Vacatur as Complete Relief

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Remedies are the next frontier in administrative law. One question vexes jurists and scholars in particular: What does the Administrative Procedure Act (APA) mean when it instructs courts to "set aside" agency action? On one reading, "set aside" means "vacate"—the court wipes the agency action off the books entirely. On another reading, however, "set aside" has a more circumscribed meaning: disregard the regulation in individual cases (i.e., enforcement actions). The debate is one of statutory interpretation, and this essay does not seek to resolve it. Rather, this essay points out a potential follow-on consequence of the debate's resolution: If "set aside" means only "disregard," then unregulated third parties may not be able to challenge agency action that has a predictable, adverse effect on them.

The Supreme Court's opinion in *Diamond Alternative Energy, LLC v. EPA*—the subject of this essay—is illustrative. Formally, the case was about the Article III standing doctrine. A consortium of fuel producers sued the Environmental Protection Agency (EPA), seeking to invalidate (i.e., "vacate") a waiver that the EPA had granted, rescinded, and granted again to California so that the Golden State could establish its own (strict) emissions standards for car manufacturers. The California law did not regulate the fuel producers directly; rather, the fuel producers' theory of their injury was that the regulations would have an impact on the design of cars and thereby decrease the market demand for the producers' fuel. The Court held that this injury could be redressed—for purposes of Article III standing—by invalidating the EPA's reinstatement of the waiver, as the fuel producers sought to do.

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The Court appeared to assume that vacatur of the reinstated EPA waiver was an available remedy. But it was also a necessary remedy to provide complete relief to the fuel producers. The case—or, more accurately, the underlying theory of the case—is an example of how the resolution of the vacatur debate could foreclose some plaintiffs from meaningful relief in regulatory litigation. The fuel producers would never have an opportunity to ask a court to disregard the EPA waiver (under the alternative understanding of "set aside"). If invalidation of the EPA waiver was not a possibility, then the fuel producers would not have a redressable injury. Under prevailing theories of statutory interpretation, that policy consequence is largely irrelevant to the task of determining what "set aside" means in the Administrative Procedure Act. Nevertheless, this reality raises the stakes of the debate; one potential interpretation of the APA would close the courthouse doors to a substantial number of plaintiffs seeking to challenge regulations that injure them.

This essay proceeds in two parts. Part I takes a close look at *Diamond Alternative Energy*. This part surveys the lead-up to the case and recounts the Court's holding that unregulated third-party plaintiffs had Article III standing to challenge an agency action that adversely impacted their interests. But, as Part I lays out, the Court's Article III holding depended on a key assumption: the plaintiffs could get a court to invalidate the agency action in question. Part II zooms out and explains why *Diamond Alternative Energy* is illustrative of a kind of lawsuit that could not go forward if "set aside" means disregard as opposed to vacate. This part begins by providing background on the debate about the meaning of "set aside." Then, this part situates the lawsuit at issue in *Diamond Alternative Energy* as an example of how the "set aside" debate could materially affect the regulatory litigation pipeline. Part II concludes with some considerations for Congress.

I. The Path to *Diamond Alternative Energy, LLC v. EPA*

In *Diamond Alternative Energy*, the Supreme Court ruled that fuel producers had Article III standing to sue the EPA about a waiver that the agency had granted to the State of California. The waiver allowed California to impose stringent fuel emissions standards on cars, which would have injured the fuel producers by causing reduced demand for their product. Justice Brett Kavanaugh authored

the opinion of the Court for a seven-Justice majority, holding that this injury was redressable by invalidation of the waiver. This part reviews both the case and the fundamental assumption upon which the majority's opinion rested.

A. The Theory of the Case

The lawsuit underlying *Diamond Alternative Energy* involved an EPA waiver to the State of California which allowed California to establish its own emissions standards for automobiles. Because California's stringent standards would push the automobile industry to make cars that consumed less gasoline, fuel producers worried that the California regulations would reduce demand for their product. So, the fuel producers sued the EPA, seeking to invalidate the waiver. California intervened in the lawsuit and challenged the fuel producers' standing to sue. The D.C. Circuit accepted California's argument and dismissed the case, but the Supreme Court reversed. The Court's opinion held that invalidation of the waiver would redress the fuel producers' injury.

In general, the Clean Air Act preempts state promulgation of fuel emissions standards for automobiles. Yet the statute—enacted in 1967—allows the EPA to exempt California, in particular, from the law's preemptive effects. California was "the only state that had adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines as of March 30, 1966"; and Section 209(a) of the law established certain circumstances under which the EPA could waive preemption as to California.[1] The law requires, among other things, that California "need[s] such . . . standards to meet compelling and extraordinary conditions."[2] And time and again, California has obtained EPA waivers to promulgate tailored "emissions standards to combat local California air-quality problems like smog."[3]

[1] Ohio v. EPA, 98 F.4th 288, 294 (D.C. Cir. 2024) (discussing 42 U.S.C. § 7543(a)), *rev'd sub nom.* Diamond Alt. Energy, LLC v. EPA, 145 S. Ct. 2121 (2025). At the time, "California's southern coastal cities faced an acute smog problem that national vehicle emission standards were unlikely to resolve." Initial Brief for Private Petitioners at 2, Ohio v. EPA, No. 22-1081 (and consolidated cases) (D.C. Cir. Oct. 24, 2022) [hereinafter Petitioners' Initial D.C. Circuit Brief].

