the president's crusade has included calls for the judge, James Boasberg, to be impeached by the House, Mr. Trump and his administration are also taking aim at a form of judicial relief that has temporarily impeded implementation of his second-term agenda and also been a headache for his predecessors in the White House.

Known as nationwide or universal injunctions, at least a dozen of these orders have been issued by judges overseeing the more than 100 cases challenging the policies rolled out by Mr. Trump. District court judges have temporarily blocked the president's effort to ban transgender people from serving in the military, his executive order seeking to end birthright citizenship and the administration's mass firings of federal probationary workers, among others.

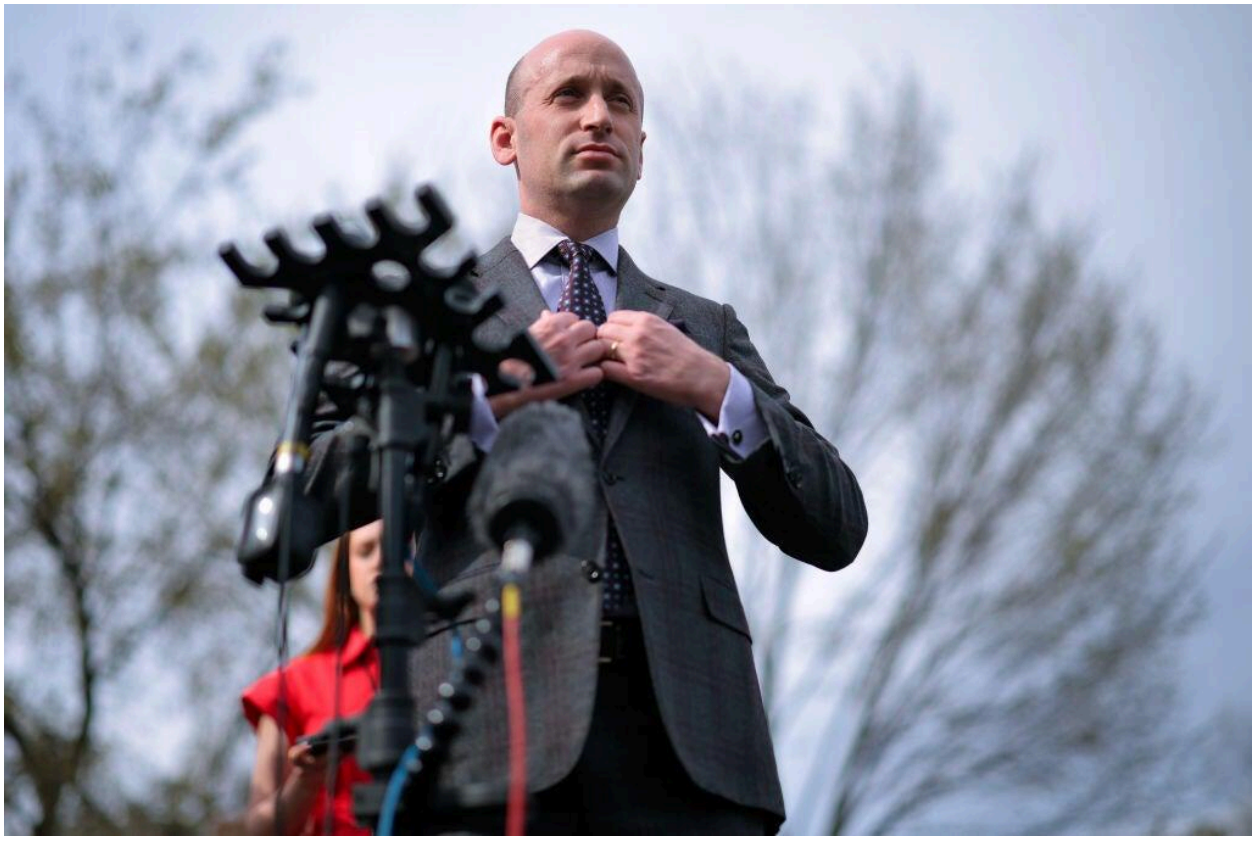
In other instances, including the president's attempt to invoke the wartime Alien Enemies Act to remove certain migrants, judges have issued temporary restraining orders that prevent enforcement of a policy, typically for 14 days, to allow for further proceedings.

