Nos. 23-35322, 23-35323, 23-35324, 23-35354

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILD FISH CONSERVANCY,
Plaintiff / Appellee / Cross-Appellant,

v.

JENNIFER QUAN, in her official capacity as Regional Administrator of the National Marine Fisheries Service; JANET COIT, in her official capacity as Assistant Administrator for Fisheries of the National Marien Fisheries Service; NATIONAL MARINE FISHERIES SERVICE; GINA M. RAIMONDO, in her official capacity as Secretary of the United States Department of Commerce; UNITED STATES DEPARTMENT OF COMMERCE,
Defendants / Appellants / Cross-Appellees,

and

Alaska Trollers Association and State of Alaska,
Intervenor-Defendants / Appellants / Cross Appellees.

On Appeal from the United States District Court
for the Western District of Washington
No. C-20-417 (Hon. Richard A. Jones)

MOTION OF LAW PROFESSORS TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLEES WILD FISH CONSERVANCY

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 29(a) and Circuit Rule 29-3, Law Professors Michael C. Blumm, John Bonine, Thomas Buchele, Laura Fox, Pamela Frasch, Peter M.K. Frost, William Funk, Kathy Hessler, Craig Johnson, Sam Kalen, Guadalupe T. Luna, Patrick C. McGinley, Michelle B. Nowlin, Patrick Parenteau, Zygmunt J.B. Plater, Daniel Rohlf, Deborah A. Sivas, Stephanie Tai, Richard Wallsgrove, and Decianna J. Winders respectfully request leave to file the attached amicus brief in support of the Appellees and Cross-Appellants Wild Fish Conservancy in this matter. The proposed amicus brief is filed concurrently and includes an Appendix A listing the full names and titles of each signatory.

Pursuant to Circuit Rule 29-3, amici counsel contacted counsel for the parties in an effort to obtain their consent to this motion. Appellee Wild Fish Conservancy consented. Federal Appellants and Intervenor-Appellant State of Alaska took no position. Intervenor-Appellant Alaska Trollers Association declined to provide a position before reviewing the brief.

Amici professors support the Appellee's requested relief and the proposed amicus brief addresses three points regarding the administrative law remedy of vacating unlawful agency action.

STATEMENT OF INTEREST

In support of this motion, the Amici Law Professors state as follows:

Amicus curiae are twenty distinguished scholars and law professors.[1] For decades, they have taught law school courses and published law review articles and casebooks covering administrative law, environmental law, animal law, wildlife law, remedies, and related fields and subfields. In some cases, the amici professors have litigated related administrative law cases as law school clinicians before this Court and in federal courts across the country.

As such, these professors have a strong, longstanding interest in the correct interpretation of the Administrative Procedure Act (APA), effective remedies for agency actions held to violate the APA, as well as the enforcement of our nation's core federal environmental laws, including and specifically those at issue here, the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA).

[1] The professors, their titles, and affiliations are individually listed in Appendix A to the Amicus Brief.

ARGUMENT

This Court has broad discretion to allow participation of amici curiae. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995). The "classic role" of amici curiae is three-fold: (1) to "assist[] in a case of general public interest"; (2) to "supplement[] the efforts of counsel"; and (3) to "draw the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Lab. & Indus., State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982). The Court may also exercise its discretion to grant amicus status in order to avail itself of the benefit of "thorough and erudite legal arguments." *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1514 n.3 (9th Cir. 1987).

First, the proposed Amici Law Professors have a strong interest in the outcome of this appeal. Specifically, the questions presented in this case involve the correct interpretation and application of the APA, as well as effective administrative law remedies for agency actions held to violate the APA. More broadly, the case involves enforcement of bedrock environmental laws and federal programs, such as those implementing the ESA and NEPA.

These issues are important ones for administrative and environmental law, the Amici Law Professors' areas of expertise and profession; these subjects are focal points of their lifelong studies, teaching, and scholarship. In some cases, Amici have

also litigated cases on behalf of public interest clients, from their positions as clinical professors at their law school clinics, which specialize in environmental law or related fields.

Second and relatedly, because of their expertise and specialization, the Amici Law Professors will aid the Court in its consideration of the questions presented. For decades, they have taught law school courses and published law review articles and casebooks covering administrative law, environmental law, animal law, wildlife law, remedies, and related fields and subfields. This includes law schools nationally recognized for their environmental law curriculum such as Lewis and Clark and Vermont, but also ranging across the country from George Washington, Duke, and West Virginia in the east to Stanford, Oregon, and Hawaii in the west.

To give just a few specific examples, the signatory amici professors include the longtime author of the leading casebook for teaching administrative law, including the APA and administrative remedies.[2] Among the amici are also multiple emeritus scholars with over five decades of experience, some of the "pioneers" of the entire

[2] *See generally* WILLIAM F. FUNK ET. AL., ADMINISTRATIVE PROCEDURE & PRACTICE: A CONTEMPORARY APPROACH (7th ed. 2023).

environmental law field.[3] Another amici scholar over the course of his decorated career has published well over a hundred law review articles and ten books on environmental and administrative law topics such as those involved here.[4] Another amici professor is considered one of, if not the, preeminent scholar in the country on the history and application of the ESA, beginning with his being counsel of the seminal 1978 Supreme Court ESA case of *Tennessee Valley Authority v. Hill*, 437 U.S.153, 194 (1978).[5] Other amici signatories were the founders[6] of or now

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[3] *See, e.g.*, *John Bonine*, UNIV. OF OREGON, SCHOOL OF LAW (Dec. 6, 2023), https://law.uoregon.edu/directory/faculty-staff/all/jbonine; *Patrick C. McGinley*, WEST VIRGINIA UNIV., COLLEGE OF LAW (Dec. 6, 2023), https://www.law.wvu.edu/faculty-staff/faculty-information/patrick-c-mcginley.