[2] 42 U.S.C. § 7543(b)(1)(B).

[3] Diamond Alt. Energy, LLC v. EPA, 145 S. Ct. 2121, 2130 (2025).

Yet "[b]eginning in 2005, California also attempted to use its unique preemption exemption . . . to address global climate change."[4] The George W. Bush Administration's EPA rejected these efforts in 2008, but the Obama Administration's EPA granted such a waiver in connection with a 2012 request for permission to enact California-specific regulations involving automobiles for model years 2017 to 2025.[5] The Trump Administration's EPA rescinded its approval in 2019, and the Biden Administration's EPA reinstated the waiver in 2022.[6] Pursuant to the waiver, California imposed regulations that "generally require automakers (i) to limit average greenhouse-gas emissions across their fleets of new motor vehicles sold in the State and (ii) to manufacture a certain percentage of electric vehicles as part of their vehicle fleets."[7] In practice, that would mean less automobile demand for such fuels as gasoline, diesel, and ethanol.

Fuel producers—among others—sued the EPA in 2022 to invalidate the waiver. Under a special statutory review provision, the fuel producers' lawsuit went directly to the D.C. Circuit.[8] The fuel producers asserted that "climate change is not an 'extraordinary' condition within the meaning of" the statute because "the term 'extraordinary' refers to unique *local* conditions in California that result from local emissions and local pollution concentrations"; they urged that "California does not 'need' its own emission standards to 'meet' global climate-change conditions that those emission standards will not meaningfully address."[9] True, the California emission standards directly regulated automobile manufacturers—not the fuel producers themselves. But, the fuel producers contended, the regulations had downstream (negative) effects on the market for liquid fuels, and invalidation of the EPA waiver would prevent those effects.[10]

[4] *Id.*

[5] *See id.*

[6] *See id.*

[7] *Id.* at 2130–31.

[8] *See* 42 U.S.C. § 7607(b)(1).

[9] Petitioners' Initial D.C. Circuit Brief, *supra* note 1, at 14–15 (emphasis added). Petitioners cited the APA's standard of review (*see id.* at 17–18) and contended that "the 2022 decision was arbitrary and capricious and exceeded the EPA's authority under Section 209(b)." Ohio v. EPA, 98 F.4th 288, 299 (D.C. Cir. 2024), *rev'd sub nom.* Diamond Alt. Energy, LLC v. EPA, 145 S. Ct. 2121 (2025).

[10] *See id.* at 16–17.

The EPA did not contest the fuel producers' Article III standing to sue, but California (which had intervened in the D.C. Circuit) argued that the fuel producers' injury was not redressable—and the D.C. Circuit agreed. Article III of the Constitution limits the reach of the federal judicial power to certain "cases" and "controversies,"[11] and the Supreme Court has interpreted this language to require that a plaintiff have "standing" to sue in federal court.[12] A plaintiff has Article III standing only if he seeks "a remedy that is likely to redress [the] injury" he claims to have suffered.[13] As California saw it, the fuel producers' injury flowed from the decisions of third parties (i.e., automobile manufacturers) to modify their vehicle fleets, and the fuel producers had provided no evidence that vacatur of the EPA waiver would inspire automobile manufacturers to change course.[14] Evaluating this argument, the D.C. Circuit noted that "[w]hether a petitioner has standing to challenge a particular government action depends, in part, upon whether the petitioner is 'an object of the action' at issue."[15] And in the D.C. Circuit's view, the fuel producers—not objects of the EPA waiver (and subsequent California emission standards) because their injury hinged on actions taken by third-party manufacturers—had not adduced evidence showing that the objects of the regulation (the manufacturers) were likely to do anything in response to vacatur.[16] The waiver concerned regulations for model years 2017 to 2025, and the D.C. Circuit issued its opinion in 2024; thus, the D.C. Circuit was skeptical both that automobile manufacturers would respond to vacatur of the waiver by changing their fleets in a way that would alleviate the fuel producers' injuries, and "that automobile manufacturers would do so relatively quickly—by Model Year 2025."[17]

The Supreme Court reversed. The Court determined that "[t]he fuel producers . . . might be considered an object of the California

[11] U.S. Const. art. III, § 2.

[12] *See* Lujan v. Def. of Wildlife, 504 U.S. 555, 560 (1992).

[13] Uzuegbunam v. Preczewski, 592 U.S. 279, 285 (2021).