Faced with these injunctions, many of which have been appealed, Mr. Trump and senior White House officials are now calling on Congress and the Supreme Court to take action to limit the ability of federal judges to issue orders that block policies nationwide.

"STOP NATIONWIDE INJUNCTIONS NOW, BEFORE IT IS TOO LATE," the president wrote Wednesday on Truth Social. "If Justice Roberts and the United States Supreme Court do not fix this toxic and unprecedented situation IMMEDIATELY, our Country is in very serious trouble!"

Stephen Miller, the White House deputy chief of staff, suggested that the administration's goal is to force action that ultimately curtails these orders.

"Our objective, one way or another, is to make clear that the district courts of this country do not have the authority to direct the functions of the executive branch. Period," he told Fox News in an interview Thursday.



White House Deputy Chief of Staff Stephen Miller talks to reporters outside the West Wing in Washington, D.C., on March 19, 2025.

CHIP SOMODEVILLA/GETTY IMAGES

When pressed on whether the administration is seeking broad change that restricts a district court's ability to block any executive branch policy, Miller said that "complete and permanent relief is what this administration seeks."

How injunctions work

Typically in the judicial system, courts focus on resolving the legitimate claims brought by the parties before them. While different courts may reach different outcomes, the broader legal questions can percolate before the Supreme Court may ultimately step in with a resolution.

But in the current landscape, there are many legal battles brought by many different litigants. In some instances, judges are issuing far-reaching orders that extend beyond the parties and bar the government from enforcing the policy at issue against anyone, anywhere in the country.

"Whatever your politics, we can agree that having all of these really important policy questions and legal questions resolved in whatever court somebody can first convince to offer nationwide relief is not the best way to run the system," said Jonathan Adler, a law professor at Case Western Reserve University. "But fixing it in a balanced and nuanced way probably requires legislation."

The Trump administration is not the first to complain about nationwide injunctions, and Mr. Trump is not the first president to have his policies derailed by them.

A study published in the Harvard Law Review last April found that at least 127 nationwide injunctions were issued from 1963 through 2023. Building on a dataset from the Justice Department, researchers identified 96 that had been entered by judges since 2001. Sixty-four of those temporarily blocked policies issued in Mr. Trump's first term, while federal judges issued 14 nationwide injunctions in challenges to

President Joe Biden's proposals through the end of his third year in office. Miller himself repeatedly touted injunctions against Biden administration policies that the legal group he led obtained.

When looking at the judges who entered these orders, the study found that of the 64 nationwide injunctions imposed during Mr. Trump's first term, 92% came from judges appointed by Democratic presidents. For Biden, all of the 14 injunctions were issued by Republican-appointed judges.

"It's a broader trend. It has affected administrations of more than one party, and it will affect the next Democratic administration as well," Adler said.

Mr. Trump's condemnation of nationwide injunctions has sparked interest from Congress. Sen. Josh Hawley, a Republican from Missouri, said he plans to introduce legislation to restrict district judges' ability to issue them.

A bill from Rep. Darrell Issa, a California Republican, would also restrict federal judges' authority to impose nationwide injunctions. An amendment to his proposal that was approved by the House Judiciary Committee earlier this month would allow the broad orders in some instances, such as in cases brought by multiple states if they're heard by a three-judge district court panel.