[4] Search for Law Review Articles by Michael C. Blumm Returning 130 Articles, Westlaw (last visited Dec. 6, 2023), https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20AU(blumm)&jurisdiction=ALLCASES&contentType=ANALYTICAL&querySubmissionGuid=i0ad6ad3f0000018c40e02deeb223eb03&categoryPageUrl=Home%2FSecondarySources&searchId=i0ad6ad3f0000018c40dff9cc7ddb00cd&transitionType=ListViewType&contextData=(sc.Search); *Michael Blumm*, LEWIS & CLARK LAW SCHOOL (Dec. 6, 2023), https://law.lclark.edu/live/profiles/250-michael-blumm.

[5] *See Zygmunt J.B. Plater*, BOSTON COLLEGE LAW (Dec. 6, 2023), https://lira.bc.edu/profiles/zplater@lira.bc.

[6] *Craig Johnston*, LEWIS & CLARK LAW SCHOOL (Dec. 6, 2023), https://law.lclark.edu/live/profiles/279-craig-johnston; *Daniel Rohlf*, LEWIS & CLARK LAW SCHOOL (Dec. 6, 2023), https://law.lclark.edu/live/profiles/285-daniel-rohlf; *Pat Parenteau*, VERMONT LAW & GRADUATE SCHOOL (Dec. 6, 2023), https://www.vermontlaw.edu/directory/person/parenteau-pat.

supervise[7] the nation's most prominent law school clinics that focus their practice on environmental law, litigation, and policy as well as related subfields, including the clinics at Stanford, Duke, Hawaii, Lewis and Clark, Oregon, and Vermont. Finally, other amici founded ground-breaking law school centers focusing on areas of study within environmental and administrative law, such as animal law and energy law.[8]

Third and finally, this amicus brief will benefit the Court by supplementing without duplicating the arguments of the parties, as well as drawing the court's attention to important aspects of the law that may have otherwise escaped consideration. *See Miller-Wohl Co.*, 694 F.2d at 204. Specifically, the brief covers three important areas of administrative law and remedies in thorough detail, providing the Court more context and richer treatment. *See Gerritsen*, 819 F.2d at

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[7] *Deborah A. Sivas*, STANDARD LAW SCHOOL (Dec. 6, 2023) https://law.stanford.edu/directory/deborah-a-sivas; *Michelle Benedict Nowlin*, DUKE LAW (Dec. 6, 2023), https://law.duke.edu/fac/nowlin.

[8] Press Release, McKinney Law, Indiana University, Professor Kalen Again Joins Faculty as Visiting Robert H. McKinney Family Chair in Environmental Law (Aug. 24, 2023), https://mckinneylaw.iu.edu/news/releases/2023/08/professor-kalen-again-joins-faculty-as-visiting-robert-h-mckinney-family-chair-in-environmental-law.html; *Pamela Frasch*, LEWIS & CLARK LAW SCHOOL (Dec. 6, 2023), https://law.lclark.edu/live/profiles/274-pamela-frasch; *Kathy Hessler*, GEO. WASH. LAW (Dec. 6, 2023), https://www.law.gwu.edu/kathy-hessler.

1514 n.3. The first of these is the broader context of the difference between vacatur and injunctions. *See* Section I. The second is an in-depth treatment of the vacatur relief standard itself. *See* Section II. And the last is a newly controversial issue based on a recent 2023 Supreme Court case only noted by the parties in a footnote. *See* Section III.

CONCLUSION

Accordingly, for the foregoing reasons, Amici Law Professors respectfully request that the Court grant this motion and permit the filing of the accompanying *amicus* brief.

Date: December 6, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rules of Appellate Procedure 27(d)(2)(A), 32(a)(5), and 32(g)(1), this motion has been prepared in a proportionally spaced typeface, 14-point Goudy Old Style font, and contains 1,239 words.

Date December 6, 2023

s/ *George Kimbrell*
GEORGE KIMBRELL

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BRIEF OF *AMICUS CURIAE* LAW PROFESSORS IN SUPPORT OF APPELLEES WILD FISH CONSERVANCY

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae are twenty distinguished scholars and law professors.[2] They teach courses and write law review articles and casebooks covering administrative law, environmental law, animal law, remedies, and related fields. In some cases, the amici professors have litigated related cases as law school clinicians. These professors have a strong, longstanding interest in the correct interpretation of the Administrative Procedure Act (APA), effective remedies for agency actions held to violate the APA, as well as the enforcement of our nation's core federal environmental laws, like those at issue here.

Amici professors support the Appellee's requested relief, namely that the Court affirm the district court's decision to vacate the Incidental Take Statement and reverse the court's decision not to vacate the prey increase program and instead vacate that program as well. This brief addresses three points regarding the administrative law remedy of vacating unlawful agency action.

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[1] Federal Appellants and the Intervenor State of Alaska take no position on the filing of this brief. Intervenor Alaska Trollers Association declined to provide a position. 9th Cir. R. 29-3. No party's counsel authored this brief in whole or in part, and no person contributed money to fund this brief. Fed. R. App. P. 29(a)(4)(E).

[2] Amici join this brief as individuals; their institutional affiliations are noted for informational purposes only. The professors are listed in Appendix A.

INTRODUCTION

Not that long ago, federal agency actions held to violate core environmental laws like the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA) and thus risk environmental harm, which by its nature is irreparable, straightforwardly merited an injunction.[3] Yet over the course of the past two decades successful plaintiffs in environmental and other administrative law cases have found it increasingly difficult to achieve a meaningful remedy halting challenged agency action, despite courts holding that action unlawful. The threshold for injunctive relief, for decades the go-to standard course for such violations, has become increasingly difficult to achieve.[4] At the same time, the Supreme Court has instructed that, rather than seeking injunctions, plaintiffs should seek the default remedy under the Administrative Procedure Act (APA) of setting aside, or vacating, the unlawful action, where that remedy will redress their injuries.[5] Thus, challengers to unlawful agency actions have more often sought vacatur.

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[3] *See, e.g.*, *Cottonwood Env't Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091 (9th Cir. 2015) (explaining that injunctions for ESA Section 7 consultation violations "should not be an onerous task").

[4] *See, e.g.*, *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22–24 (2008).