[14] *See* Brief of State and Local Government Respondent-Intervenors at 13–15, Ohio v. EPA, No. 22-1081 (D.C. Cir. Feb. 13, 2023).

[15] *Ohio*, 98 F.4th 288, 300 (quoting *Lujan*, 504 U.S. at 561), *rev'd sub nom.* Diamond Alt. Energy, LLC v. EPA, 145 S. Ct. 2121 (2025).

[16] *See Ohio*, 98 F.4th at 300.

[17] *Id.* at 302.

regulations because the regulations explicitly seek to restrict the use of gasoline and other liquid fuels in automobiles."[18] Thus, looking to "commonsense economic realities," the Court inferred that the California regulations would have a tangible impact on automobile manufacturers' market-affecting conduct by forcing "automakers to produce a fleet of vehicles that, as a whole, uses significantly less gasoline and other liquid fuels."[19] That inference was bolstered by "statements of the fuel producers, California, EPA, and the vehicle manufacturers."[20] The Court allowed "that there may conceivably be some atypical instances where a market has permanently and dramatically changed such that invalidating a challenged regulation would have no effect on the market in question."[21] Yet it observed "that governments do not usually continue to enforce and defend regulations that have no continuing effect in the relevant market" and noted that California's cramped "view of redressability fails to account for dynamic markets and the effects of interrelated economic forces and regulatory programs that change over time."[22] At bottom, the Court held that vacatur was likely to redress the fuel producers' injury.

B. The Objects of Regulation

The upshot of *Diamond Alternative Energy* is a relaxed standing inquiry for third-party plaintiffs in regulatory cases. And Justice Kavanaugh's majority opinion in the case has some nuggets that will be useful to the regulatory litigation bar. The Court cleared the way for the use of inferences—both economic and otherwise—when assessing redressability for purposes of Article III standing. Here, the Court's use of "commonsense economic principles" established an important default rule for Article III standing cases involving government regulation. Moreover, the Court's evaluation of record evidence will require government regulators (and their allies) to tread carefully against the backdrop of potential litigation. Finally, the Court was not bothered that the fuel producers could

[18] Diamond Alt. Energy, LLC v. EPA, 145 S. Ct. 2121, 2135 (2025).

[19] *Id.* at 2136–37.

[20] *Id.* at 2138.

[21] *Id.* at 2139.

[22] *Id.* at 2139–40.

not get regulated parties to file affidavits in support of the lawsuit—lowering the evidentiary burden for unregulated plaintiffs when standing is in doubt.

The Court determined that the fuel producers, despite their unregulated status, were likely to be injured by the California regulations. To get there, the Court relied most heavily on "commonsense [economic] inferences."[23] True, the Court allowed that invalidating the EPA waiver would "not *certainly* . . . make a difference for [the] fuel producers."[24] But the Court explained that the "predictable" behavior of the third-party automobile manufacturers in response to the California regulations (manufacturing "more electric vehicles and fewer gasoline-powered vehicles") was at least likely to occur.[25] Therefore, if the Court invalidated the EPA waiver, then the resulting invalidation of "California's regulations would likely mean more gasoline-powered automobiles, which would in turn likely mean more sales of gasoline and other liquid fuels by the fuel producers."[26]

The premise of the Court's straightforward theory of redressability was that government regulation has an effect on parties. So, because the fuel producers could not show exactly what would happen in the absence of California's regulation, the Court followed a default rule: "[T]he fact that a regulation was designed to produce a particular effect on the market ordinarily means that the likely result of vacating that regulation would be to reduce that effect on the market."[27] The Court thus chastised the EPA and California for arguing "that even if the California regulations are invalidated, automakers would not likely manufacture or sell more gasoline-powered cars than they do now" (based on how the vehicle market had developed over the years).[28] As the Court asked rhetorically, "[I]f invalidating the regulations would change nothing in the market, why are EPA and California enforcing and defending the regulations?"[29]

[23] *Id.* at 2136.

[24] *Id.* at 2137 (emphasis added).

[25] *Id.* at 2136.

[26] *Id.* at 2137.

[27] *Id.*

[28] *Id.*

[29] *Id.*; *see also id.* at 2139 ("[W]e can assume that governments do not usually continue to enforce and defend regulations that have no continuing effect in the relevant market.").

The opinion then looked to "record evidence" to confirm its analysis. On this point, the Court zeroed in on four pieces of evidence—of which two were essentially what the Court perceived to be admissions against interest by the government. The Court highlighted statements by California and the EPA to support the conclusion that the fuel producers had standing. The Court pointed out that California had described its regulations as "'critical' . . . for 'greater emission reductions *in the future*'" and noted that the EPA had also "stated that the California regulations are likely to reduce consumption of fuel."[30] The decision is yet another reminder that the government can undermine its own litigating position through its communications efforts.[31]

The Court also held that the fuel producers did not need to "introduce evidence . . . from directly regulated third parties to show how third parties would likely respond to a government regulation or invalidation thereof."[32] Here, Justice Kavanaugh's majority opinion displayed an appreciation for the realities of regulatory litigation. The Court took the position that requiring "affidavits from regulated parties" would make unregulated plaintiffs' lawsuits "dependent on the happenstance of whether the plaintiff and the relevant regulated parties are aligned and share litigation interests—and whether the regulated party is willing to publicly oppose (and possibly antagonize) the government regulator by supporting the plaintiff's suit."[33] For a regulated party that would prefer to stay in the government's good graces, filing an affidavit in a case brought by an unregulated party against the regulator could be a risky endeavor. Justice

[30] *Id.* at 2137–38.

