MAJOR QUESTIONS DOCTRINE JUJITSU: USING THE DOCTRINE TO REIN IN DISTRICT COURT JUDGES

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This Article addresses the intersection of two hot topics in administrative law: (1) the major questions doctrine and (2) the scope of relief that a district court judge may enter in a suit under the Administrative Procedure Act (APA) (universal vacatur, nationwide injunctions, and the like). The Article explains that the separation of powers concerns that underlie the major questions doctrine—which is a doctrine that the Supreme Court uses when interpreting Congress's delegation of authority to federal agencies—apply equally when interpreting the authority that Congress delegated to district court judges under the APA. Accordingly, the Supreme Court should interpret the APA's delegation in specified ways that rein in the scope of relief that a district court judge can enter. Using the major questions doctrine in this new way should mitigate doctrine's anti-democratic quality.

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There are two raging debates in administrative law. The first is about the legitimacy of the major questions doctrine. The second is about the scope of relief that a district court judge may enter in a suit under the Administrative Procedure Act (APA) (universal vacatur, nationwide injunctions, and the like). Much has been written on each topic, but their intersection has not yet been explored.

My thesis is that the separation of powers concerns that Justices have offered for the major questions doctrine—which is a doctrine that the Supreme Court uses when interpreting Congress's delegation of authority to federal agencies—apply with equal force when interpreting the authority that Congress delegated to district court judges under the APA. The upshot is that the Supreme Court should interpret the APA's judicial review provisions in three specific ways to avoid the significant separation of powers concerns that arise if these provisions are read broadly. First, the Supreme Court should hold that the "set aside" language in APA § 706(2) does not authorize universal vacatur of an agency's rules.[1] Second, the Supreme Court should hold that in a suit by a membership organization, the only "person[s] . . . aggrieved" within the meaning of APA § 702 and eligible for relief are those members who are identified by name in the complaint and agree to be bound by the judgment.[2] Third, the Supreme Court should hold that in a suit by a state, the only "person . . . aggrieved" and entitled to relief is the particular component of the state directly injured by the challenged

1. *See* Administrative Procedure Act (APA), 5 U.S.C. § 706(2).
2. *See* § 702.

federal regulation.[3] Deploying the major questions doctrine in these new ways will temper and potentially outweigh the doctrine's anti-democratic quality. That's true regardless of whether you like or hate the major questions doctrine and regardless of whether you conceptualize it as a substantive canon or a common-sense tool of statutory interpretation. In other words, it is time for some major questions doctrine jujitsu: let's use the doctrine's strengths to rein in district court judges.

Various scholars rightly object that the major questions doctrine is anti-democratic.[4] This argument has several strains; my focus is on the impact of the doctrine's indeterminacy on district court litigation. The Supreme Court has announced that an unusual degree of specificity is required before it will interpret a federal statute to give a federal agency authority to address a major question. The Court has not announced clear rules for determining what counts as a major question or how much specificity is needed, however.[5] That indeterminacy shifts power to district court judges—who by constitutional design are insulated from political accountability—because the "majorness" of a question is often "in the eyes of the beholder."[6] Unsurprisingly, district court judges have split over whether recent agency policies ran afoul of the major questions doctrine.[7]

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3. *Id.*

4. *See, e.g.*, Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1 (2023) (arguing that the major questions doctrine "is far more likely to weaken democratic accountability than strengthen it, by shifting considerable discretionary power to the Judiciary, undermining executive branch transparency, and exacerbating minority obstructionism in Congress."); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1010 (2023) (arguing "that the new major questions doctrine allows the presence of present-day political controversy surrounding a policy to alter otherwise broad regulatory statutes outside of the formal legislative process. It supplies an additional means for minority rule in a constitutional system that already skews toward minority rule.").

5. *See* West Virginia v. EPA, 597 U.S. 697, 723 (2022) (stating only that "[t]o overcome" the precedential skepticism of the claim that a statute gives an agency authority to address a major question, "the Government must—under the major questions doctrine—point to 'clear congressional authorization,' to regulate in that manner." (applying Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

6. *See Questions Remain on Major Questions Doctrine*, PENN CAREY L. (June 30, 2023) [hereinafter *Questions Remain*], https://www.law.upenn.edu/live/news/15982-questions-remain-on-major-questions-doctrine.

7. *Compare, e.g.*, Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1164

Such disputes among district court judges would have few policy consequences but for the growing tendency of such judges to issue sweeping forms of relief when they rule against the government. It has become increasingly common for judges to vacate an agency rule universally rather than simply preventing the agency from enforcing the rule against the plaintiff. It has become increasingly common for judges to issue a broad injunction when an organization claims to have many unidentified members. And it has become increasingly common for judges acting at the behest of "red states" or "blue states" to enjoin a rule's enforcement in half the country.[8] These sweeping forms of relief thrust an individual judge into the role of super-legislator for the entire country or large swaths of it.

Despite criticism of the major questions doctrine, the Supreme Court is unlikely to retreat from a doctrine it has so recently embraced. Indeed, the Court doubled down on the major questions doctrine in *Biden v. Nebraska*,[9] lamenting what it described as "a disturbing feature of some recent opinions to criticize the decisions with which they disagree as going beyond the proper role of the judiciary."[10] Fortunately, retreat is not the only answer. The Court can mitigate the doctrine's anti-democratic quality by applying the principles that underlie it to the judicial review provisions of the APA. The principles that underlie the major questions doctrine—which Justice Barrett described as "an interpretive tool reflecting 'common sense as to the manner in which Congress'" delegates authority to a federal agency[11]—apply with equal force when interpreting a statute that vests authority in a federal district court judge. And the grounds that the Supreme Court has offered to justify the major questions doctrine—"separation of powers principles and a practical understanding of legislative intent"[12]—provide powerful reasons to reject extravagant readings of the

(M.D. Fla. 2022) (finding that "the sheer scope of the [Center for Disease Control and Prevention's (CDC's)] [] claimed authority [to implement the mask mandate] would counsel against the Government's interpretation") (quoting Ala. Ass'n of Realtors v. HHS, 594 U.S. 758, 764 (2021))), *with* Wall v. CDC, No. 6:21-cv-975, 2022 WL 1619516, at *3–4 (M.D. Fla. Apr. 29, 2022) (finding that "CDC's authority does not run afoul of the major questions doctrine" because the COVID travel requirements were not issues of "deep 'economic and political significance" that demand explicit congressional delegation, and "clearly fall within the CDC's public health domain.").

8. *See Questions Remain*, *supra* note 6.

9. 143 S. Ct. 2355 (2023).

10. *Id.* at 2375.

11. *Id.* at 2378 (Barrett, J., concurring) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

12. West Virginia v. EPA, 597 U.S. 697, 723 (2022).

general APA terms "set aside" and "person . . . aggrieved."[13]

This Article has four parts. Part I describes the justifications for the major questions doctrine offered by those Justices who embrace the doctrine. Part II argues, at a high level of generality, that these principles apply with equal force when interpreting the authority that the APA vests in district court judges. Parts III and IV show how these principles can and should be used to interpret particular APA texts—the phrase "set aside" in § 706 and the phrase "person . . . aggrieved" in § 702—in specified ways that will resurrect the conventional limits on a district court judge's remedial authority.

As we will see, the contrary arguments blur important distinctions between the Supreme Court and a district court judge. By contrast, using the major questions doctrine to rein in a district court judge's remedial authority will restore the modest role that, under the Constitution and by statute, a district court judge occupies vis-à-vis the Supreme Court, courts of appeals, and other district court judges. It will prevent district court judges from extinguishing the rights of nonparties without due process. Finally, it will leave policymaking authority in the more politically accountable Executive Branch while litigation works its way through appellate review.

I. THE ANTI-DEMOCRATIC MAJOR QUESTIONS DOCTRINE

Various scholars have persuasively shown that the major questions doctrine is anti-democratic.[14] The doctrine contravenes what Lawrence Lessig called "the Frankfurter constraint": any rule that the Supreme Court announces should be clear enough to be consistently applied, lest the outcomes appear political and undermine the legitimacy of the Judiciary.[15]

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13. 5 U.S.C. §§ 702, 706.

14. *See, e.g.*, Freeman & Stephenson, *supra* note 4; Deacon & Litman, *supra* note 4; Jack Michael Beermann, *The Anti-Innovation Supreme Court: Major Questions, Delegation, Chevron and More*, 65 WM. & MARY L. REV. (forthcoming 2023), http://dx.doi.org/10.2139/ssrn.4383132 (arguing that in the major questions doctrine, "the Court has in effect created a major new doctrine of administrative law severely limiting agency authority without clear authorization from Congress"); Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L. J. 635, 635, 649–50 (2023) (arguing that the "rise and rise of the 'major questions doctrine'" is a "remarkable power grab" of the "John Roberts-helmed judiciary"); Blake Emerson, *The Binary Executive*, 132 YALE L.J. F. 756 (2022) (arguing that the Supreme Court's implementation of the unitary executive theory and intensifying "scrutiny of administrative policymaking" through the major questions doctrine, taken together, "create novel constitutional structures, internally contradictory jurisprudence, and unstable patterns of political rule.").

15. *See* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 174–75 (1995).

A stronger form of this idea is that indeterminacy yields outcomes that *are* political because they become infected by the policy preferences of federal judges, who, by constitutional design, are unaccountable politically.

A paradigmatic example of a rule that violated the Frankfurter constraint was the rule that the Supreme Court announced in *National League of Cities v. Usery*,[16] which held that the Tenth Amendment prevents Congress from using its Commerce Clause power to regulate states "in areas of traditional governmental functions."[17] The Supreme Court provided no clear explanation for identifying a "traditional" function, and lower courts struggled with the task.[18] Compounding the problem, the Supreme Court declared that even when a traditional governmental function is regulated, there may be circumstances in which "the nature of the federal interest advanced may be such that it justifies state submission" to the federal regulation. The Court did not explain how that weighing of interests would occur, however.[19] The Supreme Court eventually abandoned the whole enterprise as "unsound in principle and unworkable in practice."[20]

The major questions doctrine is similarly indeterminate. In a series of decisions, the Supreme Court has announced that "there are 'extraordinary cases' . . . in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion," may oblige the Judiciary to "defer not to the agency's expansive construction of the statute, but to Congress's consistent judgment to deny [the agency] this power."[21] The Court has further declared that in such "extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there," and that "[t]he agency instead must point to 'clear congressional authorization' for the power it claims."[22] But the Court has provided no straightforward way to determine which cases are "extraordinary" enough to require more specific congressional authorization or how much specificity is needed. As then-Judge Kavanaugh declared after surveying the cases that became the progenitors of the major

16. 426 U.S. 833 (1976).

17. *Id.* at 852.

18. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 538–39 (1985) (citing a list of lower federal cases that reveal "[j]ust how troublesome the task" of defining a "traditional function" under *Hodel* has been (applying Hodel v. Va. Surface Min. & Reclamation Ass'n, 452 U.S. 264, 274 (1981)).

19. *Hodel*, 452 U.S. at 288 n.29.

20. *Garcia*, 469 U.S. at 546–47 (overruling *Nat'l League of Cities*, 426 U.S. 833 (1976)).

21. West Virginia v. EPA, 597 U.S. 697, 721 (2022) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

22. *Id.* at 723 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

questions doctrine, "determining whether a rule constitutes a major rule sometimes has a bit of a 'know it when you see it' quality."[23]

Unsurprisingly, district court judges have disagreed about whether recent agency policies ran afoul of the major questions doctrine. For example, they split over the issue when considering the Centers for Disease Control and Prevention's (CDC's) mandate to wear a mask on public transportation.[24] One judge perceived that mandate as presenting issues "of vast economic and political significance" akin to those raised by CDC's eviction moratorium that the Supreme Court found unauthorized on major questions grounds.[25] But, to another judge who sat on the same district court, the requirement to wear a mask on airplanes and other public transportation was an unremarkable exercise of CDC's statutory authority that posed a negligible burden on travelers.[26]

Similarly, district court judges disagreed about major questions issues when considering the requirement that Head Start programs, as a condition of federal funding, ensure that their staff received COVID-19 vaccinations.[27] In one judge's view, Congress did not speak clearly enough to authorize that vaccination requirement, which the judge perceived as raising a major

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23. U.S. Telecomm. Ass'n v. Fed. Commc'n Comm'n (FCC), 855 F.3d 381, 421–23 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc); *see also*, *e.g.*, Thomas W. Merrill, *The Major Questions Doctrine: Right Diagnosis, Wrong Remedy*, COLUM. PUB. L. RES. PAPER, 26–27 (2023) (citing Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016), https://ssrn.com/abstract=4437332) (finding "extreme indeterminacy of the inquiry" to be one of the "rather obvious" problems with the major questions doctrine, also quoting then-Judge Kavanaugh, who "noted that clarity is a matter of degree, which makes it difficult for judges to make decisions 'in a settled, principled, or evenhanded way.'").

24. *See supra* note 7. *Compare* Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1164 (M.D. Fla. 2022) (declining to defer to CDC due to the "sheer scope of [its] claimed authority"), *with* Wall v. CDC, No. 6:21-cv-975, 2022 WL 1619516, at *3–4 (M.D. Fla. Apr. 29, 2022) (upholding CDC's authority because it "does not run afoul of the major questions doctrine").