Bills reforming nationwide injunctions have also been introduced by Democrats. In 2023, Democratic Sen. Mazie Hirono of Hawaii proposed requiring cases that seek nationwide injunctive relief to be heard by the federal district court in Washington, D.C. Another plan, from Democratic Rep. Mikie Sherrill of New Jersey, would require civil suits seeking nationwide orders to be filed in district courts with at least two active judges, an effort to prevent so-called forum shopping, where plaintiffs go looking for a friendly judge who is guaranteed to take a case in a certain district.

The House and Senate Judiciary Committees also held hearings on the topic in 2017 and 2020, respectively.

Injunctions at the Supreme Court

At the Supreme Court, several justices have taken note of the uptick in nationwide injunctions.

In its last term, during arguments over the availability of the abortion pill mifepristone brought by a group of anti-abortion rights doctors, Justice Neil Gorsuch lamented what he said is a "rash" of these broad orders.

"This case seems like a prime example of turning what could be a small lawsuit into a nationwide legislative assembly on an FDA rule or any other federal government action," he said during arguments last March.

In that dispute, U.S. District Judge Matthew Kacsmaryk, appointed by Mr. Trump in his first term, issued a sweeping order that suspended the Food and Drug Administration's 2000 approval of mifepristone. The high court last year rejected a challenge from the anti-abortion rights doctors to reinstate more stringent rules for obtaining the drug, preserving access to it.

In 2022, Justice Elena Kagan spoke out against the ability of a single judge to stop implementation of a policy across the country.

"In the Trump years, people used to go to the Northern District of California, and in the Biden years, they go to Texas," she said, referring to where challengers filed their lawsuits. "It just can't be right that one district judge can stop a nationwide policy in its tracks and leave it stopped for the years that it takes to go through the normal process."

Justice Clarence Thomas also questioned district courts' authority to enter universal injunctions in 2018, when the Supreme Court upheld the travel ban Mr. Trump implemented in his first term.

"If their popularity continues, this court must address their legality," Thomas wrote in a concurring opinion.

The high court was recently given the opportunity to address the lawfulness of nationwide injunctions, when the Biden administration filed a request for emergency relief in December and suggested it settle

the question of district court's entering preliminary relief on a universal basis.

"Universal injunctions exert substantial pressure on this court's emergency docket, and they visit substantial disruption on the execution of the laws," then-Solicitor General Elizabeth Prelogar wrote in a filing. Quoting Gorsuch, she wrote that the "'patently unworkable' practice of issuing universal injunctions has accordingly persisted."

But the high court declined to do so.

Now, the Trump administration is taking its turn in urging the high court to resolve the fight. In requests for emergency relief stemming from three district court injunctions blocking the president's executive order seeking to end birthright citizenship, acting Solicitor General Sarah Harris said the orders harm the courts and the government.

"Government-by-universal-injunction has persisted long enough, and has reached a fever pitch in recent weeks," she wrote. "It is long past time to restore district courts to their 'proper — and properly limited — role … in a democratic society.'"

The Supreme Court is unlikely to decide whether to grant the administration's request to narrow the scope of the injunctions until early April.

It’s Time For Democrats To Get Serious About Injunctions

Republican-appointed judges have routinely and systematically overruled Biden’s agenda through their unrestrained use of nationwide injunctions. It’s time for it to end.