[31] In *West Virginia v. EPA*, for example, the Supreme Court held that the EPA's Clean Power Plan contravened the major questions doctrine—a canon of statutory interpretation that counsels against novel agency assertions of significant regulatory authority. 597 U.S. 697, 732, 735 (2022). In explaining why the doctrine applies, the Court cited a White House fact sheet about the regulation at issue in the case (the Clean Power Plan); the fact sheet "stated that the Clean Power Plan would 'drive a[n] . . . aggressive transformation in the domestic energy industry.'" *Id.* at 714 (quoting White House Fact Sheet, App. in Am. Lung Ass'n. v. EPA, No. 19-1140 etc. (D.C. Cir.), at 2076). Talk of an "aggressive transformation," as Justice Neil Gorsuch pointed out in a concurrence, raised the specter of the major questions doctrine's applicability. *Id.* at 745–46 (Gorsuch, J., concurring).

[32] *Diamond Alt. Energy*, 145 S. Ct. at 2139.

[33] *Id.*

Kavanaugh translated this practical reality into Article III standing doctrine.

Notably, *Diamond Alternative Energy* was not a one-off; in a concurrence in another case this Term, Justice Amy Coney Barrett acknowledged the Court's "relaxed redressability inquiry in administrative-law procedural injury cases."[34] For the purposes of Article III standing, administrative law might just be different.

C. Redressable—Under the Assumption of Vacatur

The Court's opinion elided a more fundamental question: Could a court invalidate the EPA waiver under the APA? In *Diamond Alternative Energy*, the fuel producers' asserted injury was redressable because invalidation of the EPA waiver would nullify the California regulations. Thus, redressability depended on the availability of invalidation—that is, vacatur—as an APA remedy. The Court explicitly assumed that such a remedy was available. That assumption rested on the Court's understanding of the phrase "set aside" in the APA. And the Court's assumption was a necessary one; if the APA does not authorize vacatur, then a favorable judgment on behalf of the fuel producers could not redress the asserted injury.

In their initial brief before the D.C. Circuit, the fuel producers asked that the court "set aside EPA's action rescinding the withdrawal of California's preemption waiver."[35] The term "set aside" comes from Section 706 of the APA, which the fuel producers cited in the "Standard of Review" section of their brief.[36] Section 706 provides that a "reviewing court shall hold unlawful and *set aside* agency action . . . found to be," among other things, "not in accordance with law."[37] Under D.C. Circuit precedent, the APA's instruction to "set aside" agency action means "that '[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

[34] Gutierrez v. Saenz, 145 S. Ct. 2258, 2269 (2025) (Barrett, J., concurring in part and concurring in the judgment).

[35] Petitioners' Initial D.C. Circuit Brief, *supra* note 1, at 64; *see also id.* at 57 ("[I]f this Court agrees that the waiver exceeds EPA's statutory authority, EPA's reinstatement of that waiver must be set aside.").

[36] *See id.* at 17.

[37] 5 U.S.C. § 706(2) (emphasis added).

individual petitioners is proscribed.'"[38] The fuel producers hoped that the court would vacate the EPA's action reinstating its waiver for California, thereby preempting California's regulations.

At the Supreme Court, the majority in *Diamond Alternative Energy* assumed that "set aside" meant vacate. The Court opined that the fuel producers' injury was redressable—for Article III standing purposes—because "invalidating the California regulations would likely redress at least some of the fuel producers' monetary injuries."[39] On this point, the Court clarified that in its opinion, it would "use the term 'invalidated' as shorthand to describe the result from setting aside EPA's approval of the California regulations."[40] In part, the footnote explains that the agency action at issue is the EPA's reinstatement of its waiver—not the California regulations; thus, formally, the direct object of the verb "invalidating" is the EPA's action, not California's regulation. But the footnote also communicates something more fundamental: For the purposes of the opinion, the Court assumed that the D.C. Circuit was correct that "set aside" means invalidate.