25. *Health Freedom Def. Fund*, 599 F. Supp. 3d at 1157, 1164 (quoting Ala. Ass'n of Realtors v. HHS, 594 U.S. 758, 764 (2021)).

26. *See Wall*, 2022 WL 1619516, at *4 (reasoning that, "[i]n fact, the CDC correctly pointed out that the [mask mandate] helps *prevent* the imposition of economic burdens by stymying the spread of COVID-19 and, consequently, avoiding future lockdowns and resulting losses.").

27. *Compare* Louisiana v. Becerra, 629 F. Supp. 3d 477, 493 (W.D. La. 2022), *with* Livingston Educ. Serv. Agency v. Becerra, 589 F. Supp. 3d 697, 706 (E.D. Mich. 2022).

question because it entailed a "specific medical treatment" for roughly 274,000 employees and roughly one million volunteers.[28] However, another judge found the statutory text specific enough to authorize the Head Start rule, given parallels to the staff-vaccination requirement for federally funded healthcare facilities that the Supreme Court had upheld.[29]

If, over time, the Supreme Court applies the major questions doctrine across presidential administrations in ways that appear evenhanded, the Court may be able to defuse the charge that its decisions amount to policymaking. For example, it seems that the Supreme Court would have likely upheld CDC's transportation mask mandate and the Head Start rule if it had reviewed them before the end of the COVID-19 public health emergency, which rendered the cases moot.[30] And future Supreme Court decisions applying the major questions doctrine should provide some additional guidance for lower court judges.[31]

The problem remains, however, that the major questions doctrine gives each of the hundreds of district court judges a lot of latitude to declare agency policies lawful or unlawful based on the judge's view of whether an agency policy is especially important or politically charged. That free rein might have few real-world consequences if the judges who found a policy unlawful adhered to the traditional practice of providing only tailored, party-specific relief.[32] If they did so, their judgments would have limited impact pending appellate review. But, in reality, there has been a growing tendency among district court judges who rule against the government to issue sweeping forms of relief with immediate consequences for nonparties. For example, the

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28. *Louisiana*, 629 F. Supp. 3d at 493.

29. *See Livingston Educ. Serv. Agency*, 589 F. Supp. 3d at 706 (citing Biden v. Missouri, 595 U.S. 87, 93 (2022)).

30. *See* Health Freedom Def. Fund v. President of United States, 71 F.4th 888 (11th Cir. 2023) (vacating the district court's judgment as moot); Louisiana v. Becerra, No. 22-cv-30748 (5th Cir. Aug. 29, 2023) (vacating the district court's permanent injunction as moot); Livingston Educ. Serv. Agency v. Becerra, No. 22-1257, 2023 WL 4249469, at *1 (6th Cir. June 29, 2023) (vacating prior orders in the case as moot).

31. For example, the Supreme Court presumably will explain that the Congressional Review Act's definition of a "major rule"—which sweeps in every rule with an estimated impact on the economy of $100 million or more, *see* 5 U.S.C. § 804(2)—should not be confused with a "major question" as some district court judges have done. *See*, *e.g.*, Florida v. Becerra, 544 F. Supp. 3d 1241, 1269–70 (M.D. Fla. 2021) (conflating these concepts).

32. *See, e.g.*, United States v. Texas, 599 U.S. 670, 693 (2023) (Gorsuch, J., concurring) (explaining that "[t]raditionally, 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," and that "[i]f the court's remedial order affects nonparties, it does so only incidentally.").

judge who found CDC's mask mandate unlawful did not merely prohibit its enforcement against the handful of individuals who had been identified in the litigation; instead, that judge universally vacated that mandate so that it could not be enforced against anyone.[33] Similarly, the judge who found the Head Start vaccination rule unlawful did not merely enjoin its enforcement against the small number of state-run Head Start facilities in the twenty-four plaintiff states; instead, that judge enjoined its enforcement against every Head Start facility located within those twenty-four states.[34] Therefore, these judges dictated the real-world agency enforcement policy across the entire nation (for the CDC mandate) or half of it (for the Head Start mandate).[35]

II. TRANSPOSING THE MAJOR QUESTIONS DOCTRINE TO THE APA CONTEXT

In this Part, I aim to show—at a high level of generality—that the principles that underlie the major questions doctrine apply with equal force when interpreting the authority that the APA vests in district court judges. In Parts III and IV, I will apply these principles to specific APA text: the phrase "set aside" in § 706 and the phrase "person . . . aggrieved" in § 702.

A. Parallel Exercises of Statutory Interpretation

At the outset, it is important to appreciate that the major questions

33. *See* Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1176–78 (M.D. Fla. 2022).

34. *See* Louisiana v. Becerra, 629 F. Supp. 3d 477, 496 (W.D. La. 2022).

35. Although the examples discussed in the text involved policies of the Biden Administration, judges likewise issued sweeping relief during the Trump Administration. For example, the judge who found certain immigration-related conditions on certain federal grants unlawful did not merely enjoin their enforcement against the plaintiff (the City of Chicago), and the judge entered an injunction that was "nationwide in scope, there being no reason to think that the legal issues present in this case are restricted to Chicago or that the statutory authority given to the Attorney General would differ in another jurisdiction." City of Chicago v. Sessions, 264 F. Supp. 3d 933, 951 (N.D. Ill. 2017), *aff'd*, 888 F.3d 272 (7th Cir. 2018), *reh'g en banc granted in part, opinion vacated in part*, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, 2018 WL 4268814 (7th Cir. Aug. 10, 2018). Similarly, the judge who found President Trump's restrictions on entry into the United States by foreign nationals of certain countries to be unlawful enjoined their enforcement "on a nationwide basis," rather than against only those identified foreign nationals whose entry the plaintiffs were seeking to facilitate. Hawaii v. Trump, 265 F. Supp. 3d 1140, 1148 (D. Haw. 2017), *aff'd in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017), *rev'd and remanded*, 138 S. Ct. 2392 (2018).

doctrine is a tool of statutory interpretation with direct parallels to the interpretation of the APA's judicial review provisions. The Supreme Court emphasized in *West Virginia v. EPA*[36] that "[a]gencies have only those powers given to them by Congress."[37] The Court employed the major questions doctrine as a tool of statutory interpretation to determine "whether Congress in fact meant to confer the power the agency has asserted."[38]

Like federal agencies, lower federal courts have only those powers given to them by Congress. Article I grants Congress the power to "constitute Tribunals inferior to the [S]upreme Court."[39] Article III extends the judicial power of the United States to "such inferior [c]ourts as the Congress may from time to time ordain and establish."[40] And Article I's Necessary and Proper Clause[41] allows Congress to enact laws "to assure that those tribunals may fairly and efficiently exercise '[t]he judicial Power of the United States.'"[42]

Sometimes, Congress enacts laws that govern lower court proceedings directly, as Congress did in the judicial review provisions of the APA. Other times, Congress delegates such power to the Judicial Branch, as Congress did in the Rules Enabling Act in 1934[43]—which is the source of the Supreme Court's authority to issue the Federal Rules of Civil Procedure, for example—and its predecessor, § 17 of the Judiciary Act of 1789, which the Supreme Court upheld (per Chief Justice Marshall) as a permissible delegation of Congress's authority.[44] Either way, the scope of a district court's authority must be traceable to a federal statute.

Colloquial references to "non-statutory" judicial review of agency action are therefore imprecise.[45] The principles that govern a lower court's review

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36. 597 U.S. 697 (2022).

37. *Id.* at 723.

38. *Id.* at 721.

39. U.S. CONST. art. I, § 8, cl. 9.

40. *Id.* art. III, § 1.

41. *Id.* art. I, § 8, cl. 18.

42. Jinks v. Richland Cnty., 538 U.S. 456, 461–62 (2003) (internal quotation marks omitted) (upholding the tolling provision of 28 U.S.C. § 1367(d) on this basis); *see also* Wayman v. Southard, 10 Wheat. 1, 42 (1825) (Marshall, C.J.) (same for § 17 of the Judiciary Act of 1789).

43. 28 U.S.C. § 2072 (authorizing the Supreme Court to "prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts" and courts of appeals, but specifying that "[s]uch rules shall not abridge, enlarge, or modify any substantive right").

44. *See Wayman*, 10 Wheat. at 42.

45. *See* Clark Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1480 n.3 (1962) (explaining

of agency action—including those loosely described as prudential, judge-made, common-law, or the like—are matters of statutory interpretation. The only exception is for constraints that flow directly from the Constitution, such as Article III's case and controversy requirement, the Fifth Amendment's Due Process Clause, or the limits of Congress's enumerated powers in Article I.[46]

In sum, parallel to the interpretive inquiry under the major questions doctrine, the scope of a district court's authority under the APA depends on whether Congress intended to confer the power that the district court judge has asserted.

B. Separation of Powers Matters

The parallels continue when we examine the principles that the Supreme Court invoked to justify the major questions doctrine. Protecting the separation of powers is central to both the majority and concurring opinions in *West Virginia*, albeit in different ways.[47]

For the majority, separation of powers principles inform the determination of "whether Congress in fact meant to confer the power the agency has asserted."[48] The majority "presume[s] that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'"[49] As a matter of "common sense," the majority will not interpret "modest words" or "vague terms" to provide "[e]xtraordinary grants of regulatory authority."[50] The touchstone of the majority's inquiry is thus congressional intent, and the presumption is meant to guard against "the Executive seizing

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that "[t]he term 'nonstatutory review,' when used to describe judicial review not authorized by a specific or general statutory review provision, is not precise, in that all actions in the federal courts are based on a statute.").

46. In a recent article, William Baude and Samuel Bray argue that Article III should be understood to impose some of the same constraints proposed here. *See* William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153 (2023). By contrast, I am assuming *arguendo* that such constraints are not constitutionally required. My argument is that the constraints should be adopted as a matter of statutory interpretation, which in turn is informed by the principles that underlie the major questions doctrine.

47. West Virginia v. EPA, 597 U.S. 697 (2022).

48. *Id.* at 721. The Chief Justice wrote the opinion of the Court, which was joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett.

49. *Id.* at 723 (quoting United States Telecomm. Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

50. *Id.* (internal quotation marks omitted).

the power of the Legislature."[51]

For Justice Gorsuch, whose concurring opinion was joined by Justice Alito, the major questions doctrine is a canon of constitutional avoidance that prevents Congress from "divest[ing] its legislative power to the [e]xecutive [b]ranch."[52] The concurring Justices emphasized that Article I vests all legislative powers in Congress and inferred that "'important subjects . . . must be entirely regulated by the legislature itself,' even if Congress may leave the Executive 'to act under such general provisions to fill up the details.'"[53] The concurring Justices perceive Cabinet secretaries as "unelected officials barely responsive to" the President and regard "robust nondelegation doctrines" as "designed to ensure democratic accountability."[54]

Thus, both the majority and the concurrence see the major questions doctrine as a means to police the boundaries of the authority that is vested in federal officials. That concern should be at least as salient when interpreting a statute that vests power in a district court judge. Under the Constitution and by statute, a district court judge occupies a modest role vis-à-vis the Supreme Court and other federal judges. A district court judge is constitutionally "inferior" to the Supreme Court and, by statute, to the court of appeals for its regional circuit. [55] In establishing hundreds of district court judgeships, Congress made the position one of coequals without giving a district court judge the authority to preempt or override the judgment of another district court judge.[56] And a federal judge generally has no authority to make policy.[57]

To be sure, the separation of powers concern that Justice Gorsuch described as reason for the major questions doctrine does not apply exactly when considering the remedial power that the APA grants to district court judges. His focus was on transferring legislative power from Congress to a federal agency, whereas my focus is on aggrandizing the role of district court judges. However, that difference is not a reason to ignore the separation of powers concerns that arise from a broad reading of the APA's judicial review provisions. If, as Justice Gorsuch argued in *West Virginia*, the major questions doctrine is a "clear-statement" rule that works "to protect the Constitution's

51. Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023).

52. *West Virginia*, 597 U.S. at 739 (Gorsuch, J., concurring).

53. *Id.* at 737 (quoting Wayman v. Southard, 10 Wheat. 1, at 43–44 (1825)). As explained in the text above, *Wayman* involved Congress's delegation of authority to the judicial branch.

54. *Id.* at 739–40.

55. U.S. CONST. art. I, § 8, cl. 9; 28 U.S.C. § 1291.

56. Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) (quoting 18 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 134.02(1)(d), at 134-26 (3d ed. 2011)).

57. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).

separation of powers,"[58] then an analogous clear-statement rule should apply when the Supreme Court interprets the authority that the APA vests in a district court judge. Indeed, Justice Gorsuch has more recently argued that "universal relief, whether by way of injunction or vacatur, strains our separation of powers" by "exaggerat[ing] 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."[59] The Supreme Court should be especially reluctant to interpret a statute to transfer quasi-legislative power from Congress to district court judges, which is a form of judicial self-aggrandizement.

