**No. 21-40137**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

LAUREN TERKEL; PINEYWOODS ARCADIA HOME TEAM, LIMITED; LUFKIN CREEKSIDE APARTMENTS, LIMITED; LUFKIN CREEKSIDE APARTMENTS II, LIMITED; LAKERIDGE APARTMENTS, LIMITED; WEATHERFORD MEADOW VISTA APARTMENTS, L.P.; and MACDONALD PROPERTY MANAGEMENT, L.L.C.,

*Plaintiffs-Appellees*,

v.

CENTER FOR DISEASE CONTROL AND PREVENTION; ROCHELLE P. WALENSKY, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE CENTERS FOR DISEASE CONTROL AND PREVENTION; SHERRI A. BERGER, IN HER OFFICIAL CAPACITY AS ACTING CHIEF OF STAFF FOR THE CENTERS FOR DISEASE CONTROL AND PREVENTION; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; XAVIER BECERRA, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; and UNITED STATES OF AMERICA,

*Defendants-Appellants*.

On Appeal from the United States District Court
for the Eastern District of Texas
Case No. 6:20-CV-564

# BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

David B. Goode
BAKER BOTTS L.L.P.
98 San Jacinto Blvd., Suite 1500
Austin, Texas 78701-4078
T: 512.322.2500
F: 512.322.2501
david.goode@bakerbotts.com

Megan H. Berge
BAKER BOTTS L.L.P.
700 K Street, N.W.
Washington, DC 20001-5692
T: 202.639.7700
F: 202.639.7890
megan.berge@bakerbotts.com

**COUNSEL FOR *AMICUS CURIAE***

## SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to the persons and entities listed in the parties' Certificates of Interested Persons, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

***Amicus Curiae:***

National Association of Home Builders

Amy Chai
Thomas Ward
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th Street, NW
Washington, DC 20005
T: 202.266.8232
achai@nahb.org
tward@nahb.org

***Counsel for Amicus Curiae:***

Megan H. Berge
BAKER BOTTS L.L.P.
700 K Street, N.W.
Washington, DC 20001-5692
T: 202.639.7700
F: 202.639.7890
megan.berge@bakerbotts.com

David B. Goode
BAKER BOTTS L.L.P.
98 San Jacinto Blvd., Suite 1500
Austin, Texas 78701-4078
T: 512.322.2500
F: 512.322.2501
david.goode@bakerbotts.com

*/s/ Megan H. Berge*
Megan H. Berge

*Counsel of Record for Amicus Curiae*
*National Association of Home Builders*

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

**CASES**

**CONSTITUTION**



**STATUTES AND RULES**

**LEGISLATIVE MATERIALS**



**ADMINISTRATIVE MATERIALS**



**OTHER AUTHORITIES**

## STATEMENT OF AMICUS CURIAE[1]

Amicus curiae National Association of Home Builders ("NAHB") is a trade association whose mission is to enhance the climate for housing and the building industry. NAHB seeks to provide and expand opportunities for safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, who construct 80% of all homes built in the United States. NAHB represents both single family and multifamily builders, and many of its members are landlords. The Order issued by the Centers for Disease Control and Prevention ("CDC"), "Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19," 85 Fed. Reg. 55292 (Sept. 4, 2020) (the "CDC Order"), directly impacts NAHB's members.

NAHB proactively participates as a party litigant and amicus where litigation involves issues that impact its members. To that end, NAHB offers

[1] Justin MacDonald, President and CEO of MacDonald Companies, is an NAHB member. MacDonald Companies is a group that includes Plaintiff-Appellee MacDonald Property Management, L.L.C. No party's counsel authored this brief in whole or in part. And no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, its members, or its counsel made such a monetary contribution. Amicus has requested leave from the Court to file this brief, and the parties do not oppose amicus's motion for leave.

insight to aid this Court in determining the proper remedy under section 706 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, should the Court find the CDC Order invalid.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus curiae NAHB files this amicus brief to explain why the Government's attempt to limit the district court's judgment to the Plaintiff-Appellees alone disregards the plain language of the APA and longstanding court precedent.