Illustration: Damon Dahlen/HuffPost; Photos: Getty

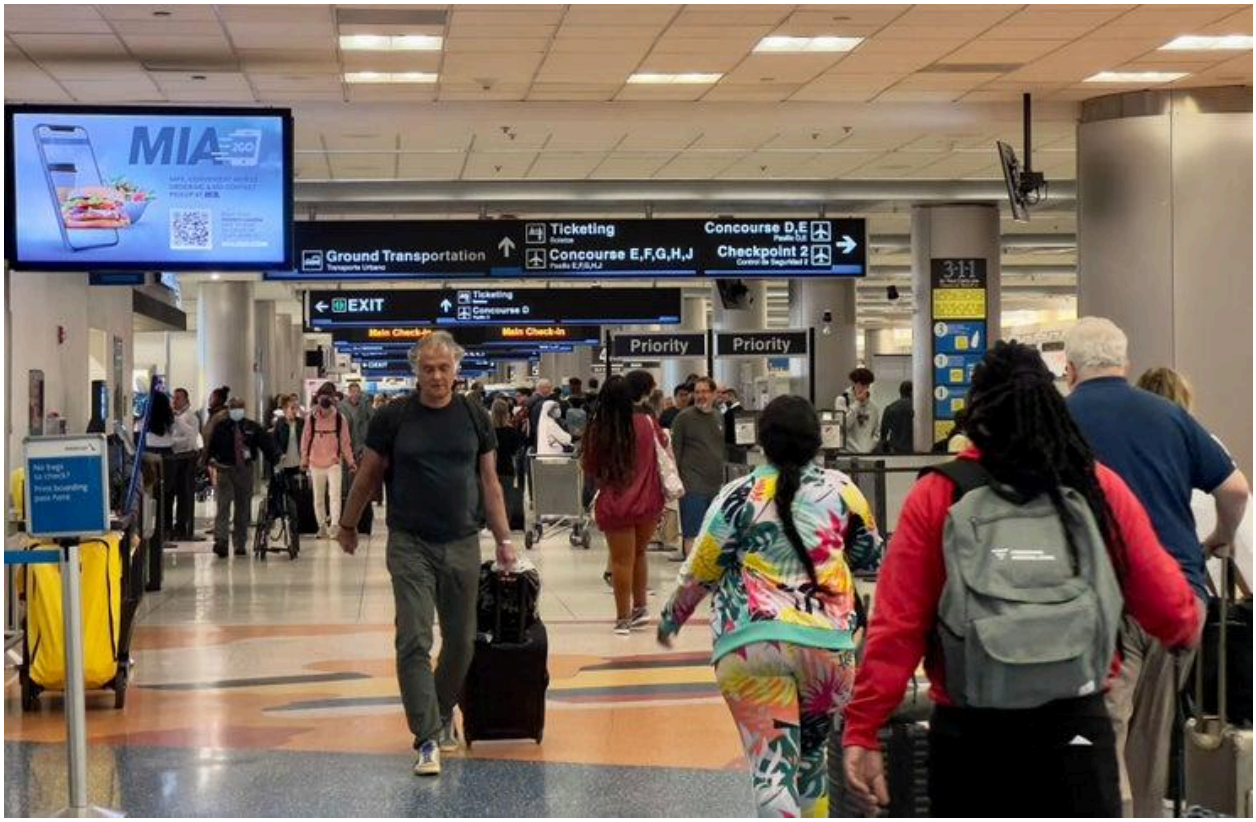
By Rep. Mondaire Jones, Guest Writer

Far-right, activist judges are on a rampage against Democratic policies. Last month, tens of millions of eligible Americans were prevented from getting up to $20,000 of their federally held student loans canceled by President Joe Biden under his long-awaited debt relief program. Unfortunately, this setback to the Biden administration's carefully-crafted, broadly popular executive order did not come from elected officials accountable to any American constituency. Instead, the hopes of millions of Americans with debilitating student debt were dashed by a single right-wing federal district court judge in Texas appointed by former President Donald Trump.

Although the Biden administration has appealed this ruling, its long-overdue student debt relief program will now, at a minimum, be stalled for many months. This begs an important question: How can a lone Trump-appointed judge in Texas, through a single opinion, overturn the Biden administration's meticulously planned executive order in all 50 states?

This issuance of a universal, or nationwide, halt on federal policy by a single right-wing judge is not a one-off incident. Over the past two years, activist district court judges have been issuing this kind of sweeping injunction of Biden's policies, and even the laws of Congress, with alarming frequency.