C. The Presumption of Continuity

Concurring in *Nebraska*, Justice Barrett elaborated on the notion put forth by the *West Virginia* majority that the major questions doctrine reflects "common sense as to the manner in which Congress is likely to delegate" to an agency a policy decision of great economic and political magnitude.[60] In her view, the major questions doctrine is not a substantive canon—which would allow a court to reject the better reading of a statute—but a tool of statutory interpretation that situates the text in context to arrive at the statute's correct reading.[61] She explains that there are "baseline assumptions" against which Congress legislates that are established by background legal conventions and our constitutional structure—among other sources.[62] And she argues that Congress is not reasonably understood to depart from these baseline assumptions through subtle means because "Congress does not 'hide elephants in mouseholes.'"[63]

Justice Barrett's reasoning echoes the reasoning of then-Judge Kavanaugh in *United States Telecommunications Ass'n v. Federal Communications Commission (FCC)*, which she cited in her concurrence and which was also cited by the majority and concurring opinions in *West Virginia*. Then-Judge Kavanaugh wrote that the "key reason" for the major questions doctrine "is the strong presumption of continuity for major policies unless and until Congress has

58. West Virginia v. EPA, 597 U.S. 697, 736–37 (2022).

59. United States v. Texas, 599 U.S. 670, 703 (2023) (Gorsuch, J., concurring).

60. Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

61. *Id.* at 2377–81.

62. *Id.* at 2378–81.

63. *Id.* at 2382 (quoting Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001)).

deliberated about and enacted a change in those major policies."[64] He suggested that "this kind of continuity is consistent with democratic values"[65] and that the presumption "accords with the in-the-arena reality of how legislators and congressional staff approach the legislative function."[66]

This reasoning transfers readily to the APA's judicial review provisions. Although the APA made significant changes to the ways that agencies operate—such as by increasing public participation in rulemaking—it is generally accepted that the APA's judicial review provisions simply "restate[d] the law of judicial review" as it existed at the time of the statute's enactment.[67] Thus, to paraphrase Justice Barrett, there should be reluctance to find that Congress intended "to confer an unusual form of authority" on district court judges "without saying more."[68] As we will see in the Parts that follow, broad interpretations of the APA terms "set aside" and "person . . . aggrieved" would vest district court judges with unusual forms of authority that undermine the separation of powers and core democratic values.[69]

III. TRANSPOSING THE MAJOR QUESTIONS DOCTRINE TO THE APA'S "SET ASIDE" LANGUAGE

A. The Debate Over the Meaning of "Set Aside"

Those who defend universal remedies rely on the phrase "set aside" in § 706 of the APA, so I will begin by framing the debate over the meaning of that phrase. In relevant part, § 706 provides that "[t]he reviewing court shall . . . (2) hold unlawful and *set aside* agency action, findings, and conclusions found to be" unlawful on various grounds, including that the

64. U.S. Telecomm. Ass'n v. FCC, 855 F.3d 381, 422 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (quoting WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 289 (2016)).

65. *Id.* (quoting ESKRIDGE, *supra* note 64, at 289).

66. *Id.* (citing Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 1004 (2013)).

67. U.S. DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947); *see also id.* at 108 (noting that § 706 "restates the present law as to the scope of judicial review"); S. Rep. No. 752, 79th Cong., 1st Sess. 38, 44 (1945); Norton v. S. Utah Wilderness All., 542 U.S. 55, 63 (2004) (explaining that § 706(1), which authorizes a district court to "compel agency action unlawfully withheld. . . . carried forward the traditional practice prior to its passage" of seeking judicial review through a writ of mandamus) (emphasis omitted).

68. *Nebraska*, 143 S. Ct. at 2383 (Barrett, J., concurring).

69. 5 U.S.C. §§ 702, 706.

agency action was arbitrary and capricious, contrary to constitutional right, in excess of statutory authority, issued without observance of legally required procedure, or unsupported by substantial evidence.[70]

1. The Broad Interpretation: Universal Vacatur

Under the broad interpretation, the phrase "set aside" in § 706(2) authorizes a district court to vacate an agency's rule universally—the result being that the rule cannot be enforced or implemented in any way, unless and until a higher court reverses or stays the district court's judgment. Ronald Levin and Mila Sohoni are the leading academic proponents of the "universal vacatur" interpretation,[71] which was also advanced in the Supreme Court by the plaintiffs in *United States v. Texas*.[72]

Section 551(13) of the APA defines "agency action" to include a "rule," and "[§] 706 says that unlawful 'agency action' shall be 'set aside.'"[73] Proponents of universal vacatur frame their textual argument by treating "set aside" as a synonym for "vacate" and argue that "[o]nce the rule is vacated, there is no rule to enforce; [v]acatur obliterates the agency decision."[74]

Proponents of universal vacatur generally qualify their position in three important ways. First, a judge's authority to vacate a rule universally depends on the posture of the suit. Proponents acknowledge that universal vacatur is not available when a rule is challenged defensively in the context of an agency's enforcement action,[75] which is the posture expressly contemplated by § 703 of the APA.[76] Instead, universal vacatur may be an available remedy only if the aggrieved party brings a pre-enforcement facial challenge to a rule—the type of APA action that the Supreme Court first

70. § 706 (emphasis added).

71. *See* Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997 (2023); Ronald M. Levin & Mila Sohoni, *Universal Remedies, Section 706, and the APA*, YALE J. REGUL. (July 19, 2020), https://www.yalejreg.com/nc/universal-remedies-section-706-and-the-apa-by-ronald-m-levin-mila-sohoni/; Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121 (2020).

72. *See* Brief for Respondents at 40–42, United States v. Texas, 599 U.S. 670 (2022) (No. 22-58), 2022 WL 12591050. The Supreme Court decided the *Texas* case on standing grounds, without reaching the issue of remedy. *See Texas*, 599 U.S. at 693.

73. Sohoni, *supra* note 71, at 1169.

74. *Id.* at 1131 (footnotes and internal quotation marks omitted).

75. *Id.* at 1130–31.

76. *See* 5 U.S.C. § 703 (2018) (providing generally that "agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement").

approved in its 1967 decision in *Abbott Laboratories v. Gardner*.[77] There, the Supreme Court "revolutionized administrative law" by "allowing facial, pre-enforcement challenges" to agency rules in addition to the defensive challenges in "as-applied review in enforcement actions."[78] The remedies at issue in *Abbott Laboratories* were a declaratory judgment and an injunction—which the Supreme Court described as discretionary equitable remedies[79]—and the proponents of universal vacatur do not appear to dispute that declaratory judgments and injunctions are ordinarily party-specific remedies.[80] However, Levin argues that universal vacatur is an available remedy in the context of a pre-enforcement facial challenge to a rule because "[p]reenforcement review, as it has become entrenched in the post–*Abbott Laboratories* era, has come to be understood as a challenge to the rule itself, not

77. Abbott Lab'ys v. Gardner, 387 U.S. 136 (1967).

78. PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2060–61 (2019) (Kavanaugh, J., concurring) (explaining that § 703—which provides that "agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement"—"establishes a general rule that, when a defendant's liability depends in part on the propriety of an agency action, that action ordinarily can be challenged in a civil or criminal enforcement suit") (quotation marks omitted); *see also* Levin, *supra* note 71, at 2003 (describing *Abbott Labs* as a "post-APA development of monumental importance" that established "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") (quoting Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 377 (1978)).

79. *See Abbott Lab'ys*, 387 U.S. at 139 (explaining that "[t]he District Court, on cross motions for summary judgment, granted the declaratory and injunctive relief sought"); *id.* at 148 (explaining that "[t]he injunctive and declaratory judgment remedies are discretionary"); *id.* at 155 (explaining that "the declaratory judgment and injunctive remedies are equitable in nature, and other equitable defenses may be interposed").

80. The Declaratory Judgment Act, by its terms, authorizes only party-specific relief. 28 U.S.C. § 2201(a). It provides that, in a case of actual controversy within its jurisdiction, a federal court "may declare the rights and other legal relations of *any interested party seeking such declaration*." *Id.* (emphasis added). And regarding injunctions, proponents of universal vacatur generally recognize that "a court might enjoin an invalid rule's enforcement only as to a particular plaintiff without also enjoining it nationwide." Sohoni, *supra* note 71, at 1130. Indeed, although Florida's Solicitor General has argued for universal vacatur of agency rules under the APA, he recently made a full-throated argument to the Supreme Court that injunctions must be party-specific. *See* Application for a Partial Stay Pending Appeal, Griffin v. HM Florida-ORL, LLC, 23A366 (U.S. Oct. 19, 2023). The problems with nationwide injunctions are well catalogued. *See, e.g.*, Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 600–01 (2020) (mem.) (Gorsuch, J., concurring); Nicholas Bagley, *A Single Judge Shouldn't Have This Kind of National Power*, THE ATLANTIC (Apr. 14, 2023, 8:35 AM), https://www.theatlantic.com/ideas/archive/2023/04/mifepristone-case-problem-federal-judiciary/673724/.

just to a particular potential application of the rule to the current plaintiff."[81]

Second, even in the context of a pre-enforcement challenge to a rule, universal vacatur is not an available remedy if the district court's reasoning does not apply universally.[82] To illustrate, a district court recently held that when the Food and Drug Administration (FDA) exercised its statutory authority to deem all products made or derived from tobacco to be "tobacco product[s]" for purposes of the Family Smoking Prevention and Tobacco Control Act, FDA did not adequately address comments urging the agency to carve out "premium cigars" and exempt those products from the rule.[83] Because the district court's reasoning applied only to premium cigars (and not to products such as other types of cigars or e-cigarettes), the court vacated the rule only as applied to premium cigars.[84]

Third, even when these two prerequisites for universal vacatur are met, proponents of universal vacatur acknowledge that it is a discretionary remedy rather than one that flows automatically from a district court's determination that the challenged rule is unlawful. Although § 706 uses the word "shall," § 702 specifies that the APA's judicial review provisions do not affect a court's power to deny relief on any "appropriate legal or equitable ground."[85] Levin invokes the "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."[86] He argues that "the availability of set-aside relief under § 706 should depend on equitable principles,"[87] including whether "enjoining the violation of law as to the plaintiff(s) but not similarly situated persons would create unacceptable incoherence in the regulatory program"[88] whether "enjoining a violation within the court's geographical

81. Levin, *supra* note 71, at 2004.

82. *See id.* at 2026 (acknowledging that there are circumstances in which "a 'facial' holding of illegality would be overbroad").

83. *See* Cigar Ass'n of Am. v. FDA., No. 16-CV-01460, 2023 WL 5094869, at *1 (D.D.C. Aug. 9, 2023).

84. *See id.*

85. 5 U.S.C. § 702.

86. Levin, *supra* note 71, at 2021; *see also* Levin & Sohoni, *supra* note 71 (stating that "the words 'shall set aside' in [§] 706 are understood to mean 'shall generally,' not 'shall invariably'"); Sohoni, *supra* note 71, at 1130 (explaining that to prevent disruption, "a court might enjoin an invalid rule's enforcement only as to a particular plaintiff without also enjoining it nationwide").

87. Levin, *supra* note 71, at 2023.

88. *Id.* at 2024.

state or region would be feasible and administrable,"[89] and whether there is "the desire to facilitate percolation or counteract forum shopping."[90]

2. The Narrow Interpretation: Party-Specific Relief

As explained below, under the narrow reading of "set aside," a district court has no power to vacate a rule universally. Instead, any relief must be party-specific. In the context of a pre-enforcement facial challenge to a rule, available relief would include a declaratory judgment stating that the rule may not be enforced against the plaintiff, an injunction prohibiting the agency from enforcing the rule against the plaintiff, and, potentially, a judgment vacating the rule as applied to the plaintiff.

There are two alternative theories of statutory interpretation that lead to the same bottom-line conclusion that only party-specific relief is authorized. One theory is that § 706 is not a remedial provision at all. Instead, the APA's remedies are authorized in § 703, which provides that the "form of proceeding for judicial review" is either a special statutory review proceeding or "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."[91] Under this theory, which was developed by John Harrison and Samuel Bray,[92] and advanced by the U.S. Department of Justice in *Texas*,[93] the phrase "set aside" in § 706 simply means "disregard." Just as a district court disregards an unconstitutional statute in determining the respective rights of the parties,[94] the district court should disregard an unlawful rule in determining the respective rights of the parties. To illustrate, if Lucas Wall had prevailed in his challenge to CDC's

89. *Id.* at 2025.

90. *Id.* at 2026.

91. 5 U.S.C. § 703.

92. *See* John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 YALE J. REGUL. BULL. 37 (Apr. 12, 2020), https://www.yalejreg.com/bulletin/section-706-of-the-administrative-procedure-act-does-not-call-for-universal-injunctions-or-other-universal-remedies/ [hereinafter Harrison, *Section 706*]; *see also* John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 YALE J. REGUL. BULL. 119 (Mar. 1, 2023), https://www.yalejreg.com/bulletin/vacatur-of-rules-under-the-administrative-procedure-act/. Professor Harrison built on ideas developed by Samuel Bray, who addressed related issues arising from nationwide injunctions. *See, e.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017).

93. *See* Brief for the Petitioners at 40–42, United States v. Texas, 599 U.S. 670 (2022) (No. 22-58) 2022 WL 12591050.