The district court unequivocally declared that the CDC Order exceeded the federal government's power and set the CDC Order aside. *Terkel v. CDC*, ___ F. Supp. 3d ___, No. 6:20-cv-00564, 2021 WL 742877, at *2 (E.D. Tex. Feb. 25, 2021). It did not enjoin the CDC Order because the district court "anticipated that [the Government] would respect the declaratory judgment." *Id.* (quoting *Poe v. Gerstein*, 417 U.S. 281, 281 (1974) (per curiam)). The Government, however, immediately appealed, and issued a statement that "[t]he decision . . . does not extend beyond the particular plaintiffs in that case, and it does not prohibit the application of the CDC's eviction moratorium to other parties. For other landlords who rent to covered persons, the CDC's eviction moratorium remains in effect." Office of Public Affairs, *Department of Justice Issues Statement Announcing Decision to Appeal*

Terkel v. CDC, U.S. Dep't of Justice (Feb. 27, 2021).[2] The Government's position flies in the face of the APA and court precedent.

The APA compels vacatur of agency action found to be invalid, and agency actions that are designed to apply nationwide must be vacated on a similar scale. Otherwise, a patchwork of inconsistent district court rulings would dot the national landscape. Parties subject to the same federal action would benefit or suffer from the agency's action based solely on their fortuitous geographic location and financial wherewithal to bring suit. Such piecemeal enforcement becomes not just arbitrary and inefficient, but inequitable to those who are not parties to proceedings challenging agency action. By contrast, vacating the rule in its entirety is not unduly burdensome or prejudicial to the Government. The Government can seek judicial relief from broad application of a court's order and vacatur in toto ensures agency compliance with prevailing legal standards.

Should the Court find the CDC Order invalid, the CDC Order must be vacated in its entirety, not solely with respect to Plaintiffs-Appellees. Anything less would result in inconsistent application of the CDC's Order. Congress enacted the APA to avoid such an arbitrary and unfair result.

[2] https://www.justice.gov/opa/pr/department-justice-issues-statement-announcing-decision-appeal-terkel-v-cdc.

## ARGUMENT

### I. The APA was enacted to ensure consistent actions by administrative agencies and compliance with the law.

The APA was enacted to bring order to the chaotic web of emerging administrative agencies. *See* S. Rep. No. 79-752, at 1 (1945) (stating the purpose of the APA "to settle and regulate the field of Federal administrative law and procedure"). In the years before the APA was enacted, there was a growing concern that disparate activities by agencies hindered a uniform approach to federal government administration and impaired the separation of powers; the executive branch had "grown up without plan or design like the barns, shacks, silos, tool sheds, and garages of an old farm." President's Committee on Administrative Management, *Report of the Committee with Studies of Administrative Management in the Federal Government* 31-32 (1937).

Accordingly, Congress enacted the APA as "a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government." 92 Cong. Rec. 2149 (1946), *reprinted in Administrative Procedure Act: Legislative History 79th Congress, 1944-46*, at 298 (1946). It was designed to "protect private parties even at the risk of some incidental or possible inconvenience" to administrative operations. S. Rep. No. 79-752, at 5; *see also United States v.*

*Morton Salt Co.*, 338 U.S. 632, 644 (1950) ("The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices.").

Consistent with this purpose, the APA ensured judicial review of agency action. *See* H.R. Rep. No. 79-1980, at 9-10 (1946) ("Congress [had] created administrative agencies without regard to any uniformity of the judicial review provisions." (quoting S. Rept. No. 76-442, at 9-10 (1939))); 5 U.S.C. § 702 ("A person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof."). The APA thus "contains comprehensive provisions for judicial review for the redress, of any legal wrong. And, since it is drawn entirely upon a functional basis, it contains no exemptions of agencies as such." H.R. Rep. No. 79-1980, at 10. And the Supreme Court has repeatedly recognized the importance of judicial review under the APA: "legal lapses and violations occur, and especially so when they have no consequence. That is why this Court has so long applied a strong presumption favoring judicial review of administrative action." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (quoting *Mach Mining, LLC v. EEOC*, 575

U.S. 480, 489 (2015)); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring in part) ("Congress passed the [APA] to ensure that agencies follow constraints even as they exercise their powers. . . . To achieve that end, Congress confined agencies' discretion and subjected their decisions to judicial review.").