[5] *Monsanto v. Geertson*, 561 U.S. 139, 165–66 (2010).

The antithesis of the "extraordinary" remedy of an injunction, the "less drastic" remedy of vacatur is the ordinary, default remedy for agency actions held to violate the APA.[6] Because of the APA's commanding "shall . . . set aside" language, 5 U.S.C. § 706(2), for decades courts have set forth very limited circumstances for the exceptions to that rule, when remand to the agency without vacatur was warranted. Rather, courts vacated as a matter of course: As Chief Justice Roberts explained in a recent colloquy, vacatur is the "established practice under the APA", "five times before breakfast, that's what you do in an APA case."[7]

However, as more vacatur cases have proliferated, the default standard for vacatur—and the two factors that courts review to determine whether the limited exception of remanding without vacatur is warranted—has become more contested and complicated, leading to differing, sometimes conflicting results in this Court.[8]

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[6] *Id.*

[7] Transcript of Oral Argument at 35, *United States v. Texas*, 599 U.S. 670 (2023) (No. 22-58).

[8] *Compare Pollinator Stewardship Council v. U.S. Env't Prot. Agency*, 806 F.3d 520, 532–33 (9th Cir. 2015) (holding unlawful registration of pesticide and unanimously vacating) *with Ctr. for Food Safety v. Regan*, 56 F.4th 648, 662–63, 668 (9th Cir. 2022) (different panel again holding unlawful the same pesticide's re-registration but nonetheless declining to vacate); *Regan*, 56 F.4th at 669–73 (Miller, J., dissenting, would have vacated).

And now, a novel new argument sweepingly claims that despite courts vacating under the APA since its enactment, courts actually lack that authority, despite the statute's plain text and decades of contrary caselaw.

The current case presents important questions of environmental protection, including protection of endangered species, as well as ensuring ocean fisheries management complies with federal environmental laws. But it also is an opportunity to address important administrative law and remedy jurisprudence issues. Appellants National Marine Fisheries Services (NMFS) echo several controversial misunderstandings regarding administrative law remedies. This brief on behalf of Amici Law Professors addresses three of them.

First, the judicial review standards for administrative agency action vacatur are very different from those for injunctions and the Court should decline Appellants' invitation to conflate them and improperly treat vacatur like an injunction. Unlike the extraordinary equitable relief of injunctions, vacatur is the ordinary remedial outcome for an APA violation, one moored to the APA's plain "shall . . . set aside" text. Whereas the movant for an injunction has the burden of persuasion, in the vacatur calculus the burden is on the defendant agency to show why anything less than complete vacatur is warranted. To be sure, Courts have some discretion to remand without vacatur and leave an unlawful agency action in place, but properly

understood it is only in rare, defined circumstances in which defendants show equity demands that outcome.

Second, to evaluate if those limited remand without vacatur circumstances are met, this Court applies the test originally from the D.C. Circuit, assessing (1) "the seriousness of the agency's errors" weighed (2) against the "disruptive consequences" from vacatur.[9] But Appellants' arguments on both prongs illustrate how the test's application has become unmoored and drifted. Properly understood, both the "deficiency" prong and the "disruption" prong should be grounded in underlying statutory scheme violated. Simply: context matters. How "serious" a violation of law is depends on the congressionally enacted program violated and its purposes. And what "consequences" matter as sufficiently disruptive similarly should gravitate to those consequences which are the statute's lodestar: the adverse impacts which Congress intended the law to protect against. In environmental cases like this one, fashioning a remedy vindicating and furthering the purposes of those statutes—ecological protection, protection of endangered species—must be the paramount consideration.

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[9] *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993); *see also Pollinator*, 806 F.3d at 532; *Nat'l Family Farm Coal. v. U.S. Env't Prot. Agency*, 960 F.3d 1120, 1144–45 (9th Cir. 2020).

Finally, Appellants' new position that vacatur is not authorized by the APA at all is contrary to the statute's text, structure, history, decades of unanimous federal court precedent and the great weight of scholarship. No court anywhere has adopted this radical argument, and the Supreme Court declined to adopt such a position when recently presented the opportunity. This Court should reject it.

ARGUMENT

I. Vacatur and Injunctions are Different and Should Not be Conflated.

A main thread of the Appellants' arguments—*see, e.g.*, ECF 43 at 20–22, 35, which echo arguments pressed in other recent cases in this Court—rely on the conflation of two very different remedies: vacating agency action and issuing an injunction. In fact, vacatur is the antithesis of injunctions, in several important ways.

An injunction is "an extraordinary remedy," *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982),[10] for which the movant carries "the burden of persuasion," 11A C. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2948 (2d ed. 2023) (hereinafter Wright & Miller); *id.* § 2942 (availability of injunctive relief). It is also the "quintessential equitable remedy" where general equitable principles govern

[10] *See also Winter*, 555 U.S. at 24; *Monsanto*, 561 U.S. at 165 ("extraordinary relief").

grant or denial.[11] Thus, even for plaintiffs that succeed on the merits (permanent injunction) or make an affirmative showing of likely success (preliminary injunctions), *Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 546 (1982); *Winter*, 555 U.S. at 20, an injunction does not follow "as a matter of course," *Winter*, 555 U.S. at 32; rather, the test requires plaintiffs to demonstrate: (1) absent the injunction's issuance they are likely to suffer irreparable harm;[12] (2) the balance of equities—the severity of the impact on the defendant should the injunction be granted and the hardship to the plaintiff should the injunction be denied—favors issuance;[13] and (3) that the public interest favors enjoining the action.[14]

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[11] David Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539, 539 (1986); *Winter*, 555 U.S. at 32 (injunctions are creatures of broad "equitable discretion").

[12] *E.g.*, *Ramirez v. Collier*, 595 U.S. 411, 420 (2022); *Winter*, 555 U.S. at 20; *Amoco*, 480 U.S. at 542; *Weinberger*, 456 U.S. at 311–12; Wright & Miller § 2948.1 (calling this "[p]erhaps the single most important prerequisite"). "Irreparable harm" is a term of art that means that the injury cannot be compensated by monetary damages alone, like environmental harms. *See Amoco*, 480 U.S. at 545.