94. *See* Massachusetts v. Mellon, 262 U.S. 447, 488 (1923) (explaining that the Judicial Branch has "little more than the negative power to disregard an unconstitutional enactment").

transportation mask mandate, the district court could have entered a judgment declaring that CDC's transportation mask mandate is unenforceable against Wall or a judgment enjoining CDC from enforcing the transportation mask mandate against him.[95] But § 706 would not authorize the district court to vacate the transportation mask mandate, either universally or as applied to him.

Under the alternative theory, the "set aside" language authorizes an additional remedy, but that remedy is one that—like a declaratory judgment or injunction—is party-specific. This narrow reading of "set aside" was acknowledged (though not advanced) by Jonathan Mitchell. Although Mitchell does not subscribe to the "disregard" theory described above—on the contrary, he argues that the power to "set aside" agency action "is a veto-like power that enables the judiciary to formally revoke an agency's rules, orders, findings, or conclusions"[96]—he acknowledges that his interpretation "does not resolve whether courts should extend relief beyond the named litigants."[97] He explains that a district court can "preserve the subparts and applications of the agency's action that do not present legal difficulties, simply by characterizing the legal and illegal components as distinct agency 'actions.'"[98] Thus, even assuming that "set aside" authorizes a remedy, the text does not show that this remedy is universal as opposed to party-specific.[99]

3. Applying a Clear-Statement Principle to the "Set Aside" Debate

The Justices who embrace the major questions doctrine recognize that clear statutory text can authorize an agency to address a major question.[100] By analogy, clear statutory text could provide a basis to conclude that district

95. *See* Wall v. CDC, No. 6:21-cv-975, 2022 WL 1619516 (M.D. Fla. Apr. 29, 2022).

96. Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 1012 (2018).

97. *Id.* at 1014.

98. *Id.* at 1013.

99. In a footnote to a recent statement respecting the denial of a stay application, Justice Kavanaugh quoted Mitchell for the proposition that the "set aside" language in § 706 of the APA "empower[s] the judiciary to act directly against the challenged agency action." Griffin v. HM Fla.-ORL, LLC, 144 S. Ct. 1, 2 n.1 (2023) (quoting Mitchell, *supra* note 96, at 1012). Justice Kavanaugh apparently overlooked Mitchell's caveat that this interpretation "does not resolve whether courts should extend relief beyond the named litigants." Mitchell, *supra* note 96, at 1014. There was no briefing on the "set aside" issue in *Griffin*, which was a suit challenging a Florida law and thus did not involve the APA. As noted above, Florida's Solicitor General argued that injunctions must be party-specific. *See supra* note 80.

100. West Virginia v. EPA, 597 U.S. 697, 722–23 (2022).

court judges have authority to vacate a rule universally, even if you are convinced by my arguments below that the asserted power of universal vacatur should be regarded as a major question.

Proponents of universal vacatur generally do not contend that the phrase "set aside," taken in isolation, clearly authorizes universal vacatur. Instead, they rely on inferences drawn from two adjacent APA provisions—§§ 705 and 706(1)—but their arguments rest on mistaken assumptions about those two provisions.

Section 705 provides that a reviewing court "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."[101] Section 706(1) provides that a district court shall "compel agency action unlawfully withheld or unreasonably delayed."[102] In *Texas*, the plaintiffs argued that their position "harmonizes the 'set aside' authority with the rest of the APA."[103] They urged that "[i]t would be illogical for the APA to allow a court to 'postpone the effective date of an agency action' during litigation, 5 U.S.C. § 705, but be powerless to terminate that action if the court concludes the action is 'unlawful.'"[104] "Likewise," they argued, "section 706(1) suggests that section 706(2) authorizes vacatur.[105] The former allows courts to 'compel' agency action while the latter authorizes the inverse."[106]

The assumption underlying this argument is that §§ 705 and 706(1) authorize remedies that are universal rather than party-specific. But as Sohoni acknowledges, the legislative history explains that the § 705 authority "is equitable" and that "[s]uch relief would normally, if not always, be limited to the parties complainant . . . ."[107] Indeed, Sohoni notes, the "relevant legislative history of [§ 705] . . . indicates that it was primarily intended to reflect existing law under the *Scripps-Howard* doctrine."[108] And *Scripps-Howard Radio v. FCC*[109] itself involved party-specific relief: the Supreme Court held that a court's authority to review an FCC order granting a construction permit to a radio station carried with it the power to stay that an FCC order

101. 5 U.S.C. § 705.

102. § 706(1).

103. Brief for Respondents at 40, United States v. Texas, 599 U.S. 670 (2023) (No. 22-58) 2022 WL 12591050 (citing § 706(2)).

104. *Id.*

105. *Id.*

106. *Id.*

107. Sohoni, *supra* note 71, at 1157 n.184 (quoting H.R. REP. NO. 79-1980, at 277 (1946)).

108. *Id.* (quoting Sampson v. Murray, 415 U.S. 61, 68–69 n.15 (1974)).

109. 316 U.S. 4 (1942).

pending review of a competitor station's challenge.[110]

Similarly, the Supreme Court has explained that § 706(1) "carried forward the traditional practice prior to its passage, when judicial review was achieved through use of the so-called prerogative writs—principally writs of mandamus."[111] Mandamus is party-specific relief and accordingly, the D.C. Circuit has refused to compel agency action under § 706(1) or mandamus—despite agency delay in acting on a plaintiff's application for statutory benefits (Tribal recognition in one case and drug approval in another)—when granting party-specific relief would simply move the plaintiff to the "head of the queue" of similarly situated entities.[112]

More generally, Sohoni acknowledges that the APA's legislative history does not "explicitly address[] the precise question that is our concern here—whether *universal* vacatur of rules is authorized."[113] Levin recognizes that "agencies did most of their policymaking through adjudication at the time of the APA's enactment" and concludes that "Congress probably did not foresee the advent of agencies' widespread reliance on substantive rulemaking" that began in the 1960s and 1970s.[114] Thus, neither the APA's

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110. *See id.* at 8–9.

111. Norton v. S. Utah Wilderness All., 542 U.S. 55, 63 (2004).

112. *See* Mashpee Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094, 1100 (D.C. Cir. 2003) (quoting In re Barr Lab'ys., Inc., 930 F.2d 72, 75 (D.C. Cir. 1991)). *Barr Laboratories* was a direct-review case rather than a district court action under § 706(1), but it illustrates that mandamus is a party-specific remedy. *See* 930 F.2d at 73.

113. Sohoni, *supra* note 71, at 1154. Sohoni identifies three cases during the pre-APA period in which a three-judge district court vacated or enjoined an agency order universally, but each involved a special statutory review provision. *See id.* at 1146–51. She also describes the D.C. Circuit's injunction in Lukens Steel Co. v. Perkins, 107 F.2d 627 (D.C. Cir. 1939), but as she recognizes, the Supreme Court reversed that injunction and criticized it for going "beyond any controversy that might have existed between the complaining companies and the [] Government officials." *See id.* at 1152 (quoting Perkins v. Lukens Steel Co., 310 U.S. 113, 123 (1940)). Furthermore, as Sohoni notes, the passage from the 1941 Attorney General's Report that cited *Perkins* also likened "'judicial review of administrative regulations'" to "an attack on . . . a statute" that "can involve 'the validity of a regulation as a whole.'" *Id.* at 1153 & n.165 (quoting Attorney General's Commission on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. DOC. NO. 77-8, at 115 (1st Sess. 1941)). The Supreme Court had by that time announced that the Judiciary has "little more than the negative power to disregard an unconstitutional enactment." Massachusetts v. Mellon, 262 U.S. 447, 488 (1923). Thus, whatever might be inferred from the discussion of *Perkins* in the 1941 Attorney General's report, it does not show that Congress specifically intended for the APA to authorize universal vacatur of an agency rule.

114. Levin, *supra* note 71, at 2013–14.

text nor its context clearly show that Congress intended to authorize universal vacatur. It is, therefore, timely and appropriate for the Supreme Court to consider whether the principles that underlie the major questions doctrine require the Court to reject the universal vacatur interpretation of "set aside." For the reasons set out below, they do.

B. Separation of Powers Matters and the Presumption of Continuity (Redux)

As discussed in Part II, the Justices who embrace the major questions doctrine do so as a means to keep officials who wield federal power in their lanes—either because of a presumption that Congress intends to do so, to avoid constitutional problems, or both. When we examine the justifications offered for universal vacatur, we see that this broad interpretation of "set aside" raises analogous concerns. First, a district court's judgment of universal vacatur usurps the role of the Supreme Court. Second, in a significant category of cases, universal vacatur extinguishes the rights of absent parties without due process. Third, universal vacatur infringes on the Executive Branch's responsibility to determine how federal law should be enforced.

1. Usurping the Role of the Supreme Court

In rejecting Bray's contention that a district court judge should "simply prescribe relief for the successful plaintiff and wash its hands of broader issues,"[115] Levin argues that "the power to vacate a rule" universally "has proved to be an indispensable component of judicial review of rulemaking."[116] He expresses doubt that "the present Supreme Court, with its skepticism about real or perceived abuses of agency power, would have any interest in abandoning that role."[117]

This line of argument blurs the distinction between the Supreme Court and a district court. The party-specific interpretation of "set aside" constrains the scope of a district court's judgment; it does not diminish the Supreme Court's ability to establish precedent that binds courts nationwide. And as a practical matter, an agency cannot continue to enforce a requirement that the Supreme Court has declared unlawful, because any aggrieved entity could challenge the enforcement action in a forum that would be bound by the Supreme Court's decision. Indeed, the government would risk Rule 11 sanctions if it continued to defend a rule that the Supreme Court had declared unlawful (assuming the government lacked a good-faith

115. *Id.* at 2006–07 (discussing Bray, *supra* note 92, at 476).

116. *Id.* at 2015.

117. *Id.* at 2007.

argument that the Supreme Court should reconsider its decision).[118]

District courts differ from the Supreme Court in fundamental ways. Unlike the Supreme Court—which Justice Jackson famously described as "infallible only because" it is "final"[119]—a district court judgment is neither final nor infallible. Its judgment is subject to appellate review and reversal.[120] And there is no reason to assume, in the abstract, that a district court judge who finds an agency's rule to be unlawful is more likely to be affirmed than a district court judge who finds the same rule to be lawful. Recall, for example, the Supreme Court's decisions upholding the vaccination requirement for workers in federally funded healthcare facilities,[121] the travel ban,[122] and exemptions from the contraceptive-coverage requirement.[123] Each of these executive branch policies had been deemed unlawful by one or more district court judges.[124] Of course, the Supreme Court sometimes agrees with a district court that an agency policy is unlawful, but that is not a reason to privilege the opinion of one district court judge over another. As the judge who rejected a challenge to CDC's transportation mask mandate observed,[125] "[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case."[126] The role of a district court judge is to adjudicate the respective rights of the parties, not to assess whether there is "desire to facilitate percolation" of legal issues or to "counteract forum shopping."[127]

Universal vacatur transforms each district court judge into a miniature Supreme Court. One judge's decision to vacate a rule universally renders the contrary decisions of other district court judges meaningless. It also

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118. *See* FED. R. CIV. P. 11(b)(2).

119. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the judgment) ("We are not final because we are infallible, but we are infallible only because we are final.").

120. 28 U.S.C. § 1291.

121. Biden v. Missouri, 595 U.S. 87 (2022) (per curiam).

122. Trump v. Hawaii, 585 U.S. 667 (2018).

123. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 591 U.S. 657 (2020).

124. Missouri v. Biden, 571 F. Supp. 3d 1079, 1104 (E.D. Mo. 2021); Hawaii v. Trump, 265 F. Supp. 3d 1140, 1160 (D. Haw. 2017); Pennsylvania v. Trump, 281 F. Supp. 3d 553, 585 (E.D. Pa. 2017).

125. *See* Wall v. CDC, No. 6:21-cv-975, 2022 WL 1619516, at *5 n.11 (M.D. Fla. Apr. 29, 2022).

126. Camreta v. Greene, 563 U.S. 692, 709 (2011) (quoting MOORE, *supra* note 56, at 134-26.

127. Levin, *supra* note 71, at 2026.

renders meaningless the contrary decisions of courts of appeals. Consider, for example, the district court's judgment in *Oklahoma ex rel. Pruitt v. Burwell*[128] which addressed the same Internal Revenue Service (IRS) premium tax credit rule that the Supreme Court ultimately upheld in *King v. Burwell*.[129] At the time the district court entered its judgment in *Oklahoma*, the Fourth Circuit had concluded that the IRS regulation was lawful.[130] A divided panel of the D.C. Circuit had reached the opposite conclusion, but the full court had vacated that panel decision for rehearing en banc.[131] Nonetheless, after explaining that it found the reasoning of the D.C. Circuit panel majority persuasive, the judge in *Oklahoma* "vacated" the IRS rule universally.[132] The judge avoided creating chaos and stepping on the toes of the Fourth Circuit and D.C. Circuit by entering a sua sponte stay of its vacatur order pending appeal,[133] but the universal vacatur interpretation of "set aside" does not require such a stay. The universal vacatur interpretation of "set aside" would allow a single judge to vacate a rule universally even if the same rule has already been found lawful by the courts of appeals for *every* circuit apart from its own.

It is thus a considerable understatement to say that the universal vacatur interpretation of "set aside" would "confer an unusual form of authority" on a district court judge.[134] That authority would undermine the modest role that, under the Constitution and by statute, a district court judge occupies vis-à-vis the Supreme Court, other district court judges, and the courts of appeals.