In other words, the APA ensures that those who suffer a legal wrong because of an agency's action are not without a remedy.

## II. Vacatur of an invalid agency action under section 706 of the APA is mandatory and universal.

The plain text of the APA compels the remedy for an unlawful agency action: vacatur of the agency action. Specifically, section 706 provides that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions" that fall within any one of six categories, including action that is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2). Thus, when a reviewing court finds that an agency acted unlawfully, that agency action is held invalid and set aside. And the scope of the agency's wrong determines the scope of the court's relief. Vacatur is universal for agency actions that are designed to apply universally.

If the Court finds that the CDC's Order is unconstitutional, as the lower court has, the APA instructs that the Court "shall" set it aside. As this Court is aware, "[u]se of the word 'shall' connotes a mandatory intent." *In re DP*

*Partners Ltd. P'ship*, 106 F.3d 667, 670-71 (5th Cir. 1997); *see also Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020) (quoting *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016)); *Ola Props. Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 336 F. App'x 419, 421 (5th Cir. 2009) (per curiam) (explaining that "[u]nder § 706, agency action must be set aside . . . if the action failed to meet statutory, procedural, or constitutional requirements"). And "set aside" generally means "to annul or vacate." *Set Aside*, Black's Law Dictionary (11th ed. 2019). This is true under section 706: Setting aside means vacating. *See Sw. Elec. Power Co. v. U.S. Envtl. Prot. Agency*, 920 F.3d 999, 1022 (5th Cir. 2019) (citing *Checkosky v. SEC*, 23 F.3d 452, 491 (D.C. Cir. 1994) (Randolph, J.)); *Action on Smoking & Health v. CAB*, 713 F.2d 795, 797 (D.C. Cir. 1983) (per curiam) ("To 'vacate,' . . . means 'to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside.'" (citation omitted)). The text of the APA thus compels courts to vacate invalid agency actions.

Courts have authority to declare an agency action inapplicable nationwide where the action at issue concerns a nationally applicable regulation, order. "[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class."

*Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). "[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." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)). *See Chamber of Commerce of U.S. v. U.S. Dep't of Labor*, 885 F.3d 360, 388 (5th Cir. 2018) (vacating a Department of Labor rule *in toto* where the agency exercised arbitrary and capricious administrative power). "Section 706(2) does not tell a circuit court to 'set aside' unlawful agency action only within the geographic boundaries of that circuit. Vacatur of an agency rule prevents its application to all those who would otherwise be subject to its operation."[3] *E. Bay Sanctuary Covenant v. Garland*,

[3] Amicus recognizes that whether to vacate an agency order nationwide or with respect to the plaintiffs and affected parties within a court's jurisdiction is subject to the court's discretion. *See* Pls.' Mem. of Law in Supp. of Mot. to Clarify or Am. J. at 11-12, *Skyworks Ltd. v. CDC*, No. 5:20-cv-02407-JPC (N.D. Ohio Apr. 7, 2021), ECF 58. Although there may be prudential reasons for a court to limit the scope of its order, *see Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."), the key consideration informing that discretion is the character and scope of the challenged agency action, *see Am. Farm Bureau Fed'n v. U.S. Envtl. Prot. Agency*, No. 3:15-CV-00165, 2018 WL 6411404, at *2 (S.D. Tex. Sept. 12, 2018) ("[A] preliminary injunction should only be granted nationwide when it is clear and unambiguous that the harm threatened is one of

994 F.3d 962, 987 (9th Cir. 2020), *as amended* (2021). If the "agency action" is a "rule of broad applicability . . ., the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual." *Nat'l Mining Ass'n*, 145 F.3d at 1409 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting)).[4]

This Circuit has affirmed a district court's authority to order a nationwide injunction and universal vacatur of agency action with broad applicability. *See Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd per curiam by an equally divided Court*, 136 S. Ct. 2271 (2016). In *Texas v. United States*, this Court rejected the Government's argument that an injunction prohibiting the Department of Homeland Security from implementing the Deferred Action for Parents of Americans and Lawful Permanent Residents program should be limited to Texas or the plaintiff states. *Id.* at 187-88. The Court explained that "the Constitution vests the District Court with

national character.").