In April, U.S. District Court Judge Kathryn Mizelle, a Trump appointee in Florida, struck down the Biden administration's mask mandate for public transportation, a common-sense public health measure meant to reduce the spread of the deadly COVID-19 virus. In June 2021, U.S. District Court Judge Marcia Howard, a former President George W. Bush appointee in Florida, halted a provision in the American Rescue Plan Act that provides $4 billion in debt forgiveness, grants, and training, and education to farmers and ranchers of color to redress the effects of discrimination. On dubious legal grounds, Trump-appointed district court judges have also blocked Biden's plan for a 100-day pause on deportations upon his taking office and his effort to end Trump's inhumane "Remain in Mexico" policy. And, as of this month, a Bush-appointed judge appears poised to strike down an Affordable Care Act provision requiring employers to cover treatment like HIV-prevention pills and other preventative medical services.



Travelers transit through Miami International Airport in Miami, Florida, on April 22, 2022. The U.S. government is appealing a court ruling that controversially lifted a federal mask mandate on public transport earlier this week, the Justice Department said on April 20. After the Centers for Disease Control and Prevention (CDC) assessed that masks remain "necessary to protect the public health, the Department has filed a notice of appeal," spokesman Anthony Coley said. A federal judge on April 18 struck down the COVID mask mandate, stating that it exceeded the CDC's statutory authority.

As U.S. Supreme Court Justice Neil Gorsuch — a conservative Trump appointee — pointed out in his concurrence in Department of Homeland Security v. New York, the "routine issuance of universal injunctions" will inevitably prove "patently unworkable" for the federal legal system. First, one judge's decision to implement a nationwide injunction is, by definition, a "rushed, high-stakes, low-information" decision based on limited facts in an ordinary federal district court's docket.

Second, the ability of a lone, right-wing, activist judge in Florida or Texas to issue decisions that bind parties *other* than those who are a party to the case encourages forum shopping. Over the last two years,

right-wing litigants have figured out that they can obtain nationwide injunctions by specifically targeting states like Texas, where local rules allow them to handpick any one of several Republican-appointed federal district court judges who will hear their case — many of whom have track records of issuing universal injunctions in support of conservative causes.

The consequences of these universal injunctions have been dire. Millions of Americans were deprived of life-changing student debt relief during high inflation and record wealth inequality. A deadly virus that would be better contained if basic protocols like masking were implemented based on scientific data and public health expertise. Thousands of vulnerable migrants unjustly returned to dangerous conditions in their home countries based on illegal Trump-era policies that remain in effect.

I have long called for Congress to restore sanity to our democratic system and exercise its well-established constitutional powers to regulate the federal judiciary.

As one of my final acts this term, I'm introducing the "Injunction Reform Act" to bar the ability of activist federal courts to issue nationwide injunctions of federal policies, channeling that authority instead to the federal district court in Washington, D.C., the D.C. Circuit Court of Appeals, and the U.S. Supreme Court. By making these three courts the only ones that can universally enjoin federal laws, regulations, and executive orders, my bill would vest this authority in the courts best suited to make decisions with national implications — as judged by their jurisprudential history and subject-matter expertise.

Nationwide injunctions are not *per se* a bad thing; we saw their appropriate use during the racist, xenophobic presidency of Trump, like when courts blocked his attempt to add a "citizenship question" to the 2020 census as part of a strategy to deny representation to non-citizens in the drawing of congressional seats and counting of Electoral College votes. However, at its core, the judicial branch exists to impartially administer laws as they are written. It should overrule the executive and legislative branches only when the law — rather than politics — dictates that result. The judicial branch does *not* exist to legislate from the bench, through a long list of Trump-appointed judges creating policy on behalf of a political party increasingly unable to win national elections absent voter disenfranchisement, foreign meddling, or election subversion.

Democrats must respond to this historical moment of right-wing judicial activism by limiting the ability of activist judges to strike down federal policies without a basis in fact or law. In doing so, we would restore integrity to the judiciary while returning power to the people and the representatives they elect.