2. Extinguishing Rights of Absent Parties Without Due Process

The premium tax credit litigation discussed above illustrates another structural problem raised by universal vacatur: in a significant category of cases, that remedy extinguishes the rights of absent parties without due process. It is a "due process 'principle of general application in Anglo–American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'"[135] That principle is based in

128. 51 F. Supp. 3d 1080 (E.D. Okla. 2014), *rev'd sub nom.*, 2015 WL 13824466 (10th Cir. July 28, 2015).

129. 576 U.S. 473 (2015).

130. *See* King v. Burwell, 759 F.3d 358 (4th Cir. 2014).

131. *See* Halbig v. Burwell, 758 F.3d 390 (D.C. Cir. 2014), *reh'g en banc granted, judgment vacated*, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014).

132. 51 F. Supp. 3d at 1093.

133. *See id.*

134. Biden v. Nebraska, 143 S. Ct. 2355, 2382–83 (2023) (Barrett, J., concurring).

135. Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999) (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)).

"our deep-rooted historic tradition that everyone should have his own day in court."[136] "As a consequence, '[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.'"[137]

The *Oklahoma* court's judgment of universal vacatur nonetheless extinguished the rights of millions of people who were strangers to the case. The IRS regulation at issue in the premium tax credit cases provides that the IRS will pay tax credits to subsidize premiums regardless of whether a person buys a plan through the marketplace run by the federal government (the contested issue, which affected people living in thirty-four states) or through the marketplaces run by state governments.[138] The vast majority of people (87% in 2014) who buy plans through the federal marketplace do so with the benefit of these tax credits.[139] Yet under the universal vacatur theory, the *Oklahoma* district court's vacatur of the IRS rule "obliterate[d]"[140] the rights of millions of absent parties.[141]

Similar due process issues arise from universal vacatur whenever the agency's rule protects people who have an independent right to enforce the rule's requirements. Consider, for example, the Fair Labor Standards Act (FLSA), which imposes a legal duty on employers to pay overtime and gives employees the right to enforce that requirement against their employer through a private action for damages.[142] The FLSA exempts various categories of employees and directs the U.S. Department of Labor (DOL) to define and delimit the scope of those exemptions by regulation.[143] A district court judge entered a preliminary injunction that barred DOL from enforcing one such rule, and the judge later held nonparty employees in contempt for seeking to enforce the rule against their employer in an independent action.[144] Reversing the contempt sanctions, the Fifth Circuit reasoned that the

136. *Id.* (internal quotation marks omitted) (quoting 18 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449, at 417 (1981)).

137. Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996) (quoting Martin v. Wilks, 490 U.S. 755, 762 (1989) and citing Blonder-Tongue Lab'ys, Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971)).

138. *See* King v. Burwell, 576 U.S. 473, 484 (2014).

139. *See id.* at 494.

140. Sohoni, *supra* note 71, at 1131 (quotation marks omitted).

141. As explained above, chaos was avoided only because the judge in *Oklahoma* stayed its judgment sua sponte. *See supra* Part III(B)(1).

142. *See* 29 U.S.C. §§ 207, 216(b).

143. *See, e.g.*, § 213(a)(1).

144. *See* Texas v. Dep't of Lab., 929 F.3d 205, 207 (5th Cir. 2019).

preliminary injunction did not bind the nonparty employees.[145] Although the same due process constraint applies at the final judgment stage, the universal vacatur interpretation of "set aside" would leave a judge free to extinguish a rule and thus nullify the independent rights of nonparties.

Yet another example of this due process problem arose in a recent case involving the Affordable Care Act's requirement that insurance plans cover, without cost sharing, items and services that have an "A" or "B" rating from the U.S. Preventive Services Task Force. By statute, that coverage requirement can be privately enforced by employees and their beneficiaries.[146] A district court judge, nonetheless, universally vacated agency actions implementing the coverage requirement and thereby extinguished the independent rights of 150 million nonparties.[147]

Then-Professor Barrett argued that even the doctrine of stare decisis can raise a due process issue, to the extent that it deprives nonparties of the opportunity to be heard on the merits of their claims or defenses.[148] And the rationales that are typically offered for stare decisis—that it "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process"[149]—are plainly not reasons for a district court judge to extinguish third-party rights. As Chief Judge Sutton has explained, "[t]he law already has a mechanism for applying a judgment to third parties."[150] "That is the role of class actions, and Civil Rule 23 carefully lays out the procedures for permitting a district court to bind nonparties to an action."[151] Rule 23 is itself the product of the express delegation of authority that Congress gave the Supreme Court in the Rules Enabling Act.[152] Paraphrasing Justice Barrett once again, an interpretation of "set aside" that circumvents the required class-action procedures thus would undermine "Congress's creation of 'a distinct regulatory scheme'" to

145. *See id.* at 210–13.

146. *See* 29 U.S.C. § 1132(a)(1)(B), (3).

147. *See* Braidwood Mgmt., Inc. v. Becerra, No. 4:20-CV-00283-O, 2023 WL 2703229, at *1 (N.D. Tex. Mar. 30, 2023). Pending appeal, the Fifth Circuit stayed the district court's universal remedies, pursuant to a stipulation by the parties. *See* Grant of Stay Pending Appeal, Braidwood Mgmt., Inc. v. Becerra, No. 23-10326, (5th Cir. May 15, 2023).

148. *See* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1026 (2003).

149. Gamble v. United States, 139 S. Ct. 1960, 1969 (2019).

150. Arizona v. Biden, 40 F.4th 375, 396 (6th Cir. 2022) (Sutton, C.J., concurring).

151. *Id.*

152. *See supra* Part II(A).

govern district court proceedings.[153]

3. Usurping the Executive Branch's Enforcement Discretion

A third structural problem created by universal vacatur is that it allows district court judges to usurp the core executive branch responsibility of determining how to enforce—that is, to execute—federal law. Consider, for example, the universal vacatur entered by the judge who found CDC's transportation mask mandate unlawful. Although that case was not a class action, the judge reasoned that universal relief was needed because of "[t]he difficulty of distinguishing the named Plaintiffs from millions of other travelers . . . ."[154] But that putative difficulty was a problem for the agency to consider, not one for the district court to address preemptively. CDC's mask mandate itself exempted individuals who could not wear a mask because of a disability that is within the scope of the Americans with Disabilities Act.[155] If, nonetheless, CDC could not find a workable way to exempt only the "named Plaintiffs" in the case, CDC could have chosen not to enforce the mask mandate on a wider scale. But that was a policy call for CDC to make: a district court may not preemptively remove such enforcement discretion from the Executive Branch, where it is vested by Article II of the Constitution.[156]

The Supreme Court underscored that principle in *United States v. Texas*.[157] At issue were guidelines issued by the Secretary of Homeland Security that prioritized the arrest and removal from the United States of certain noncitizens, such as ones who were suspected terrorists or dangerous criminals.[158] In a suit brought by two states, the district court universally vacated the guidelines, reasoning that "[u]niversal relief can be appropriate to ensure uniformity in immigration policies as prescribed by federal law."[159] But as the Supreme Court explained in holding that the plaintiffs lacked

153. Biden v. Nebraska, 143 S. Ct. 2355, 2382 (2023) (Barrett, J., concurring) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

154. Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1177 (M.D. Fla. 2022).

155. *See id.* at 1155 (describing that exemption).

156. As discussed in Part IV *infra*, the district court compounded the problem by granting relief to unidentified members of the plaintiff organization.

157. *See* United States v. Texas, 599 U.S. 670, 678–79 (2023) (discussing the Article II enforcement power of the Executive Branch).

158. *Id.* at 673.

159. Texas v. United States, 606 F. Supp. 3d 437, 500 (S.D. Tex. 2022).

standing, there is no requirement that *enforcement* of immigration law be uniform.[160] On the contrary, "the Executive's Article II authority to enforce federal law . . . extends to the immigration context . . . ."[161] It is the responsibility of the agency—not a district court—to decide whether to extend court-imposed, party-specific relief more broadly because of an interest in uniform enforcement or other policy concerns.

For similar reasons, Levin is mistaken to urge that "the courts' ability to order the nullification of rules on an across-the-board basis is, in many instances, a practical necessity."[162] He argues that an agency "needs to be able to develop and implement these rules on a uniform, or at least holistically designed, basis[;]" that if a single regulated company seeks judicial review of a rule and prevails, "the court cannot award relief only to that company without creating chaos[,]" and that, "[i]f the rule is to be revised, it must be revised to apply to all similarly situated companies."[163] And he cites as an example the Supreme Court's decision in *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*,[164] which held that the agency did not adequately explain a rule rescinding the requirement that car manufacturers include airbags in new cars.[165] But the *State Farm* example illustrates that an agency faces a different set of options after an adverse Supreme Court decision than it faces after it loses in district court.[166] A Supreme Court decision establishes precedent that binds lower courts nationwide, so as a practical matter, an agency generally has no choice but to implement it on a uniform basis.[167] By contrast, the question that an agency typically confronts after an adverse district court decision is what to do pending appellate review. In many situations, the agency may be in a position to limit relief to the prevailing party without creating chaos. That is a matter of enforcement policy for the agency to consider rather than a justification for a district court judge to enter universal relief.

Of course, there may be circumstances in which relief that is tailored to

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160. *See* 599 U.S. at 674, 678–79 (discussing the Executive Branch's ability to choose arrest or prosecute individuals).

161. *Id.* at 678–79.

162. Levin, *supra* note 71, at 2005.

163. *Id.*

164. 463 U.S 29 (1983).

165. *Id.* at 34.

166. *See generally id.* (discussing the district court's holding and the analyzing Supreme Court review of agency appeals).

167. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

the plaintiff also benefits nonparties. For example, if a district court in an unreasonable delay case orders an agency to file status reports on its progress in taking the relevant agency action, interested nonparties can read the status reports as well.[168] In those circumstances, the "remedial order affects nonparties," but "it does so only incidentally."[169] The possibility of such incidental benefits is not a reason to construe "set aside" to authorize a district court judge to vacate (or compel) agency action on a universal basis. Whatever one may think of executive branch agencies, they are more accountable politically than are district court judges. Cabinet secretaries serve at the pleasure of the President—the politically accountable official who is especially likely to take credit and receive blame when his Administration addresses a matter of vast economic and political significance.[170] Indeed, the Supreme Court emphasized in *United States v. Texas* that "through elections, American voters can both influence [e]xecutive [b]ranch policies and hold elected officials to account . . . ."[171] By contrast, a district court judge is unelected and, by virtue of Article III's life tenure and salary protections, is insulated from political accountability on an ongoing basis.

C. "Five Times Before Breakfast": The Mistaken D.C. Circuit Precedent

Proponents of universal vacatur often quote the D.C. Circuit's 1998 decision in *National Mining Ass'n v. U.S. Army Corps of Engineers*[172] for the proposition that universal vacatur of an agency's rule is the "ordinary result" of a successful pre-enforcement APA challenge.[173] As Levin notes, at oral argument in *Texas*, the Chief Justice and Justice Kavanaugh—both former members of the D.C. Circuit—expressed incredulity at the notion that

168. *See*, *e.g.*, Agua Caliente Band of Cahuilla Indians v. Mnuchin, No. 20-CV-01136, 2020 WL 2331774, at *8 (D.D.C. May 11, 2020) (requiring the Secretary of the Department of the Treasury to file regular reports regarding his progress in paying Title V funds to "Tribal governments").

169. United States v. Texas, 599 U.S. 670, 693 (2023) (Gorsuch, J., concurring).

170. *See* Feds for Med. Freedom v. Biden, 25 F.4th 354, 357 (5th Cir. 2022) (Higginson, J., dissenting) (noting that the President is "the most singularly accountable elected official in the country.").

171. *Texas*, 599 U.S. at 685.

172. 145 F.3d 1399 (D.C. Cir. 1998).

173. Sohoni, *supra* note 71, at 1122 n.1 (quoting *Nat'l Mining Ass'n*, 145 F.3d at 1409, and citing 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.").

universal vacatur is unauthorized.[174] The Chief Justice quipped that the D.C. Circuit vacates agency rules "five times before breakfast" and described the government's position as "fairly radical . . . ."[175] Justice Kavanagh likewise declared that the government's position was "a pretty radical rewrite, as the Chief Justice says, of what's been standard administrative law practice."[176]

As Justice Gorsuch noted in his concurring opinion in *Texas*, D.C. Circuit precedent merits "respectful consideration" even though it does not bind the Supreme Court.[177] The author of the *National Mining* opinion, Judge Williams, was among the ablest of judges. But he was also endowed with humility and quick to welcome wisdom that "comes late."[178] It is in that spirit that we should reexamine the reasoning of *National Mining*.[179]

The phrase "ordinary result," used in *National Mining*,[180] first appeared in a footnote in the D.C. Circuit's 1989 decision in *Harmon v. Thornburgh*,[181] which stated, "[w]hen 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."[182] The court did not provide any citation or additional explanation for this footnote. Moreover, *Harmon* did not involve a district court's authority to vacate an agency's rule.[183] The judgment on appeal was an injunction that prohibited the Department of Justice from implementing random urinalysis drug testing program for specified categories of Department employees.[184] The D.C. Circuit narrowed the injunction for merits reasons[185] and observed, in a different footnote, that "[i]t is possible that DOJ will argue on remand that the injunction should apply only to named plaintiffs, not to similarly-situated

174. Levin, *supra* note 71, at 2000 (quoting the oral argument transcript); Transcript of Oral Argument, at 35–36, 54–55, United States v. Texas, 143 S. Ct. 1964 (2023) (No. 22-58).