The Court's redressability holding depended on this assumption. If a court invalidated the EPA's waiver, and thereby nullified the California regulations, then the automakers would not be forced "to produce a fleet of vehicles that, as a whole, uses significantly less gasoline and other liquid fuels"—likely leading to "more gasoline-powered automobiles, which would in turn likely mean more sales of gasoline and other liquid fuels by the fuel producers."[41] The alternative, however, would not provide complete relief to the fuel producers. If "set aside" means only that the agency action's "application to the individual petitioners is proscribed" (an interpretation that the D.C. Circuit rejected in *National Mining Association*), then the fuel producers would likely lack standing. If the EPA waiver did not apply to the fuel producers, then the California regulations would be preempted and could not apply to the fuel producers. But the California regulations *already* do not apply to the unregulated fuel

[38] 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)).

[39] *Diamond Alt. Energy*, 145 S. Ct. at 2135.

[40] *Id.* at 2135 n.3.

[41] *Id.* at 2137.

producers. Thus, proscribing the application of those regulations to the petitioner fuel producers—and only the fuel producers—would be an ineffectual remedy that would fail to redress the asserted injury. As unregulated challengers, the fuel producers needed vacatur.

II. The Vacatur Debate and Unregulated Third-Party Plaintiffs

The Supreme Court has not definitively held that the APA authorizes vacatur of agency action.[42] The Justices disagree about whether it does. On one side, Justice Kavanaugh—incidentally, the author of *Diamond Alternative Energy*—defends the D.C. Circuit's approach: Vacatur is the appropriate remedy under the APA. Justice Gorsuch, however, has led the way in arguing for an alternative approach: The term "set aside" merely requires courts to disregard the agency action when deciding disputes. In the long run of regulatory cases, the meaning of "set aside" defines the scope of the remedy. Had the automobile manufacturers sued the EPA and asked that the court set aside the waiver, the "set aside" debate would determine who enjoys the remedy. If "set aside" means vacate, then all automakers would be free from the California regulations. But if "set aside" means disregard, then only the automobile manufacturers before the court would evade the regulatory burden.

The upshot of the "set aside" debate is, however, far more consequential for the fuel producers and other regulatory litigants who are themselves unregulated. If courts adopt Justice Gorsuch's view, then the fuel producers and similarly situated litigants might be unable to bring APA lawsuits even though agency actions have caused them injury. To a textualist, this consequence may be irrelevant to the question of statutory interpretation around which the debate revolves. Nevertheless, this potential consequence could be of interest to Congress, to the extent that the legislature considers amending the APA. Against the backdrop of a high-stakes judicial disagreement about the meaning of "set aside" in the APA, Congress can provide much-needed clarity by revising the law.

A. Surveying the Landscape on Vacatur

This essay takes stock of the debate over the term "set aside" in the APA without attempting to resolve it. On one side is what might be

[42] *See* Trump v. CASA, Inc., 2025 WL 1773631, at *8 n.10 (U.S. June 27, 2025).

described as the traditional view—"set aside" means vacate. Justice Kavanaugh is the leading proponent of this understanding, and scholars like Mila Sohoni are fellow adherents. On the other side, however, is an emerging view—"set aside" means disregard as to the litigant. Justice Gorsuch has expressed sympathy for this understanding, and he is joined by John Harrison and the Department of Justice, among others. The Supreme Court has come close to resolving the debate, but it has declined to do so.

One possible reading of "set aside" in Section 706 of the APA is as an instruction to courts to invalidate unlawful agency action altogether. As Jonathan Mitchell sees it, Section 706 establishes "a veto-like power that enables the judiciary to formally revoke an agency's rules, orders, findings, or conclusions—in the same way that an appellate court formally revokes an erroneous trial-court judgment."[43] The D.C. Circuit has long understood Section 706 to authorize this remedy,[44] and at least one judge has opined that the statute requires it.[45] Justice Kavanaugh (formerly of the D.C. Circuit) penned a concurrence in a recent case—*Corner Post, Inc. v. Board of Governors of the Federal Reserve System*—to advocate for this interpretation of the law.[46] And Justice Kavanaugh's interpretation has scholarly support. Mila Sohoni has laid out the historical argument for the proposition that "[t]he APA authorizes the universal vacatur of rules."[47] Ron Levin has bolstered Sohoni's claims by arguing that "the phrase 'set aside' has the same simple, straightforward meaning that most people—with the exception of a few heretics—have always thought it has,"

[43] Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 1012 (2018).

[44] *See Nat'l Mining Ass'n,* 145 F.3d at 1409 (quoting *Harmon*, 878 F.2d at 495 n.21).

[45] *See* Checkosky v. SEC, 23 F.3d 452, 492 (D.C. Cir. 1994) (Randolph, J., separate opinion) (determining that Section 706, under D.C. Circuit precedent, "requires" courts to vacate impermissible agency action).

[46] *See* 603 U.S. 799, 826 (2024) (Kavanaugh, J., concurring) ("[T]he APA authorizes vacatur of agency rules.").