[4] *See also, e.g.*, *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 677 (S.D.N.Y. 2019) ("Because the Secretary's *decision* was universal, APA relief directed at that decision may—indeed, arguably must—be too."), *aff'd in part, rev'd in part, and remanded on other grounds sub nom. Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019); *Wyoming v. Dep't of Agric.*, No. 07-CV-017-B, 2009 WL 10670655, at *2 (D. Wyo. June 15, 2009) ("If the Rule is illegal, as this Court has found it to be, then it is illegal nationwide, just as it was enforced nationwide.").

'the judicial Power of the United States.' That power is not limited to the district wherein the court sits but extends across the country." *Id.* at 188 (quoting U.S. Const. art. III, § 1. And the Court emphasized that not only did the Constitution require "an *uniform* Rule of Naturalization," *id.* at 187 (quoting U.S. Const. art. I, § 8, cl. 4), Congress instructed that immigration laws be enforced "*uniformly*," *id.* at 187-88 (quoting Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384). Accordingly, the Court concluded that "[i]t is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction." *Id.* at 188.

In sum, the plain language of section 706 of the APA requires that a reviewing court vacate an agency's action found to violate Section 706(2). *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019)[5] (explaining that there is no plausible reason for *Auer* deference where no uncertainty exists in a regulation; "[t]he regulation then just means what it means—and the court must give it effect, as the court would any law"). Where, as here, an agency's action

---

[5] Although the Supreme Court "has never *squarely decided* that the term 'set aside' authorizes universal vacatur," Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121, 1139 (2020), "it has affirmed lower court decisions that have invalidated rules universally," *id.* at 1138 & n.87 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *Whitman v. Am. Trucking Ass'ns Inc.*, 531 U.S. 457, 486 (2001); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020)).

applies nationwide,[6] so too must the court's relief from that action.

## III. Nationwide injunctive relief is necessary to prevent the Government from enforcing agency actions deemed invalid.

Should the Court find the CDC Order invalid, the CDC Order must be vacated in its entirety, not solely with respect to Plaintiffs-Appellees. Anything less would result in inconsistent enforcement of the CDC's Order. Neither Congress (in enacting the APA) nor the CDC (in enacting the CDC Order) intended such an arbitrary result. In fact, Congress intended just the opposite by enacting the APA.

The Government has recently taken the position that an unlawful agency action can only be invalidated with respect to the plaintiffs who brought the case.[7] *See, e.g.*, Memorandum from the Attorney General,

---

[6] The issue in this case indisputably concerns agency action of national character: the CDC's authority to issue a national moratorium on local evictions. The CDC Order provides that a landlord, residential property owner, or "other person with a legal right to pursue eviction or possessory action shall not evict any covered person from any residential property *in any State or U.S. territory* . . . that provides a level of public-health protections below the requirements listed in this Order." 85 Fed. Reg. at 55296 (emphasis added). Accordingly, amicus NAHB's members are subject to the CDC Order regardless of where they are located.

[7] The Government has taken this position in cases similar to the instant action, including one case brought by amicus curiae. *See Ala. Ass'n of Realtors v. U.S. Dep't of Health & Human Servs.*, ___ F. Supp. ___, No. 20-cv-3377, 2021 WL 1779282, at *9 (D.D.C. May 5, 2021) (rejecting the CDC's request to limit any vacatur order under section 706 to the plaintiffs with standing before the court), *appeal docketed*, No. 21-05093 (D.C. Cir. May 5, 2021); Defs.' Mem. in Opp'n to Pls.' Mot. to Clarify or Am. J. at 6-8,

Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions (Sept. 13, 2018).[8] The Government's position stands in stark contrast to the plain language and precedential approach to invalid agency actions under section 706.