175. Levin, *supra* note 71, at 2000.

176. *Id.*

177. United States v. Texas, 599 U.S. 670, 701 (2023) (Gorsuch, J., concurring).

178. Fraternal Ord. of Police v. United States, 173 F.3d 898, 900–01 (D.C. Cir. 1999) (Williams, J.) (quoting Henslee v. Union Planters Nat'l Bank & Tr. Co., 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting)).

179. Nat'l Mining Ass'n v. U.S. Army Corps Eng'rs,145 F.3d 1399, 1409 (D.C. Cir. 1998).

180. *Id.*

181. 878 F.2d 484 (D.C. Cir. 1989).

182. *Id.* at 495 n.21.

183. *See generally id.* (analyzing an appeal on an injunction against a U.S. Department of Justice (DOJ) program).

184. *See id.* at 485.

185. *See id.*

agency employees."[186] The origin of the "ordinary result" language is thus unexplained dicta from a footnote in *Harmon*.[187]

Nine years later, the D.C. Circuit decided *National Mining*, which involved a facial challenge to a rule issued by the Army Corps of Engineers that required a permit for virtually all excavation and dredging performed in wetlands.[188] The plaintiffs—"various trade associations whose members engage in dredging and excavation"—alleged that the rule (referred to as the *Tulloch* rule) exceeded the agency's statutory authority.[189] The district court agreed and entered a judgment providing that the "*Tulloch* rule is declared invalid and set aside, and henceforth is not to be applied or enforced by the Corps of Engineers or the Environmental Protection Agency."[190] The D.C. Circuit affirmed, and most of the opinion was devoted to the merits.[191]

The relevant part of *National Mining*'s remedy discussion is short. The opinion treated, as its starting point, the unexplained dicta from the *Harmon* footnote.[192] The opinion then noted that Justice Blackmun's dissenting opinion in *Lujan v. National Wildlife Federation*[193] made "a similar observation[.]"[194] Based on a footnote in the *Lujan* majority's opinion, *National Mining* suggested that Justice Blackmun was "apparently expressing the view of all nine Justices[.]"[195] But as Sohoni recognizes, the majority's cross-referenced footnote was "a hypothetical dictum."[196] *National Mining*'s justifications for universal vacatur are thus in this single paragraph:

> Moreover, if persons adversely affected by an agency rule can seek review in the district court for the District of Columbia, as they often may, see 28 U.S.C. § 1391(e), our refusal to sustain a broad injunction is likely merely to generate a flood of duplicative

186. *Id.* at 496 n.23. In the same footnote, the *Harmon* court suggested that DOJ might have waived this argument by failing to raise it in the first appeal.

187. *Id.*

188. Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1401 (D.C. Cir. 1998).

189. *Id.* at 1401–02.

190. *Id.* at 1408 (quoting Am. Mining Cong. v. U.S. Army Corps of Eng'rs, 951 F. Supp. 267, 278 (D.D.C. 1997).

191. *See generally id.* (discussing the merits of the district court's decision to overrule the *Tulloch* rule).

192. *See id.* at 1409 (citing Harmon v. Thornburgh, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989).

193. 497 U.S 871 (1990).

194. *Nat'l Mining Ass'n*, 145 F.3d at 1409 (citing *Lujan*, 497 U.S. at 913).

195. *Id.*

196. Sohoni, *supra* note 71, at 1139 n.91.

> litigation. Even though our jurisdiction is not exclusive, an injunction issued here only as to the plaintiff organizations and their members would cause all others affected by the Tulloch Rule (or at least all those with enough at stake and with astute enough lawyers) to file separate actions for declaratory relief in this circuit. Issuance of a broad injunction obviates such repetitious filings. It does so, to be sure, at the cost of somewhat diminishing the scope of the "non-acquiescence" doctrine, under which the government may normally relitigate issues in multiple circuits. *See* United States v. Mendoza, 464 U.S. 154 (1984). By contrast, agency defeats in other circuits cannot produce as severe an effect, because, although other courts can also issue nationwide injunctions, they need not fear a flood of relitigation since venue restrictions would exclude many would-be plaintiffs from access to the invalidating court. The resulting gap in the effective scope of the non-acquiescence doctrine appears to be no more than an inevitable consequence of the venue rules in combination with the APA's command that rules "found to be . . . in excess of statutory jurisdiction" shall be not only "h[e]ld unlawful" but "set aside." 5 U.S.C. § 706(2)(C).[197]

It should be clear from the quoted passage that the D.C. Circuit's vacatur practice rests on shaky foundations. The passage conflates concepts of venue, precedent, and judgments that it is important to keep distinct. The venue statute that *National Mining* cited generally makes federal agencies suable in the District Court for the District of Columbia.[198] As a result, the practical impact of D.C. Circuit precedent is much greater than the practical impact of the precedents of other circuits. If the D.C. Circuit issues a published opinion holding that an agency's rule is unlawful, that opinion establishes precedent that binds all of the district court judges in the District of Columbia. Thus, agencies have a strong incentive to throw in the towel after a D.C. Circuit loss in a case like *National Mining*, where it was reasonable to assume that regulated nonparties would simply file follow-on suits in the district court in D.C. if the agencies continued to enforce the rule against them.[199] By contrast, as *National Mining* explained, "agency defeats in other circuits cannot produce as severe an effect" because "venue restrictions would exclude many would-be plaintiffs" from filing suit in a district court within those circuits.[200]

The practical impact of D.C. Circuit precedent has nothing to do with the scope of a district court's judgment, however, and it certainly does not suggest that the APA allows district court judges to vacate an agency's rule universally. Indeed, if the APA gave district court judges the authority to vacate an agency's

197. *Nat'l Mining Ass'n*, 145 F.3d at 1409–10.

198. 28 U.S.C § 1391(e).

199. For the same reason, agencies have relatively little incentive to quarrel over the scope of relief in the D.C. Circuit. *See* Samuel Bray, *Vacatur and United States v. Texas*, REASON (Nov. 30, 2022, 2:02 AM), https://reason.com/volokh/2022/11/30/vacatur-and-united-states-v-texas/.

200. *Nat'l Mining Ass'n*, 145 F.3d at 1409–10.

rule universally, then each and every one of the over 600 district court judges around the country would have the power to vacate a rule universally.

The practical impact of an adverse D.C. Circuit opinion depends on whether nonparties are actually likely to bring follow-on suits if the agency continues to implement or enforce the rule. Sometimes, the entities covered by a rule are uniformly hostile to it, but sometimes, they are not. Recall the IRS's premium tax credit rule, which a divided D.C. Circuit panel declared unlawful. The panel majority assumed that its "ruling will likely have significant consequences both for the millions of individuals receiving tax credits through federal Exchanges and for health insurance markets more broadly."[201] But there was no basis for that assumption. Although the lone individual found to have standing, David Klemencic, objected to receiving the tax credits that made his health insurance affordable, there was no reason to believe that millions of nonparties felt the same way and would have filed follow-on suits in the district court in D.C. if the IRS continued to pay their tax credits.[202] On the contrary, everyone living outside D.C. could have sued in their home districts to compel the IRS to resume paying the tax credits if the IRS had halted them on the basis of the D.C. Circuit's ruling.

The premium tax credit litigation was unusual because it was designed (for partisan reasons) to extinguish a benefit that millions of people wanted. Nonetheless, that litigation underscores that the question of whether to acquiesce in adverse D.C. Circuit precedent is an enforcement decision for the agency. Contrary to *National Mining*'s premise, the possibility of follow-on suits in the district court in D.C. is not a basis to interpret the APA's "set aside" language to allow every district court judge around the country to vacate a rule universally.

At the oral argument in *Texas*, Justice Barrett posed an interesting set of questions to the Solicitor General. Justice Barrett asked:

> [L]et's say that I agree with you and agree with some of the scholarship that says that

201. Halbig v. Burwell, 758 F.3d 390, 412 (D.C. Cir. 2014).

202. The panel concluded that David Klemencic had standing because the tax credits meant he would pay only $21 per year for health coverage, which would make his coverage affordable pursuant to a statutory formula and thus make him subject to the individual mandate's tax penalty if he failed to maintain such coverage. *See id.* at 396–97. Klemencic was also a plaintiff in Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012), where he intervened in the Supreme Court after the lead plaintiff's standing was called into question. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 565 U.S. 1154 (2012) (motion to add parties Dana Grimes and David Klemencic as additional petitioners in No. 11-343 and additional respondents in Nos. 11-398) (granting intervention).

> [universal 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? . . . [S]et aside is broad, right? It's not specific.[203]

I suggest two overarching responses. The first is that the APA's judicial review provisions are not written like the Rules Enabling Act of 1934, which vests the Supreme Court with authority to prescribe and revise the rules that govern district court proceedings. In the APA, Congress itself addressed the scope of a district court's review of agency action, even though it could have used the Rules Enabling Act as a model.

The second is the central theme of this Article. By any of the metrics used in the Supreme Court's major questions doctrine cases, a district court judge's asserted authority to vacate an agency's rule universally should qualify as a major question. There is no sound reason to conclude that Congress "meant to upset the bedrock practice of case-by-case judgments with respect to the parties in each case" by including the "unremarkable" "set aside" language in § 706.[204] In other words, "Congress does not hide elephants in mouseholes."[205] Even if the APA allows for administrative common law in some contexts,[206] the principles that underlie the major questions doctrine provide compelling reasons to reject the arguments for universal vacatur.

IV. TRANSPOSING THE MAJOR QUESTIONS DOCTRINE TO THE APA PHRASE "PERSON . . . AGGRIEVED"

A. Broad Injunctions Entered at the Behest of Membership Organizations and State Governments

Rejecting the universal vacatur interpretation of "set aside" is necessary to restore the remedial authority of district court judges to its conventional scope, but it is not sufficient to do so. That is because it has become increasingly common for district court judges to grant sweeping relief at the behest of membership organizations and state governments.

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203. Transcript of Oral Argument at 59–60, United States v. Texas, 143 S. Ct. 1964 (2023) (No. 22-58).

204. Arizona v. Biden, 40 F.4th 375, 396 (6th Cir. 2022) (Sutton, C.J., concurring).

205. Biden v. Nebraska, 143 S. Ct. 2355, 2382 (2023) (Barrett, J., concurring) (quotation marks omitted) (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

206. *See* Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1347–52 (2012) (documenting how the APA's silence on some key issues invites courts to exercise flexibility and discretion); *see also* Christopher J. Walker & Scott T. MacGuidwin, *Interpreting the Administrative Procedure Act: A Literature Review*, 98 NOTRE DAME L. REV. 1963 (2023) (examining competing methodologies for APA interpretation).

In *Feds for Medical Freedom v. Biden*,[207] for example, the district court judge entered sweeping relief at the behest of a membership organization. The judge enjoined nationwide an Executive Order that required approximately 3.5 million federal employees to be vaccinated against COVID-19 (subject to exemptions). The judge reasoned that "tailoring relief" was not "practical" because the "lead plaintiff, Feds for Medical Freedom, has more than 6,000 members spread across every state and in nearly every federal agency, and is actively adding new members," and that "limiting the relief to only those before" the court "would prove unwieldy and would only cause more confusion."[208] The en banc Fifth Circuit affirmed the injunction's nationwide scope even though the D.C. Circuit and the Fourth Circuit had upheld the dismissal of analogous challenges to the Executive Order, and the Third Circuit was considering an appeal from a decision in the government's favor.[209]

The *Louisiana* case discussed above—which involved the rule requiring Head Start grantees to ensure that their staff were vaccinated against COVID-19 (subject to exemptions)—illustrates a broad injunction entered at the behest of states.[210] The judge enjoined the rule's enforcement against every Head Start center located within any of the twenty-four plaintiff states, even though the plaintiffs had identified only one Head Start center that was state-run (a center run by Southern Utah University, which is a component of the State of Utah).[211] In describing the nature of the twenty-four states' injuries, the judge relied on collateral effects that the states claimed the rule's enforcement against third parties would have on the states' fiscs, such as "alleged loss of jobs, businesses, [and] tax revenue" and increased "unemployment benefits" that the plaintiffs claimed would "result[] from employees being fired for refusing the vaccine, and/or providers being terminated" from the Head Start program for noncompliance with the rule.[212]

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207. 581 F. Supp. 3d 826 (S.D. Tex. 2022), *aff'd*, 63 F.4th 366 (5th Cir. 2023) (en banc).

208. *Id.* at 836.

209. *Feds for Medical Freedom,* 63 F.4th at 394 (Oldham, J., dissenting in relevant part).

210. *See supra* Part I.

211. Louisiana v. Becerra, 629 F. Supp. 3d 477, 496 (W.D. La. 2022), *aff'd in part*, *vacated in part*, 20 F.4th 260 (5th Cir. 2021); *see* Defendants' Response in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, Louisiana v. Becerra, No. 3:21-cv-04370, 2021 WL 7185875 (W.D. La. Dec. 29, 2021) (acknowledging that Southern Utah University was a Head Start grantee, but otherwise contesting the plaintiff states' standing).