[13] *Amoco*, 480 U.S. at 542; *Winter*, 555 U.S. at 25, 26–28; Wright & Miller § 2948.2.

[14] *Winter*, 555 U.S. at 20; *Amoco*, 480 U.S. at 531; Wright & Miller § 2948.4 ("Focusing on this factor is another way of inquiring whether there are policy considerations that bear on whether the order should issue.").

Vacatur is very different. First, while injunctions are "extraordinary relief," the Supreme Court has specifically juxtaposed vacatur as the "less drastic remedy" that should be sought when it will suffice, *Monsanto*, 561 U.S. at 165–66, and is in fact the "default" remedy for APA violations, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021), that should apply in all but rare, limited, or unique fact circumstances. *See more infra.*

Second, vacatur sounds not only in equity but in statute, in the commanding text of the APA, the foundational statute that provides the standards for judicial review of agency action. Pursuant to the APA, reviewing courts "*shall . . . hold unlawful and set aside* agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (emphasis added). "Set aside" means to negate or nullify an agency action.[15] Indeed, while it is the minority view, because of the APA's mandatory "shall" command, some jurists have interpreted vacatur as *required* for

[15] M. 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").

every agency action held in violation of the APA.[16] That said, the established standard in this Court and the D.C. Circuit is that courts have equitable discretion not to vacate and to instead remand without vacatur, but only in limited circumstances. *See, e.g.*, *Pollinator*, 806 F.3d at 532; *Allied-Signal*, 988 F.2d at 150–51.

Thus, third, the context of that judicial discretion is material: the *default* outcome is vacatur, and the equitable discretion of courts is not whether to issue vacatur to *begin* with, but rather whether to pivot potentially away from that remedial starting command and not vacate instead. And the language of the precedent reflects this starting point: Vacatur is the traditional, normal, ordinary outcome. *E.g.*, *Nat. Res. Def. Council*, 38 F.4th at 51 ("Vacatur is the traditional remedy for erroneous

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[16] *See, e.g.*, *Comcast Corp v. Fed. Commc'ns Comm.*, 579 F.3d 1, 10 (D.C. Cir. 2009) (Randolph, J., concurring) ("'[S]hall' means 'must.' I see no play in the joints."); *id.* ("Section 706(2)(A) of the APA could not be clearer: a court faced with an arbitrary and capricious agency rule . . . 'shall hold unlawful and set aside' that agency action. 'Set aside' means vacate, according to the dictionaries and the common understanding of judges . . . ."); *Milk Train v. Veneman*, 310 F.3d 747, 758 (D.C. Cir. 2002) (Sentelle, J., dissenting) (same); *In re Core Commc'ns, Inc.*, 531 F.3d 849, 862–63 (D.C. Cir. 2008) (Griffith, J., concurring) (discussing caselaw and the "disputed legality" of remand without vacatur); *Ctr. for Food Safety v. Vilsack*, 734 F. Supp. 2d 948, 951 (N.D. Cal.) (vacating agency action under controlling Ninth Circuit test but also noting "this Court agrees" that vacatur should be mandatory). With this reading of the APA's command, to overcome vacatur the defendant agency would be required to meet stay/injunctive standards such as a showing of likely irreparable harm to *avoid* vacatur. *See, e.g.*, *Nken v. Holder*, 556 U.S. 418, 426 (2009).

administrative decisions."); *Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 654 (9th Cir. 2007) ("Under the APA, the normal remedy for an unlawful agency action is to 'set aside' the action. In other words, a court should vacate the agency's action and remand to the agency to act in compliance with its statutory obligations."); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) ("Ordinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid.").[17]

And, because vacatur is the starting conclusion, unlike injunctions it is *defendants*, not plaintiffs, that have the burden to show why vacatur should not be the remedy for invalid agency action. *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121–22 (9th Cir. 2018) ("presumption of vacatur" unless defendants meet burden showing otherwise); *350 Montana v. Haaland*, 50 F.4th 1254, 1273 (9th Cir. 2022) ("[P]laintiffs are correct that vacatur is the presumptive remedy under the APA . . . ."); *Western Watersheds v. Zinke*, 441 F. Supp. 3d 1042, 1083 (D. Idaho 2020) ("The burden is on [the agency] to show that compelling equities demand anything less than vacatur."); *Ctr. for Env't Health v. Vilsack*, 2016 WL 3383954, at

[17] *See also Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (vacatur is the "ordinary result"); *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) (the "normal[]" approach to APA review).

*13 (N.D. Cal. 2016) ("[G]iven that vacatur is the presumptive remedy for a procedural violation such as this, it is Defendants' burden to show that vacatur is unwarranted."); *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litig.*, 818 F. Supp. 2d 214, 238 (D.D.C. 2011) ("[V]acatur is the presumptive remedy for this type of violation.").[18]

Fourth, the agency's burden to overcome the default of vacatur can only be met in "limited" or "rare" or "unique facts" type circumstances. *Pollinator*, 806 F.3d at 532 ("limited"); *Humane Soc'y v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010) ("rare"); *Regan*, 56 F. 4th at 668 ("unique facts"). And only when "equity demands" that outcome instead of vacatur. *Pollinator*, 806 F.3d at 532 (quoting *Idaho Farm Bureau*, 58 F.3d at 1405); *e.g.*, *Ctr. for Food Safety*, 734 F. Supp. 2d at 951 ("[T]he

[18] Appellants rely on the Supreme Court's *Monsanto* decision, ECF 43 at 21, 24, but it does not support them. There, the Court did not question the propriety of the lower court's vacatur and instead held it up as the proper remedy, one reason the injunction also granted below was unwarranted. *Monsanto*, 561 U.S. at 164 ("[W]e do know that the vacatur of [the agency's] deregulation decision means that virtually no [Roundup Ready Alfalfa] can be grown or sold until such time as a new deregulation decision is in place . . . ."); *see also id.* at 165–66. Moreover, the "improper presumption" of injunctive relief addressed in *Winter* on which Appellants also rely is wholly inapposite for vacatur, where the APA's plain textual command establishes the presumptive outcome of vacatur, as this Court has repeated held. *See supra*.