[47] Mila Sohoni, *The Past and Future of Universal Vacatur*, 133 Yale L.J. 2305, 2311 (2024); *see generally* Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121 (2020). One commentator has uncovered evidence of state-law origins for the phrase "set aside," further supporting the conclusion that "the APA's 'set aside' provision contemplates universal vacatur." Fred Halbhuber, *The State-Law Origins of the APA's 'Set-Aside' Power*, Yale J. on Regul.: Notice & Comment (June 11, 2025), https://www.yalejreg.com/nc/the-state-law-origins-of-the-apas-set-aside-power-by-fred-halbhuber/.

while allowing that "the sentence should be read as *authorizing* set-aside relief, not as commanding it in every instance."[48]

But another view of "set aside" has gained some high-profile backers in recent years. John Harrison has contended that vacatur is inconsistent with the original meaning of the APA.[49] Rather, as Harrison sees it, unlawful agency actions are invalid from the moment that they are undertaken.[50] Thus, "[w]hen the regulated party is the defendant, the court should disregard unlawful regulations" because they are "non-binding."[51] The Department of Justice has taken this position in litigation; indeed, the department issued Litigation Guidelines in 2018 instructing the department's civil litigators to advance this alternative reading of the statute.[52] The Court eventually confronted this position at oral argument in *United States v. Texas*,[53] prompting an incredulous reaction from Chief Justice John Roberts and "palpable surprise" from several others.[54] Yet Justice Gorsuch was joined by Justices Barrett and Clarence Thomas when he concurred in the case to note that "[t]here are many reasons to think [Section] 706(2) uses 'set aside' to mean 'disregard' rather than 'vacate.'"[55] So, according to one view—ascendant on the Court, attaining scholarly acceptance, and central to the Justice Department's view of the APA—the "set aside" language in Section 706 means that a court must merely disregard an agency action in an individual case.

[48] Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 Notre Dame L. Rev. 1997, 2021 (2023).

[49] *See* John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 Yale J. on Regul.: Bull. 119, 120 (2023).

[50] *See* John Harrison, *Remand Without Vacatur and the Ab Initio Invalidity of Unlawful Regulations in Administrative Law*, 48 BYU L. Rev. 2077, 2079 (2023).

[51] *Id.* at 2140.

[52] *See* Sohoni, *The Power to Vacate a Rule*, *supra* note 47, at 1123 (discussing Memorandum from the Off. of the Att'y Gen. to the Heads of Civ. Litigating Components U.S. Att'ys, Litig. Guidelines for Cases Presenting the Possibility of Nationwide Injunctions 7–8 (Sept. 13, 2018), https://www.justice.gov/opa/press-release/file/1093881/download).

[53] 599 U.S. 670 (2023).

[54] *See* Sohoni, *The Past and Future of Universal Vacatur*, *supra* note 47, at 2309 ("At oral argument for *United States v. Texas*, . . . the Solicitor General contended that the Administrative Procedure Act . . . does not authorize a federal court to vacate a rule universally. Several of the Justices reacted to this argument with palpable surprise. Chief Justice Roberts exclaimed, 'Wow.'" (footnotes omitted)).

[55] *Texas*, 599 U.S. at 696 (Gorsuch, J., concurring).

B. What about the Fuel Producers in Diamond Alternative Energy*?*

Reading "set aside" to mean disregard as opposed to vacate would have practical consequences. In particular, lawsuits like that of the fuel producers in *Diamond Alternative Energy* might have a redressability problem. Determining that courts should disregard an agency action like the EPA waiver is not likely to provide complete relief to unregulated plaintiffs. That lack of complete relief differs from lawsuits like the one in *Corner Post*, which sparked a disagreement between Justice Kavanaugh and John Harrison about the need for vacatur in lawsuits brought by regulatory-beneficiary plaintiffs. Yet the theory of the case in *Diamond Alternative Energy* is well-known in administrative law. Getting rid of such lawsuits would remove an arrow in the quiver of the regulatory litigation bar by narrowing the universe of litigants that can challenge agency action.

In practice, the fuel producers need vacatur. If a court vacates the EPA waiver, then the automakers would not be required to abide by California's regulatory scheme. Those regulations, however, could not lead to a situation in which a court would need to disregard the EPA waiver as to the fuel producers. If Harrison is right, and the agency action is void *ab initio*, then a judgment that "hold[s] unlawful" that agency action might be redundant—to say nothing of the practical likelihood that automakers might be reluctant to alter their course of action on the basis of one district court's decision.[56] Thus, the fuel producers (and similarly situated litigants) would struggle to challenge agency actions like the EPA waiver. To be sure, this is just a policy consequence of interpreting "set aside" one particular way. And the Court has eschewed consideration of policy consequences when interpreting statutes.[57] This essay does not contend that the interpretation of "set aside" should turn on the availability of suits by unregulated entities. But when the regulatory bar considers the implications of a different approach to the statutory text, the fate of lawsuits like that in *Diamond Alternative Energy* is relevant.

[56] *Cf.* Trump v. CASA, Inc., 2025 WL 1773631, at *13 n.17 (U.S. June 27, 2025) (observing "the reality that district court opinions lack precedential force even vis-à-vis other judges in the same judicial district").