212. 629 F. Supp. 3d at 487. The judge also ruled that the states could bring *parens patriae* actions against the federal government. *See id.* However, as discussed in the text below, that theory is foreclosed by longstanding Supreme Court precedent.

Similarly, the two district court judges who enjoined the rule requiring COVID-19 vaccination for staff in federally funded healthcare facilities—i.e., the rule that the Supreme Court later upheld in *Biden v. Missouri*[213]—relied on the rule's asserted collateral effects on state governments to justify enjoining the rule's enforcement against healthcare facilities writ large, rather than against only the small number of healthcare facilities that were state-operated. For example, one judge reasoned that the rule's application to healthcare facilities located within the ten plaintiff states "would have a negative effect on the economies in [p]laintiff states" that was distinct from the harm to state "proprietary interests" arising from the rule's application to those healthcare facilities that the plaintiff states "themselves operate."[214] The effect of these two injunctions was to block, in roughly half the country, the implementation of a rule that the Supreme Court later upheld as a proper exercise of the agency's authority to protect vulnerable patients in federally funded hospitals, nursing homes, and other medical facilities.[215]

District court judges likewise issued sweeping injunctions at the behest of states during the Trump Administration. For example, in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*,[216] which was a suit brought by Pennsylvania and New Jersey, the district court enjoined—nationwide—the implementation of a rule exempting insurers and plans with religious or moral exemptions from the requirement to cover contraceptives.[217] And in *Trump v. Hawaii*,[218] which was a suit brought by Hawaii, three individuals, and the Muslim Association of Hawaii, a district court enjoined—nationwide—the enforcement of a presidential proclamation restricting entry into the United States by foreign nationals of designated countries.[219]

B. "Prudential Standing" and Statutory Interpretation

Sweeping injunctions of the kinds described above create separation of powers problems that are comparable and often identical to the problems created by a judgment of universal vacatur. They enable individual judges to assume the role of super-legislator. They usurp the prerogatives of the

213. 595 U.S. 87 (2022).

214. Missouri v. Biden, 571 F. Supp. 3d 1079, 1102 (E.D. Mo. 2021), *rev'd*, 595 U.S. 87 (2022). The other judge enjoined the rule's enforcement nationwide, but the Fifth Circuit stayed the injunction to the extent that it applied outside the fourteen plaintiff states. *See* Louisiana v. Becerra, 20 F.4th 260, 263–64 (5th Cir. 2021).

215. *See Missouri*, 595 U.S. at 92–97.

216. 591 U.S. 657 (2020).

217. *See id.* at 672–73.

218. 585 U.S. 667 (2018).

219. *See id.* at 680–81.

Supreme Court, courts of appeals, and other district court judges. They adjudicate the rights of nonparties without their consent. And they preemptively curtail the enforcement discretion that Article II vests in the Executive Branch. The principles that underlie the major questions doctrine thus provide compelling reasons to interpret the APA's text to avoid these problems. And as I explain in Parts C and D below, the phrase "person . . . aggrieved" in APA § 702[220]—which for simplicity, I will henceforth shorten to "person aggrieved" or "persons aggrieved"—is readily construed in ways that curb a district court judge's ability to grant sweeping relief at the behest of membership organizations and state governments.

It bears emphasis that the proposals I offer for identifying who qualifies as a "person aggrieved" under APA § 702 do not implicate the concern about "prudential standing" doctrine that the Supreme Court raised in *Lexmark International, Inc. v. Static Control Components, Inc.*[221] Writing for the Court, Justice Scalia observed that an argument that a federal court should decline to adjudicate an Article III case "on grounds that are 'prudential[]' rather than constitutional" is "in some tension" with "the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging."[222]

Justice Scalia took pains, however, to explain that this tension is not implicated when the Supreme Court is endeavoring "to ascertain, as a matter of statutory interpretation, the scope of [a] private remedy created by Congress" and "the class of persons who could maintain" suit under "that legislatively conferred cause of action."[223] He noted, for example, that the Supreme Court's earlier decision holding that only "plaintiffs whose injuries were proximately caused by a defendant's antitrust violations" could bring a private damages action under § 4 of the Clayton Act "rested on statutory, not 'prudential,' considerations."[224]

It is equally appropriate to use "traditional principles of statutory interpretation"[225] when determining the scope of the cause of action that APA § 702 confers on a "person aggrieved" by agency action. Indeed, *Lexmark* explained that the "zone of interests" test originated "as a limitation on the cause of action for judicial review conferred by the Administrative

220. *See* 5 U.S.C. § 702.

221. 572 U.S. 118 (2014).

222. *Id.* at 125–26 (internal quotation marks omitted).

223. *Id.* at 126 (internal quotation marks omitted).

224. *Id.*

225. *Id.* at 128.

Procedure Act (APA)."[226] As already explained, transposing the principles that underlie the major questions doctrine to the APA's judicial review provisions is a project of statutory interpretation.[227] Accordingly, "'prudential standing' is a misnomer" in this context.[228]

C. Actions Brought by Membership Organizations

I will begin the discussion of suits by membership organizations with my bottom line. When a membership organization brings an APA action on behalf of its members, only those members whom the complaint identifies—by name—as having agreed to be bound by the judgment should be regarded as "persons aggrieved," and only those members should be eligible for relief.[229]

That proposal may sound radical, but it follows from conventional legal principles. A membership organization that sues in a representative capacity is acting as an agent; the principals are the members it represents, who are the real parties in interest.[230] In a conventional suit, the real parties in interest must identify themselves in the complaint[231] and, by doing so, they agree to be bound by the judgment.[232]

Nothing in the APA's text suggests an intent to depart from that conventional model by allowing membership organizations to obtain relief on behalf of unidentified members. Indeed, nothing in the APA's text specifically contemplates actions by membership organizations at all. Nor was there an apparent pre-APA practice of suits by membership

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226. *Id.* at 129.

227. *See supra* Part II.A.

228. *Lexmark*, 572 U.S. at 127 (internal quotation marks omitted).

229. As in a conventional suit, privacy interests of members can be protected where necessary through the use of pseudonyms, protective orders, and the like. *See, e.g.*, Doe v. Cabrera, 307 F.R.D. 1 (D.D.C. 2014).

230. *Cf.* Biden v. Nebraska, 143 S. Ct. 2355, 2379 (2023) (Barrett, J., concurring) (describing other principal-agent relationships).

231. *See* FED. R. CIV. P. 17(a)(1) (generally providing that "[a]n action must be prosecuted in the name of the real party in interest.").

232. *See* FED. R. CIV. P. 17 advisory committee's note to 1966 Amendment (explaining that "the modern function of the rule in its negative aspect is . . . to insure generally that the judgment will have its proper effect as res judicata"); *cf.* Taylor v. Sturgell, 553 U.S. 880, 884 (2008) (noting the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not *designated as a party* or to which he has not been made a party by service of process") (internal quotation marks omitted) (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)) (emphasis added); *id.* at 893 (noting as an exception to this principle that a nonparty "who agrees to be bound by the determination of issues in an action between others is bound in accordance with the terms of his agreement").

organizations, much less suits in which organizations were allowed to obtain relief for unidentified members. Although the Supreme Court once suggested that there was pre-APA authority for "associational standing," the underlying citation does not support that point. In its 1986 decision in *International Union v. Brock*,[233] the Supreme Court declared: "It has long been settled that [e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members."[234]

The cited opinion in *National Motor Freight Ass'n v. United States*[235]—a one-paragraph per curiam decision—in turn cited a pre-APA case, the Supreme Court's 1940 decision in *FCC v. Sanders Bros. Radio Station*,[236] for the proposition that a membership organization has standing to represent the interests of its members.[237] But *Sanders* did not involve a membership organization: it was an action brought by a radio station that objected to an FCC order granting a construction permit to its competitor.[238] The Supreme Court held that the objecting radio station was a "person aggrieved" within the meaning of the direct-review provision of the Communications Act of 1934[239]—a holding that has nothing to do with associational standing.

The Supreme Court later offered practical reasons for allowing an association to bring suit on behalf of members. In *International Union*, for example, the Court reasoned that suits by associations are "advantageous both to the individuals represented and to the judicial system as a whole" because "an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital."[240] The Court also stated that "the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others."[241]

These practicalities may be sound reasons for allowing a membership organization to sue on behalf of members, but they provide no basis to excuse the organization from identifying in the complaint those members who agreed to be represented and thereby bound. As Curtis Bradley and Ernest Young have explained in their comprehensive examination of third-party

233. 477 U.S. 274 (1986).

234. *Id.* at 281 (quoting Warth v. Seldin, 422 U.S. 490, 511 (1975) (citing Nat'l Motor Freight Ass'n v. United States, 372 U.S. 246 (1963)).

235. 372 U.S. 246 (1963) (per curiam).

236. 309 U.S. 470 (1940).

237. *Nat'l Motor Freight Ass'n*, 372 U.S. at 247.

238. *See Sanders*, 309 U.S. at 471–72.

239. *Id.* at 472–73.

240. 477 U.S. 274, 289 (1986).

241. *Id.* at 290.

standing,[242] it is otherwise "far from clear that members are bound by any adverse judgment against the organization."[243] People join organizations for many reasons, and there is no empirical basis to assume that all members have implicitly authorized the organization to file lawsuits on their behalf. The same due process principles that preclude a district court judge from adjudicating the rights of nonparties through universal vacatur likewise precludes a judge from doing so in a membership organization's lawsuit, absent a member's express agreement to be bound. Indeed, *International Union* recognized that if an organization does not "represent adequately the interests of all their injured members," "a judgment won against it might not preclude subsequent claims by the association's members without offending due process principles."[244]

Conversely, members of an organization should not be able to obtain relief unless they commit up front to be bound by an adverse judgment. The district court's suggestion in *Feds for Medical Freedom* that a nationwide injunction was appropriate because the plaintiff organization was "actively adding new members"[245] would be unheard of in other contexts. Indeed, Rule 23's requirement that a judge rule on a motion for class certification at an early stage of the proceedings was designed to prevent "'one-way' intervention."[246]

Returning to this Article's central theme, the Supreme Court should be reluctant to find that Congress intended "to confer an unusual form of authority" on district court judges "without saying more."[247] Thus, when the plaintiff is a membership organization, the Court should interpret "person aggrieved" with the limitations proposed above.[248]

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242. *See generally* Curtis A. Bradley & Ernest A. Young, *Unpacking Third-Party Standing*, 131 YALE L. J. 1 (2021).

243. *Id.* at 69.

244. 477 U.S. at 290.

245. 581 F. Supp. 3d 826, 836 (S.D. Tex. 2022), *vacated*, 30 F.4th 503 (5th Cir. 2022), *reh'g granted*, 37 F.4th 1093 (5th Cir. 2022).

246. FED. R. CIV. P. 23 (advisory committee's note to 1966 Amendment) (internal quotation marks omitted).

247. Biden v. Nebraska, 143 S. Ct. 2355, 2383 (2023) (Barrett, J., concurring).

248. Examining associational standing doctrine more broadly, Micheal Morley and Andrew Hessick have argued that the doctrine should be abandoned or reformed in at least five respects. *See* Michael T. Morley & F. Andrew Hessick, *Against Associational Standing*, U. CHI. L. REV. (forthcoming, 2023), https://ssrn.com/abstract=4540176. In the specific context of an APA action, my proposed interpretation of "person aggrieved" should address the central concerns that Morley and Hessick identified. *See id.*; *supra* Part IV(C).

D. Actions Brought by State Governments

The explosion of partisan-driven APA actions by state governments is well documented. Depending on which major political party controls the Presidency, "red states" or "blue states" routinely bring suits under the APA to challenge executive branch policies.[249] There is a wealth of literature that examines the rationales for and implications of such litigation.[250]

My focus is on the distinctive remedial issues presented by such state suits. The interpretation of the APA proposed here is similar to the membership-organization proposal offered above. Specifically, the Supreme Court should hold that when a state brings an APA action, the only "person aggrieved" is the particular component of the state that is directly injured by the challenged federal rule, and only that component is eligible for relief. A state should not be regarded as a "person aggrieved" simply because the rule's enforcement against people or entities located within the state will have collateral consequences for the state (budgetary or otherwise).

The fact pattern in *Nebraska* illustrates how this interpretation would work in practice. There, six states brought suit under the APA to challenge a student loan forgiveness plan developed by the Secretary of Education.[251] The district court dismissed the complaint on standing grounds, but the Eighth Circuit entered a nationwide preliminary injunction pending its disposition of the appeal.[252] The Supreme Court granted certiorari before judgment and held that Missouri had standing because the Missouri Higher Education Loan Authority (MOHELA)—a nonprofit government corporation that Missouri had created to participate in the student loan market—would be directly injured by the Secretary's loan forgiveness plan, which would cause MOHELA to lose an estimated $44 million a year in fees that it otherwise would have earned under its contract with the Department of Education.[253] The Supreme Court further held that the State of Missouri could sue on MOHELA's behalf, reasoning that "[w]here a State has been harmed in carrying out its responsibilities, the fact that it chose to exercise its authority through a public corporation it created and controls does not bar

249. *See, e.g.*, Ernest A. Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893 (2019).