Ninth Circuit has only found remand without vacatur warranted by equity concerns in limited circumstances, namely serious irreparable environmental injury.").

Finally, from the starting point of all the above, to evaluate if these limited circumstances for remand without vacatur are met, this Court instead applies the two-factor test assessing (1) "the seriousness of the agency's errors" weighed (2) "against the disruptive consequences of an interim change that may itself be changed." *E.g., Pollinator*, 806 F.3d at 532; *Nat'l Family Farm Coal.*, 960 F.3d at 1144–45. Within that framework and as discussed more in Section II *infra*, in environmental cases this Court considers "the extent to which either vacating or leaving the decision in place would risk environmental harm." *Nat. Res. Def. Council v. U.S. Env't Prot. Agency*, 38 F.4th 34, 51–52 (9th Cir. 2022). And in some cases, the Court has also considered whether an agency "could adopt the same rule on remand," or, on the other hand, whether there are "fundamental flaws" in the decision that make it "unlikely that the same rule would be adopted on remand." *Id.*; *Nat'l Farm Farm Coal.*, 960 F.3d at 1144–45 (also setting forth the test); *Pollinator*, 806 F.3d at 532.

In summary: injunctions are an extraordinary relief as compared to vacatur as the default or ordinary one. Injunctions are a broad equitable assessment, with a burden of persuasion on plaintiffs; vacatur starts from the APA's "shall" vacate

command that creates a strong presumption but is interpreted to include bounded equitable discretion to stray from that decree. In the injunctive inquiry, plaintiffs must show likely irreparable harm, and even after/if that showing is met, the court must also balance the equities and consider the overall public interest. In the vacatur inquiry, it is defendants' burden to show that equity demands remand without vacatur, which given the context they should only be able to carry in limited or rare circumstances. Rather, all that is required is for the court to conclude the legal violations of the agency are sufficiently serious and in environmental cases like this one, the potential consequences of whether vacatur will itself not cause more environmental harm than remand without vacatur.

While these factors are not stringent and should lead to vacatur in all but the most extreme cases, some applications have strayed from the moorings and unnecessarily confused what should be a straightforward inquiry, as discussed in the next section.

II. The Test Authorizing Any Limited Remand Without Vacatur Must Be Guided By the Underlying Statutory Context and Purposes, Here Environmental Laws Focused on Environmental Protection.

To evaluate whether defendants can meet their burden to show equity demands remand without vacatur, this Court and others assess (1) the seriousness of the agency's errors" weighed against (2) the "disruptive consequences" from vacatur. *Pollinator*, 806 F.3d at 532; *Nat'l Family Farm Coal.*, 960 F.3d at 1144–45.

Appellants' arguments here miscast the inquiry on both prongs. *See* ECF 43 at 24–40.

Properly understood, both the "deficiency" prong and the "disruption" prong should be grounded in underlying statutory scheme that the Court held violated. That is, whether a violation is serious or merely 'technical' depends on the particular statutory scheme, its purposes, and how minor or major the violation is within it. And what consequences matter as sufficiently disruptive similarly should center on those consequences against which Congress intended the statute to protect. In environmental cases like this one, fashioning a remedy vindicating the purposes of those statutes—ecological protection, protection of endangered species—must be the paramount consideration of both prongs.

A. *The Seriousness of the Agency's Violations*

Where, as here, the violated statutory provisions are procedural, like ESA consultation and the NEPA assessment process, the injury derives from a failure to follow the required process, and the Court's disposition must focus on protecting the integrity of those processes. Some courts have gotten this inquiry spot-on. *See, e.g.*, *Oregon Nat. Desert Ass'n v. Zinke*, 250 F. Supp. 3d 773, 774 (D. Or. 2017) (explaining that the "seriousness of the order's deficiencies should be measured by the effect the error has in contravening the purposes of the statute in question, here

the [NEPA]") (internal quotations omitted); *Zinke*, 441 F. Supp. 3d at 1083 ("*Allied-Signal's* first prong should be measured by the effect the error has in contravening the purposes of the statute[s] in question, here, the APA, [Federal Land Policy and Management Act], and NEPA") (internal quotations omitted); *Ctr. for Food Safety*, 734 F. Supp. 2d at 953 (NEPA violation was serious because "NEPA is a procedural statute designed to ensure comprehensive consideration of the environmental consequences of agency action").[19]

But another type of inquiry has crept in, the same argument made by Appellants here, that has confused the seriousness issue: whether the agency could "cure" the violation on remand. *See, e.g.* ECF 43 at 25 & 26 ("NMFS is, in fact, likely to be able to adopt the same decision on remand."); *id.* at 28. Much of the time, as here, this argument is used to attempt to minimize "procedural" violations, such as violations of the APA, NEPA, and the ESA. *Id.* at 27.

Yet for some statutes, the required procedures are central to their entire scheme, and a major part of their purposes. Understood in their proper statutory context, these violations could not be more serious. ESA Section 7 consultation is a

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[19] The Supreme Court has endorsed this approach even in the broader injunctive analysis. *See Weinberger,* 456 U.S. at 314–15 ("The purpose and language of the statute limited the remedies available to the District Court; only an injunction could vindicate the objectives of the Act.").

procedure, but it is called by this Court the "heart" of that statute, *e.g.*, *Karuk Tribe v. U.S. Forest Serv.*, 681 F.3d 1006, 1019 (9th Cir. 2012) (en banc). That process is how agencies carry out the ESA's substantive mandate to protect endangered species. 50 C.F.R. §§ 402.12, 402.16; *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) ("[T]he strict substantive provisions of the ESA justify *more* stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions.") *abrogated on other grounds by Cottonwood Env't Law Ctr.*, 789 F.3d at 1088–89. As the Supreme Court has explained, in passing the ESA, "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'" *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978). Instead here NMFS's violations of the ESA's Section 7 result in increased risks to federally protected whales and salmon.