[57] *See, e.g.*, Corner Post, Inc. v. Bd. of Govs. of the Fed. Rsrv. Sys., 603 U.S. 799, 823 (2024).

The fuel producers' situation is different from that of regulatory beneficiaries. In connection with *Corner Post*, Justice Kavanaugh and John Harrison appeared to disagree about the implications of vacatur's availability to the regulatory challengers in the case. *Corner Post* involved a challenge by a truck-stop merchant to a Federal Reserve regulation that established the maximum "interchange fee" that banks can charge merchants when customers use those banks' debit cards to buy the merchants' goods.[58] Corner Post argued that the interchange fees were too high and that the Federal Reserve should set a stricter cap.[59] At the Supreme Court, the case involved a question about the statute of limitations under the APA. Yet in his concurrence, Justice Kavanaugh observed that "Corner Post can obtain relief in this case only because the APA authorizes vacatur of agency rules."[60] As he explained, "an injunction barring the agency from enforcing the rule against [Corner Post] would not help [it], because [Corner Post] is not regulated by the rule in the first place."[61] Rather, as an unregulated plaintiff, Corner Post could "obtain meaningful relief only if the APA authorizes vacatur of the agency rule, thereby remedying the adverse downstream effects of the rule on" the merchant.[62] John Harrison took a different view; in a blog post, he contended that "[i]f a regulatory beneficiary who claims that an agency has regulated too little prevails, a court can give that party full relief without itself vacating any rule the agency has adopted."[63] Harrison argued that because the case involved an agency's failure to act, the appropriate remedy would be to enter "a mandatory injunction directing an agency to regulate more than the agency already has, or to consider doing so pursuant to the court's directions."[64] Vacatur is not necessary.

[58] *See id* at 805.

[59] *See id.*

[60] *Id.* at 826 (Kavanaugh, J., concurring).

[61] *Id.*

[62] *Id.*

[63] John Harrison, *Agency Action, Agency Failure to Act, and Universal Relief in* Corner Post v. Board of Governors of the Federal Reserve System, Yale J. on Regul.: Notice & Comment (Mar. 25, 2024), https://www.yalejreg.com/nc/agency-action-agency-failure-to-act-and-universal-relief-in-corner-post-v-board-of-governors-of-the-federal-reserve-system-by-john-harrison/.

[64] *Id.*

But *Diamond Alternative Energy* did not involve a suit by regulatory beneficiaries seeking more stringent regulation. In his *Corner Post* concurrence, Justice Kavanaugh warned that "[e]liminating vacatur as a remedy would terminate entire classes of administrative litigation that have traditionally been brought by unregulated parties."[65] Yet Justice Kavanaugh's examples of such "classes of administrative litigation" largely involved lawsuits that challenged "the allegedly unlawful under-regulation of other[s]."[66] The theory of the case in *Diamond Alternative Energy* exemplifies a separate class of administrative litigation in which vacatur is required—without the problem of Harrison's objection to regulatory beneficiaries' need for vacatur. And the fuel producers' lawsuit is not the only such case in which the unregulated object of a regulation challenges that regulation. In one regulatory suit that predated the APA, for example, "[a] manufacturer of corn syrup" challenged a regulation that "established a definition and standard of identity for sweetened condensed milk" that "did not authorize the use of corn syrup" in the milk—the manufacturer contended that he would suffer an injury because "canners of milk sold in interstate commerce would no longer buy" his corn syrup.[67] At bottom, interpreting "set aside" to mean disregard as opposed to vacate would call an entire class of suits into question.

Some Justices discuss vacatur as going unnecessarily beyond the parties in the case, but suits like *Diamond Alternative Energy* provide a counterexample. In *Trump v. CASA, Inc.*, the Supreme Court emphasized that "'[c]omplete relief' is not synonymous with 'universal relief.'"[68] And in his *United States v. Texas* concurrence, Justice Gorsuch contrasted vacatur with "party-specific relief" that "affects nonparties . . . only incidentally."[69] But in *Diamond Alternative Energy*, vacatur seems to be the only way that the fuel producer plaintiffs

[65] *Corner Post*, 603 U.S. at 833 (Kavanaugh, J., concurring).

[66] *Id.* Justice Kavanaugh did give a brief nod to the essentiality of vacatur "when a State challenges an agency action that does not regulate the State directly but has adverse downstream effects on the State." *Id.* at 836–37 (citing, as an example, Dep't of Com. v. New York, 588 U.S. 752 (2019)).

[67] Note, *Competitors' Standing to Challenge Administrative Action Under the APA*, 104 U. Pa. L. Rev. 843, 850 (1956) (discussing A.E. Staley Mfg. Co. v. Sec'y of Agri., 120 F.2d 258 (7th Cir. 1941)).

[68] 145 S. Ct. at 2557.