250. *See*, *e.g.*, Tara Leigh Grove, *Foreword: Some Puzzles of State Standing*, 94 NOTRE DAME L. REV. 1883, 1883 n.1 (2019) (providing examples).

251. *See Nebraska*, 143 S. Ct. at 2362.

252. *See id.* at 2365.

253. *See id.* at 2365–66.

the State from suing to remedy that harm itself."[254] After rejecting the agency's position on the merits, the Supreme Court remanded for further proceedings consistent with its opinion.[255] The Supreme Court did not address the scope of the injunction, apart from stating incorrectly that the issue was "moot."[256]

Under the interpretation that I propose, MOHELA alone was the "person aggrieved" and, although Missouri could bring suit on MOHELA's behalf, the injunction should have prohibited only the forgiveness of student loans serviced by MOHELA. The plaintiff states could not premise standing or obtain relief based on collateral effects on the states that would arise from the forgiveness of loans serviced by other entities.[257] Likewise, the only "person aggrieved" in *Louisiana* was the single Head Start grantee that was identified as an arm of one of the plaintiff states,[258] and the district court's injunction should have been limited to barring enforcement of the staff-vaccination requirement against that grantee alone rather than against all Head Start grantees located within the twenty-four plaintiff states. And the only "persons aggrieved" in *Missouri* were the small number of state-run healthcare facilities subject to the staff-vaccination rule, so the injunctions there should have been limited to those facilities rather than made applicable to all healthcare facilities located within the plaintiff states.[259]

This alternative interpretation may sound radical, but it carries forward important structural principles that predate the APA. Although a state may

254. *See id.* at 2368.

255. *See id.* at 2375–76.

256. *Id.* at 2376.

257. Of course, the Supreme Court's conclusion that the loan forgiveness plan exceeds the Secretary's authority is precedent that binds courts nationwide, and as a practical matter, that precedent provided reason for the Secretary to abandon the plan entirely. I am differentiating here between precedent and the scope of district court relief, which are distinct issues. As Baude and Bray note, it is surprising that the Supreme Court overlooked the distinction between judgment and precedent in *Nebraska*, given that the Court had emphasized that distinction just two weeks earlier in *Haaland v. Brackeen*, 599 U.S. 255, 293–94 (2023). *See* Baude & Bray, *supra* note 46, at 178–79, 186–87 (emphasizing the importance of understanding the distinction between judgments and opinions).

258. *See* Louisiana v. Becerra, 629 F. Supp. 3d. 477, 496 (W.D. La. 2022) (identifying Sandy Brick as the lone individual plaintiff harmed by the challenged requirement) *aff'd in part*, *vacated in part*, No. 22-30748, 2023 WL 8368874 (5th Cir. Aug. 29, 2023).

259. *See* Reply in Support of Applications for Stays, Biden v. Missouri, Nos. 21A240, 21A241, 2022 WL 2270198, at *16–17 (explaining that "the vast majority of the facilities subject to the condition are *private* entities participating in Medicare and Medicaid" and that the condition applies "to state-run hospitals and other facilities only in the same manner as they apply to federally funded facilities generally").

bring a *parens patriae* action against a *private* entity to protect its citizens from injury, the Supreme Court held in 1923 (and has since reiterated) that a state cannot bring a *parens patriae* action against the federal government to protect its citizens from injury.[260] The Supreme Court reasoned that "the citizens of [a state] are also citizens of the United States," and that "it is no part of [a state's] duty or power to enforce their rights in respect of their relations with the [f]ederal [g]overnment."[261]

This limitation on state standing to sue the federal government would be essentially meaningless if a state were treated as a "person aggrieved" under the APA simply because the agency's regulation of people or entities located within the state has indirect impacts on the state. As the Supreme Court recognized in *Texas*, "in our system of dual federal and state sovereignty, federal policies frequently generate indirect effects on state revenues or state spending."[262] The Court suggested that such "indirect effects" may be too "attenuated" even to meet Article III's requirements.[263] But assuming that such indirect injuries suffice for Article III purposes, they need not and should not be regarded as sufficient to demonstrate that a state is a "person aggrieved" for purposes of the APA's cause of action.

A contrary interpretation would give states hostile to the policies of whichever political party controls the presidency the ability to block such executive branch policies in half the country—a major transfer of power from the federal government to the states.[264] That federalism impact would be especially pronounced because of the way the Supreme Court has framed the major questions doctrine.[265] Under the Supreme Court's reasoning, the "majorness" of a question depends in part on the "political significance" of the federal policy[266] and whether that policy "has been the subject of an

260. *See* Massachusetts v. Mellon, 262 U.S. 447, 485–86 (1923).

261. *See id.*; *see also* Florida v. Mellon, 273 U.S. 12, 18 (1927) (reaffirming this principle); Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 610 n.16 (1982) (same); *Brackeen*, 599 U.S. at 294–95 (same).

262. United States v. Texas, 599 U.S. 670, 680 n.3 (2023).

263. *Id.*

264. Adam Liptak, *The Curious Rise of a Supreme Court Doctrine That Threatens Biden's Agenda*, N.Y. TIMES (Mar. 6, 2023), https://www.nytimes.com/2023/03/06/us/politics/supreme-court-major-questions-doctrine.html (discussing the transfer of power amid a politically skewed doctrine).

265. *See* West Virginia v. EPA, 597 U.S. 697 (2022) (discussing factors that implicate the major questions doctrine).

266. *Id.* at 721 (internal quotation marks omitted).

earnest and profound debate across the country[.]"[267] Given this framing, district court judges can seize on the fact that large numbers of "red states" or "blue states" have challenged a federal policy as evidence that the issue is politically charged enough to trigger the major questions doctrine.

There is strong precedent for interpreting a general term like "person" to avoid this significant federalism impact. At issue in *Will v. Michigan Department of State Police*,[268] was the cause of action in 42 U.S.C. § 1983, which authorizes private suits against any "person" who, acting under color of state law, deprives another person of any rights, privileges, or immunities secured by the Constitution and federal laws. Interpreting the term "person," the Supreme Court held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983."[269] The Court reasoned that when "Congress intends to alter the 'usual constitutional balance between the [s]tates and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"[270] The same principle holds when an interpretation of a federal statute would transfer substantial power from the federal government to the states, as would be the case if states were treated as "persons aggrieved" under the APA simply because of the indirect effects on states that arise from a federal rule's enforcement against third parties. Accordingly, the Supreme Court should hold that a rule's collateral impact on a state does not suffice to make the state a "person aggrieved" for purposes of the APA.[271]

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267. *Id.* at 732 (internal quotation marks omitted).

268. 491 U.S. 58 (1989) (resolving whether a state is a person under § 1983).

269. *Id.* at 71.

270. *Id.* at 65 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)). At the same time, the Court reaffirmed that the term "person" incudes municipalities. *Id.* at 62 (citing Monell v. N.Y.C Dep't of Soc. Servs., 436 U.S. 658, 690 (1978). The Court also clarified that "a state official in his or her official capacity, when sued for injunctive relief, would be a person." *Id.* at 71 n.10 (first citing Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985); then citing Ex parte Young, 209 U.S. 123, 159–60 (1908)).

271. My interpretation of "person aggrieved" should mitigate the problem of forum shopping and judge shopping that others have described. *See*, *e.g.*, Steve Vladeck, *The Growing Abuse of Single-Judge Divisions*, ONE FIRST, (Mar. 13, 2023), https://stevevladeck.substack.com/p/18-shopping-for-judges (defining judge shopping as "where plaintiffs are able to pick the specific judge who hears a specific case simply by manipulating where the case is filed."); Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29, 42–51 (2019) (providing a substantial overview of forum shopping and its "unfortunate consequences"). To illustrate, the *Louisiana* case was brought by twenty-four states and filed in the Western District of Louisiana, but under my interpretation of "person aggrieved," only Utah would have been a proper

I will end this discussion of state APA suits with a few observations about the implications of my argument. First, my argument about the scope of the APA's cause of action for a "person aggrieved" does not necessarily carry over to the causes of actions in other federal statutes. For example, the judicial review provision of the Clean Air Act that was at issue in *Massachusetts v. EPA*[272] uses different language and serves different purposes than the APA. Second, my argument does not necessarily foreclose statewide relief in an APA action. For example, as part of the American Rescue Plan Act,[273] Congress authorized grants for states to use for specified purposes and authorized the Treasury Department to issue implementing rules.[274] If, hypothetically, a state had successfully challenged a rule as impermissibly restricting the state's expenditure of federal funds, statewide relief might well have been appropriate. Third, although the focus of my argument has been on cabining the relief that is available when states bring suit under the APA, a consequence is that some federal policies will not be subject to a challenge by any state because no component of any state is directly injured by the challenged federal policy. Under such circumstances, only the directly injured parties can bring suit under the APA to challenge the federal policy.

CONCLUSION

I will close this Article by anticipating two questions. First, how can the Supreme Court resolve the interpretive issues about the scope of relief that is available under the APA, given that a Supreme Court decision often resolves the dispute on the merits? Second, why shouldn't the Supreme Court leave some wiggle room for district court judges to enter sweeping relief in extraordinary cases? After all, even Chief Judge Sutton—who has thoughtfully and comprehensively shown why universal remedies "have not been good for the rule of law"—has left some wiggle room, urging that "[t]he sooner they are

plaintiff. *See* Louisiana v. Becerra, 629 F. Supp. 3d. 477, 485 (W.D. La. 2022), *aff'd in part*, *vacated in part*, No. 22-30748, 2023 WL 8368874 (5th Cir. Aug. 29, 2023). The available venues thus would have been limited to the District of Utah or the District of Columbia. *See* 28 U.S.C. § 1391(b)(1) (making venue dependent, in part, on where a plaintiff or defendant resides).

272. 549 U.S. 497, 505–06 (2007) (describing the EPA's authority under § 202(a)(1) of the Clean Air Act).

273. Pub. L. No. 117-2, 135 Stat. 4 (2021) (delivering a $1.9 trillion stimulus package to help American families and the American economy recover from the COVID-19 pandemic).

274. § 9901, 135 Stat. at 4 (appropriating $219,800,000,000 to states, territories, and tribal governments to respond to economic effects of COVID-19).

confined to discrete settings or eliminated root and branch the better."[275]

The answer to the first question draws on the distinction between a judgment and a precedent that is a recurring theme of this piece. It is true that when the Supreme Court definitively resolves a case in an agency's favor, the district court has no choice on remand but to enter a judgment for the agency, which means that the scope of relief is a moot point. But that is not true when the Supreme Court rules against the agency. In *Nebraska*, for example, the Supreme Court, having held that the Secretary's loan forgiveness plan was unlawful, could have instructed the lower courts on remand to narrow the injunction to encompass only loans serviced by MOHELA. Although the Supreme Court's opinion established precedent that binds all lower courts in the nation—thus making it futile in practice for the Secretary to forgive loans serviced by any objecting entity—that precedential impact is distinct from the scope of the lower court's judgment. Likewise, if the Supreme Court's opinion resolves only certain issues and leaves other issues for the lower courts to consider on remand (as it did in *Little Sisters*), the Supreme Court can properly address the scope of relief. Thus, the Supreme Court can and should resolve the interpretative questions that are the subject of this Article when the Court is presented with an appropriate vehicle.

The second question brings us full circle to the problem of indeterminacy. Simply put, there are too many district court judges to allow each one to decide whether a particular APA case is extraordinary enough to warrant a sweeping remedy. It takes just one judge to enter a universal vacatur or broad injunction that presents all of the problems catalogued above. And a district court judge will be especially apt to deem a sweeping remedy appropriate when the judge believes—rightly or wrongly—that a federal agency has impermissibly resolved an issue of vast economic and political significance. Therefore, to restore district court judges to their properly limited roles and temper the anti-democratic quality of the major questions doctrine, the Supreme Court should adopt bright-line constraints on the scope of relief that eliminate sweeping district court remedies "root and branch."[276] If a particular dispute calls for a universally binding resolution, the Supreme Court alone should provide it.

If you found this Article persuasive, you may be wondering whether the principles that underlie the major questions doctrine should be transposed to other areas as well, such as to other aspects of judicial review under the APA or to other federal statutes that delegate authority to federal courts. For example, I have argued (as have others before me) that the APA's judicial review provisions should not be interpreted to undermine Rule 23's strictures

275. Arizona v. Biden, 40 F.4th 375, 398 (6th Cir. 2022) (Sutton, C.J., concurring).

276. *Id.*

for class action litigation.[277] But how do we know that Rule 23 is a permissible exercise of the general authority that Congress vested in the Supreme Court through the Rules Enabling Act? To use the parlance of the major questions doctrine, why doesn't Rule 23 itself address an issue of vast economic significance, given that class certification can lead to "potentially ruinous liability[?]"[278] The answer to such questions will depend in large measure on how the Supreme Court resolves indeterminacies in the major questions doctrine going forward. Perhaps asking such questions will persuade the Court to rein in the major questions doctrine itself.

277. *See supra* Part II.B.1.

278. FED. R. CIV. P. 23(f) (advisory committee's note to 1988 amendment).