Similarly, the entire purpose and policy of NEPA is procedural. *See Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 737 n.18 (9th Cir. 2001) (In NEPA cases, "the requisite harm is the failure to follow the appropriate procedures"); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1034 (9th Cir. 2007) (that "harm is compounded by the added risk to the environment that takes place when governmental

decisionmakers make up their minds without having before them an analysis (with public comment) of the likely effects of their decision on the environment") (internal quotations omitted). Thus, remanding without vacating—and letting action go ahead before NEPA analysis is done—negates its most basic NEPA action-forcing purpose of requiring informed agency decision-making. *See, e.g., Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520, 523, 536 (D.C. Cir. 2018) (explaining that letting mining project proceed despite NEPA violations simply because it is a "procedural deficiency" would "vitiate" the statute's purpose).

This new "cure on remand" argument also cannot be squared with a long body of prior administrative law precedent that recognizes that a failure to have lawful public notice-and-comment—the quintessential procedural violation that could be "cured" on remand simply by holding notice-and-comment—is nonetheless "unquestionably" a serious deficiency for vacatur analysis. *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) ("[D]eficient notice is a 'fundamental flaw' that almost always requires vacatur."); *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 85 (D.C. Cir. 2020) (notice-and-comment violation is a "fundamental flaw that normally requires vacatur"); *id.* ("EPA's [notice-and-comment] error requires us to vacate the 2018 Rule."); *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 91 (D.D.C. 2007) (compiling cases) ("[F]ailure to comply with . . . notice-and-comment requirements is

unquestionably a 'serious' deficiency" for purposes of vacatur.). That logical conclusion follows because of the specific statutory context and purposes vitiated by the violation: the APA's central purpose and elements are those very notice-and-comment processes, to ensure fairness to affected parties and develop evidence in the record to inform the agency's decision. *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009); *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

There are two ways to clear up this confusion. First, if the Court wishes to consider what the agency might do after remand, all that matters is that "a different result *may* be reached" after the agency complies with its legal mandates after remand, not that it necessarily *will*. *Pollinator*, 806 F.3d at 532 (emphasis added). That a different result may be reached undermines the premise of any reliance on the status quo from "disruptive consequences of an interim change that may itself be changed" back, and thus supports vacatur. *Id.* In *Pollinator Stewardship Council*, this Court vacated a pesticide registration because the Environmental Protection Agency (EPA), after undertaking the missing bee studies on remand, might well again approve the pesticide, but with different restrictions based on the further study results. 806 F.3d at 532–33 ("Once the EPA obtains adequate Tier 2 studies, it *may* conclude that a lower maximum application rate of sulfoxaflor is warranted . . . .")

(emphasis added). Nothing more was required to support the conclusion that the error was sufficiently serious to warrant vacatur.

The same is true here and in the mine-run of procedural violation cases: after the agency complies with the required processes and/or analyses under the APA, NEPA, ESA or similar mandates, it will be better informed, e.g., have new information/data, stakeholder input, other agency consultation, conditions/mitigation, and, based on that—whatever the future result—that decision will not be the "same" decision procedurally and substantially. This case is a prime example: NMFS has subsequently agreed that not one but two new NEPA assessments/processes are required and will inform a future decision.[20] In sum, under the proper test, because an agency's procedural violations like failure-to-consult, failure to comply with NEPA, and failure to have notice-and-comment are not merely "technical"[21] but rather are "fundamental flaws," that violate the core of

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[20] 88 Fed. Reg. 68,572 (Oct. 4, 2023); 88 Fed. Reg. 54,301 (Aug. 10, 2023).

[21] To be sufficiently serious is a low bar; anything beyond a mere technical error raises significant doubts about the agency's choices, meaning a different result may be reached. In the few instances of remand without vacatur in this Court's precedent, the Court has repeatedly explained that the violations were merely "technical" in nature, not fundamental flaws of missing analysis like those here under NEPA and the ESA. *See Nat'l Family Farm Coal. v. U.S. Env't Prot. Agency*, 966 F.3d 893 (9th Cir. 2020) (single "technical" violation not sufficiently serious "in light of [agency's] full compliance with ESA and substantial compliance with

those schemes, it naturally follows that they make it "unlikely that the same rule would be adopted." *Nat'l Family Farm Coal.*, 960 F.3d at 1145.

Second, if there is any proper "cure" aspect of the inquiry, it is logically not whether the agency will again ultimately re-issue the decision. It is whether the agency could justify its decision to *skip* the required procedure(s) before issuing the decision. The D.C. Circuit recently clarified this application of the *Allied Signal* test in procedural cases. *Standing Rock*, 985 F.3d at 1051–52, *cert. denied*, 142 S. Ct. 1187 (2022); *accord Dine Citizens Against Ruining Our Env't v. Haaland*, 59 F.4th 1016, 1049 (10th Cir. 2023).

As here, in *Standing Rock*, the defendants argued remand without vacatur was warranted because the NEPA violation was "only" procedural, and the agency could "justify" its decision on remand. 985 F.3d at 1051. But, as the D.C. Circuit explained, whether the agency will again ultimately re-approve the decision "is not the question." *Id.* Rather, "[w]hen an agency bypasses a fundamental procedural step, the vacatur inquiry asks *not* whether the *ultimate* action could be justified, but

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[underlying statute]"); *Cal. Communities Against Toxics v. U.S. Env't Prot. Agency*, 688 F.3d 989, 993 (9th Cir. 2012) ("procedural error" of "misstat[ing] that all documents in the docket were listed in the index"); *Idaho Farm Bureau*, 58 F.3d at 1395 (failure to provide the public the ability to review a provisional report in comment period).

whether the agency could, with further explanation, *justify its decision to skip* that procedural step." *Id.* at 1052 (emphases added). This approach properly recognizes the purposes of procedural statutes in addressing the "deficiency" vacatur prong. *Id.* ("Otherwise, our cases explaining that vacatur is the default response to a fundamental procedural failure would make little sense."); *Wheeler*, 955 F.3d at 85 ("In general, vacatur is the normal remedy for a procedural violation . . . .") (internal quotation marks omitted).[22]

B. Disruptive Consequences

Appellants also raise allegations of economic disruption, ECF 43 at 30–40, but in environmental cases the touchstone of the "disruption" prong should be consequences to the environment, and courts should be guided towards the exception of remand without vacatur only if that result is the most environmentally protective remedy because vacatur itself will cause environmental harm.