The APA was designed to promote uniformity and consistency. *See supra* Part I. Although the APA affords a remedy to individuals aggrieved by agency action, the focus of the APA extends beyond the plaintiff to the agency and the agency action itself. Under section 706, a reviewing court must "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. And, as discussed *supra* Section II.A, the reviewing court must hold unlawful and set aside agency action under certain circumstances. *See id.* § 706(2).

"A judge with equity power in a lawsuit with personal jurisdiction over the defendant may order or forbid the defendant's improper conduct everywhere." Doug Rendleman, *Preserving the Nationwide National Government Injunction to Stop Illegal Executive Branch Activity*, 91 U. Colo. L. Rev.

---

*Skyworks Ltd. v. CDC*, No. 5:20-cv-02407-JPC (N.D. Ohio Apr. 29, 2021), ECF 60 (arguing that nationwide injunctive relief for CDC Order would be inappropriate where other courts were considering the same agency action).

[8] https://www.justice.gov/opa/press-release/file/1093881/download.

887, 905 (2020). In other words, "[i]f a judge grants a plaintiff an injunction that forbids or commands the defendant's conduct, it requires the defendant to obey everywhere." *Id.* The Government should not be subject to a different standard.

Importantly, limiting the invalidation of a nationally applicable rule to solely those parties challenging agency action presents technical, logistical, and equitable difficulties. By vacating an agency action with respect to plaintiffs, but allowing the agency to continue enforcing an action deemed invalid, "the Court would be 'drawing a line which the agency itself has never drawn.'" *New York v. U.S. Dep't of Commerce*, 351 F.Supp.3d 502, 677-78 (S.D.N.Y. 2019) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 (D.C. Cir. 1989)), *aff'd in part, rev'd in part, and remanded on other grounds sub nom. Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019). Logistically, limiting vacatur to the plaintiffs would present difficult questions about which entities and individuals are entitled to relief from the agency's actions, particularly where plaintiffs include entities, groups, and individuals that may manage properties across multiple jurisdictions. Indeed, such a piecemeal enforcement would undermine the purpose for the CDC Order to prevent the spread of COVID-19 *because* it relies on uniform enforcement.

The deficiencies of the Government's position are best illustrated when

litigation is brought by non-regulated entities. For example, amicus curiae, a trade association, recently participated as an amicus in litigation challenging an Environmental Protection Agency ("EPA") regulation concerning dust-lead hazard standards and the regulatory definition of lead-based paint. *A Cmty. Voice v. Envtl. Prot. Agency*, ___ F.3d ___, No. 19-71930, 2021 WL 1940690 (9th Cir. May 14, 2021). The regulation directed lead-abatement professionals to adhere to certain standards as they complete their work. *See id.* at *2. But the plaintiffs challenging the regulation were not abatement professionals; instead, plaintiffs included a group of advocacy organizations with members in multiple states.[9] *Id.* at *2-3. Ultimately, the court agreed that the regulation violated the APA and remanded the rule to the agency for reconsideration, leaving the rule in place until a new regulation is promulgated. *Id.* at *4.

As advocacy organizations, the plaintiffs in *A Community Voice* were not directly regulated by the EPA. Logistically, had the court limited its decision to the plaintiffs, a host of logistical problems would arise. Would residences occupied by the plaintiffs and their members be subject to more

[9] For example, A Community Voice is an "affiliate of ACORN and a non-profit organization comprised of working, poor, elderly, women, children, and families." *About a Community Voice*, A Community Voice – Louisiana, http://acommunityvoice.org/about/ (last visited May 31, 2021).

stringent dust-lead hazard standards than those occupied by non-plaintiffs? Would industry professionals, such as NAHB's members, have to meet different standards for their work based on the litigation status of their customers? The logistical impossibilities become apparent very quickly.