[69] 599 U.S. at 693 (Gorsuch, J., concurring in the judgment).

can obtain complete relief. As other courts have recognized in separate contexts, vacatur may be "necessary to grant complete relief" to a party.[70] And so it appears to be here.

C. Considerations for Congress

If Congress is concerned about the alternative approach to "set aside" taking hold, it can change the law. In particular, Congress can clarify when vacatur is available. To be sure, Congress would need to grapple with constitutional constraints on its power to authorize wide-ranging remedies. But with a potential opening for APA reform in Congress, the legislature could take a crack at resolving the "set aside" debate. Indeed, the Supreme Court's tendency toward statutory interpretation in administrative law cases has "preserve[d] space for Congress to change the law if it wants to [address] courts' remedial powers in regulatory litigation."[71]

In recent years, Congress has signaled that it might be willing to amend the APA,[72] and the legislature might want to take a closer look at the potential problem of unregulated plaintiffs. One possible fix is the establishment of a special statutory review provision for unregulated plaintiffs—who are nevertheless the objects of regulation—to challenge regulations that adversely affect them and obtain vacatur. Additionally, Congress could take a side in the ongoing debates about the meaning of "set aside." Or, it could pass a law stating that whatever the meaning of "set aside," unregulated plaintiffs may obtain vacatur when it would provide them complete relief in a regulatory challenge. Such a move could alleviate the tension between narrow conceptions of APA remedies and a robust understanding of the right for unregulated entities like the fuel producers to challenge regulations that target them.

[70] Florida v. United States, 660 F. Supp. 3d 1239, 1284 (N.D. Fla. 2023) (quoting Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1177 (M.D. Fla. 2022), *vacated as moot sub nom.* Health Freedom Def. Fund v. President of the U.S., 71 F.4th 888 (11th Cir. 2023)).

[71] Jennifer L. Mascott & Eli Nachmany, *Answered by Text*, 48 Harv. J.L. & Pub. Pol'y 33, 48 (2025).

[72] *Cf. id.* at 42 n.30 (discussing congressional consideration of bills to amend the APA in light of the Supreme Court's elimination of deference to agencies in statutory interpretation).

Article III of the Constitution looms in the background, but authorizing vacatur for certain unregulated plaintiffs would likely satisfy this constitutional requirement. The Supreme Court in *CASA* did not invoke Article III when opining that the Judiciary Act of 1789 likely does not authorize universal injunctions; rather, the Court relied only on the statute itself.[73] And jurists who have expressed skepticism about APA vacatur's consistency with Article III have focused on the notion that judges only have the power "to decide cases and controversies," and thus they should "avoid trenching on the power of the elected branches to shape legal rights and duties more broadly."[74] The key objection is that courts, when issuing the remedy of vacatur, assert an "authority to issue decrees that purport to define the rights and duties of sometimes millions of people who are not parties before them."[75] But even if that result is the incidental effect of vacatur in a case involving an unregulated plaintiff like the fuel producers, "there is no doubt that an Article III court 'may administer complete relief between the parties, even [if] this involves the determination of legal rights which otherwise would not be within the range of its authority.'"[76]

[73] *See CASA*, 145 S. Ct. at 2550 (describing the issue as "whether, under the Judiciary Act of 1789, federal courts have equitable authority to issue universal injunctions"). Indeed, the resolution of the universal injunctions issue fit with a broader theme at the Supreme Court of "focus[ing] on statutory interpretation as opposed to reaching for . . . constitutional holdings." Mascott & Nachmany, *supra* note 71, at 36.

[74] *Texas*, 599 U.S. at 694 (Gorsuch, J., concurring in the judgment).

[75] *Id.*

[76] *Health Freedom Def. Fund, Inc.*, 599 F. Supp. 3d at 1177 (quoting Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488, 507 (1928), and then citing Trump v. Hawaii, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring), as "explaining that historic equity permitted relief to benefit third parties if it was 'merely a consequence of providing relief to the plaintiff'"), *vacated as moot sub nom.* Health Freedom Def. Fund v. President of the U.S., 71 F.4th 888 (11th Cir. 2023). *But cf.* Jameson M. Payne & GianCarlo Canaparo, *Is Vacatur Unconstitutional?* (July 2, 2025) (contending that vacatur may violate Article III by operating on the agency action instead of enjoining the relevant government official). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5333468.

Conclusion

In some APA cases, the remedy of vacatur is necessary to provide complete relief to a party. *Diamond Alternative Energy, LLC v. EPA* is an example—an unregulated challenger that is concerned about the downstream economic consequences of a regulation. But some jurists and scholars have called into question whether the APA authorizes vacatur—that is, they argue, the phrase "set aside" in the APA means disregard, not invalidate. If that argument wins the day, then cases like *Diamond Alternative Energy* may struggle to get off the ground. Although that policy consequence may not bear on the meaning of the term "set aside" (from the standpoint of statutory interpretation), it is nevertheless relevant to regulatory litigators and, perhaps, Congress.