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[22] While a divided panel of this Court recently claimed *Standing Rock* is a "new standard for vacatur," *Regan*, 56 F.4th at 663 n.11, by its own terms it simply applies the *Allied Signal* test in the specific context of procedural violation cases. *Standing Rock*, 985 F.3d at 1051–52 (applying *Allied Signal*). The majority noted it was "not bound" by *Standing Rock* since it was extra-circuit and declined to follow it in the facts of that case. Amici urge this Court to apply the *Standing Rock* analysis and maintain consistency with the D.C. Circuit.

This Court's repeated rationale in environmental vacatur precedent underscores this conclusion. *All. for the Wild Rockies*, 907 F.3d at 1122 (vacating action because vacatur "appropriate when leaving in place an agency action risks more environmental harm than vacating it"); *Pollinator*, 806 F.3d at 532 (vacating because "given the precariousness of bee populations, leaving [agency's] registration of sulfoxaflor in place risks more potential environmental harm than vacating it."); *compare Nat. Res. Def. Council*, 38 F.4th at 52 (vacating part of action because vacatur "unlikely to risk environmental harm") *with id.* at 60 (declining to vacate another portion because, while unlawful, it contained endangered species mitigation measures).

This Court's history in developing the remand without vacatur exception is instructive. In *Idaho Farm Bureau*, a 1995 decision, the Court declined to vacate a rule listing the Bruneau hot spring snail as endangered, despite affirming the district court's decision that the agency had committed procedural errors in its listing decision. 58 F.3d at 1401–05. However, because there were concerns about its extinction—the snail existed in only a single spring—those "concerns weigh toward leaving the listing rule in place while [the agency] remedies its procedural error," *id.* at 1406, because having any listing decision was more environmentally protective than not having one. *See also W. Oil & Gas v. U.S. Env't Prot. Agency*, 633 F.2d 803,

813 (9th Cir. 1980) (similar, under Clean Air Act); *accord Nat. Res. Def. Council v. U.S. Dep't of Interior*, 275 F. Supp. 2d 1136, 1143–44 (C.D. Cal. 2002) (discussing caselaw and explaining that the Ninth Circuit has "expressed special concern for the potentially one-sided and irreversible consequences of environmental damage prompted by vacating defective rules during remand").

There are a few environmental decisions from this Court where economic consequences have been considered to warrant remand without vacatur, potentially improperly.[23] But even in those cases, this Court gave weight to economic consequences only when there is *first* a showing of *environmental* harm from vacatur, as in *California Communities*, 688 F.3d at 993–94;[24] *Regan*, 56 F.4th at 668 (disruption to agricultural industry considered, but only after finding remand without vacatur the more environmentally protective remedy).

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[23] In cases involving endangered species, the ESA flatly prohibits weighing economic costs against risks to endangered species, even in the more onerous injunction context. *Cottonwood Env't Law Ctr.*, 789 F.3d at 1091 ("[T]he equities and public interest factors always tip in favor of the protected species.").

[24] *California Communities* involved a violation of the Clean Air Act, where EPA unlawfully approved an air quality plan that provided credits to a nearly completed power plant. 688 F.3d at 993–94. The Court found vacatur would cause environmental harm by delaying completion of that plant, risking the power supply and resulting in blackouts that would necessitate diesel generator use, polluting the air: "the very danger the Clean Air Act aims to prevent." *Id.* at 994.

In contrast, because these are environmental statutes, economic allegations alone are insufficient, as illustrated by the myriad Ninth Circuit decisions that vacated despite acknowledging potentially severe economic ramifications. *Nat'l Family Farm Coal.*, 960 F.3d at 1145 (setting aside registration of pesticide used on millions of acres of farmland despite severe "adverse impact[s] on growers" because agency's violation "compels us to vacate the registrations"); *Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Eng'rs*, 466 F. Supp. 3d 1217, 1226 (W.D. Wash. 2020) (industrial aquaculture permits set aside despite "devastating" economic impacts because they did not "outweigh the environmental consequences of continuing" the activities), *aff'd* 843 F. App'x 77; *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 698 F.3d 1101, 1128 (9th Cir. 2012) (vacating decision to authorize 678-mile natural gas pipeline); *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1072, 1100 (9th Cir. 2011) (vacating approvals authorizing construction of 130-mile railroad to haul coal); *Se. Alaska Conservation Council v. Fed. Highway Admin.*, 649 F.3d 1050, 1054-56, 1059 (9th Cir. 2011) (vacating decision to approve new highway and ferry terminal); *Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1129 (9th Cir. 1998) (vacating water service contracts). Here, the district court even narrowed the vacatur to mitigate any economic disruption. 1-ER-45.

III. The APA Authorizes Vacatur Remedy, As Shown By Its Text, Structure, History, Scholarship, and As This Court (And Every Other) Have Held For Decades.

Finally, Appellants argue that the APA does not authorize vacatur to begin with, noting the new revisionist position taken by the United States in a recent Supreme Court case and a resulting concurrence. ECF 43 at 20 n.3 (citing *United States v. Texas*, 599 U.S. 670 (2023)).

First, Appellants admit the *Texas* concurrence discussion is only dicta and absent some future, different Supreme Court decision—which is very unlikely, *see infra*—that their argument is contrary to "this Court's precedent on APA remedies [which] controls at this stage of the proceedings." ECF 43 at 20 n.3. Decades of prior Ninth Circuit cases establish the APA authorizes vacatur. That should be the end of it.