To take another example, this Court vacated portions of an EPA rule governing two power plant wastewater streams in *Southwestern Electric Power Co. v. U.S. Environmental Protection Agency*, finding that the EPA unlawfully set the best available technology for legacy wastewater, and illegally conflated two different technology standards in a way not allowed by the Clean Water Act. 920 F.3d at 1004. The petitioners, various environmental groups, had associational standing to challenge the rule on behalf of members who were injured by negative impacts on property and decrease in enjoyment of waterways. *Id.* at 1014 n.18. The groups, however, were not regulated by the rule, so a decision preventing the EPA from enforcing the rule against the petitions alone would have been irrelevant. *See id.* at 1012-13.

Vacating an agency action with national implications is not merely required, it is good policy. Indeed, "Congress determined that rule-vacatur was not unnecessarily burdensome on agencies when it provided vacatur as a standard remedy for APA violations." *See Pennsylvania v. President U.S.*,

930 F.3d 543, 575 (3d Cir. 2019), *rev'd and remanded on other grounds sub nom. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020). Preventing the Government from enforcing a deemed-invalid action against non-parties preserves the status quo while the legal infirmity of the action is fully resolved.

Nor would vacating agency actions in their entirety hinder Government agencies from fulfilling their statutory and regulatory purposes. After a district court determines that an agency's action is invalid, the Government may seek a stay of the decision from the district court while it appeals the district court's decision. *See* Fed. R. App. P. 8(a)(1). Seeking a stay provides the agency more time to decide whether it should modify its action or continue its appeal. *Cf. Abbott Labs v. Gardner*, 387 U.S. 136, 154 (1967) (recognizing that if an agency loses a facial APA challenge, "it can more quickly revise its regulation."), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

The agency may also ask the appellate court to stay the district court's decision pending a decision on appeal. *See* Fed. R. App. P. 8(a)(2)(A)(ii). Absent a stay, the agency may not enforce the invalid action. In some cases, such as rulemaking, the effect would be that the regulated activity subject to the invalid rule would either remain unregulated or subject to a previous

rule. *See Pennsylvania*, 930 F.3d at 575 ("[C]ourts invalidate—without qualification—unlawful administrative rules as a matter of course, leaving their predecessors in place until the agencies can take further action.").

Either way, vacatur itself does not itself hinder agency action. Vacating the rule in its entirety maintains the status quo until the agency either appeals the district court's decision or pursues further action consistent with the scope of the agency's authority and the APA. Thus, universal vacatur ensures that agency action complies with prevailing legal standards.

## CONCLUSION

When courts find that a universally applicable federal action is unlawful, the correct remedy is to vacate that rule universally. Amicus curiae respectfully requests that this Court apply this long-standing administrative law principle here, and restore the ability of NAHB members to run their business.

Dated: June 2, 2021

Respectfully submitted,

By: */s/ Megan H. Berge*

Megan H. Berge
California Bar No. 332536
**BAKER BOTTS L.L.P.**
700 K Street, N.W.
Washington, DC 20001-5692
T: 202.639.7700
F: 202.639.7890
megan.berge@bakerbotts.com

David B. Goode
Texas Bar No. 24106014
**BAKER BOTTS L.L.P.**
98 San Jacinto Blvd., Suite 1500
Austin, Texas 78701-4078
T: 512.322.2500
F: 512.322.2501
david.goode@bakerbotts.com

**ATTORNEYS FOR AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS**

**CERTIFICATE OF SERVICE**

I hereby certify that on June 2, 2021, I electronically filed the foregoing using the Court's CM/ECF filing system, which will send notification of such filing to all counsel of record.

Dated: June 2, 2021

*/s/ Megan H. Berge*
Megan H. Berge

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G), the undersigned certifies this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the portions of the brief exempted by Fed. R. App. P. 32(f), this brief contains 4,026 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with Georgia 14-point font for text and footnotes.

Dated: June 2, 2021

*/s/ Megan H. Berge*
Megan H. Berge