But second, careful review of the *Texas* case shows that, while some Justices think the issue worth consideration, none have outright endorsed it and a majority has indicated they reject it. There, Texas challenged immigration enforcement priority guidelines, which the lower court vacated. *Texas*, 599 U.S. at 670–71. Granting certiorari, the Supreme Court reversed. *Id.* Writing for the majority, Justice Kavanaugh explained the states lack standing because they lacked cognizable injury-in-fact from the executive branch's decision to exercise enforcement discretion over

immigration prosecutions. *Id.* at 676–78, 686. While the remedy issues were briefed, the Court did not reach them.

Justice Gorsuch, joined by Justices Thomas and Barrett, wrote a concurrence opining that he would have held the lack of standing via a different route, namely the lack of redressability. *Id.* at 686–704. In dicta he wondered aloud about the APA's authorization of vacatur of a rule versus only providing relief as applied to a prevailing challenger (which would presumably affect redressability). *Id.* at 693–704; *id.* at 701–02 (noting that the questions are "serious" with "[t]houghtful arguments and scholarship on both sides" and that the Court will "have to address them sooner or later").

The remaining six justices did not join Justice Gorsuch's concurrence. And while the majority ignored the concurrence in its opinion, during oral argument the justices who are former D.C. Circuit judges (and thus with significant APA case experience) gave multiple indications they strongly disagreed with the argument. Chief Justice Roberts characterized the position as "fairly radical and inconsistent with" decades of D.C. Circuit precedent.[25] Vacatur is so standard in an APA case, it

[25] Transcript of Oral Argument at 35, *United States v. Texas*, 599 U.S. 670 (No. 22-58).

happens "five times before breakfast." *Id.* "Are you overturning that whole established practice under the APA? . . . Wow." *Id.* at 35–36.

Similarly, Justice Kavanaugh noted that "the government never has made this argument in all the years of the APA." *Id.* at 54. The argument was a "radical rewrite . . . of . . . standard administrative law practice," thoughtfully applied by courts for decades. *Id.* at 54–55; *see also id.* at 55–56 (referring to the argument as "extreme" and "astonishing").[26]

And Justice Jackson explained the "conceptual problem" in trying to fashion a plaintiff-only remedy—the unworkability of disregarding the agency action only for those particular plaintiffs—instead of simply vacating in an unlawful decision. *Id.* at 67–68. Indeed, in many instances a court's ability to nullify a rule on an across-the-

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[26] Just a few weeks ago, Justice Kavanaugh again went out of the way to again re-affirm the APA vacatur remedy in a case in an entirely different context:

> Importantly, that issue is distinct from the issue of a court's setting aside a federal agency's rule under the Administrative Procedure Act. **The APA expressly authorizes a court to "hold unlawful and set aside agency action" that violates the Act.** 5 U. S. C. § 706(2); *see M. Sohoni, The Power To Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121, 1173 (2020) ("The term 'set aside' means invalidation—and an invalid rule may not be applied to anyone" (footnote omitted)).

Griffin v. HM Fla.-ORL, LLC, No. 23A366, 2023 WL 7928928, at *1 n.1 (U.S. Nov. 16, 2023) (emphasis added).

board basis is a practical necessity for a functioning administrative state. *O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019) ("As a practical matter, for example, how could this Court vacate the Rule with respect to the organizational plaintiffs in this case without vacating the Rule writ large? What would it mean to 'vacate' a rule as to some but not other members of the public? What would appear in the Code of Federal Regulations? Fortunately, the Court need not engage in such logical gymnastics because the language of the APA and the controlling D.C. Circuit precedent are unambiguous.").

Third and finally, even taken on its merits, the argument is contrary to the APA's text, structure, history, long-held views of the courts, as well as the great weight of the academic scholarship. *See generally* Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997 (2023); Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1122 (2020).

To summarize: The APA's plain and forceful "shall . . . set aside" text unambiguously authorizes vacatur. 5 U.S.C. § 706(2); *see infra.* In structural context, Section 706(1) first sets forth the remedy for agency action "unlawfully withheld or unreasonably delayed" and directly after Section 706(2) neatly mirrors it with the remedy for agency action held "contrary to law." The term "set aside" is well-known both as a remedies legal term of art and by its common sense meaning to refer to negating or nullifying an action.[27] There is no opinion in any court supporting a contrary interpretation.[28] Instead, any other reading would call into question decades of decisions from the Supreme Court,[29] the courts of appeals,[30] and district courts across the country.

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[27] Sohoni, *supra* note 15.

[28] *See supra* note 26 at 55 (Justice Kavanaugh: "[N]o case has ever said what you're saying anywhere.").

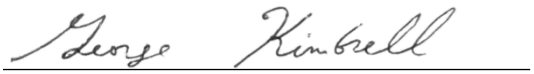
[29] *See, e.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1901 (2020) (holding that the challenged action must be vacated where it violated the APA); *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2564, 2567, 2568 (2019) (affirming a district court's decision that "vacated" the challenged agency action and using "set aside" interchangeably with "vacate"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 41 (1983) (clarifying that "agency's action" itself must be set aside if it is contrary to or in excess of agency authority); *Abbott Labs. v. Gardner*, 387 U.S. 136, 154–55 (1967), *abrogated by Califano v. Sanders*,

CONCLUSION

For the foregoing reasons, Amici respectfully request this Court grant Appellee's requested relief.

Date: December 6, 2023

Respectfully submitted,



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430 U.S. 99 (1977) (explaining that "pre-enforcement challenge" by regulated parties "is calculated to speed enforcement" because "[i]f the Government prevails, a large part of the industry is bound by the decree; if the Government loses, it can more quickly revise its regulation").

[30] *See, e.g., Allina Health Serv. v. Sebellius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (stating that "vacatur is the normal remedy" for an APA violation); *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.").

APPENDIX A

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Certificate of Compliance for Briefs

9th Cir. Case Numbers: 23-35322, 23-35323, 23-35324, 23-35354

I am the attorney for *Amicus curiae* Law Professors.

This brief contains 6,978 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature */s/ George Kimbrell* **Date** December 6, 2023