

No. 26-60344

IN THE
**United States Court of Appeals
for the Fifth Circuit**

MAHMOUD KHALIL,

Petitioner,

v.

TODD WALLACE BLANCHE, *Acting U.S. Attorney General,*

Respondent.

*On Petition for Review of an Order of the Board of Immigration
Appeals*

**BRIEF OF *AMICI CURIAE* FEDERAL COURTS, ADMINISTRATIVE
LAW, AND CONSTITUTIONAL LAW SCHOLARS IN SUPPORT OF
PETITIONER**

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STATEMENT OF COMPLIANCE WITH RULE 29

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *amici curiae* certify that all parties consent to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici are legal scholars who teach and write about federal courts, administrative law, and constitutional law jurisprudence at law schools across the United States. They are published in the nation’s leading law journals, and their research is cited regularly in academic literature. Their names and institutional affiliations are set forth in the Appendix to this brief.

Amici have no personal interest in the outcome of this case and take no position on Mr. Khalil’s entitlement to any form of immigration relief, nor do they express any view on the factual findings of the Board of Immigration Appeals (“BIA”). They write to provide scholarly analysis of the institutional and remedial ramifications of the BIA’s reliance on a final agency action that was previously vacated by a United States District Court. This brief contextualizes the role of vacatur under 5 U.S.C. § 706(2) to the Administrative Procedure Act’s (“APA”) remedial scheme, explains why the District of Massachusetts’ ruling in *American*

Association of University Professors v. Rubio, 802 F. Supp. 3d 120 (D. Mass. 2025) [hereinafter “AAUP”], vacated Secretary Rubio’s 8 U.S.C. § 1227(a)(4)(C)(i) determination of deportability specifically as to Mr. Khalil (the “Rubio Determination Letter”) such that the BIA could not rely on it as a ground for removal, and highlights the institutional ramifications were this Court to affirm the BIA’s reliance on a vacated final agency action.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a narrow question of significant institutional importance: Whether the BIA may rest a finding of deportability on a vacated final agency action. *Amici* contend that it may not. The weight of authority, both in this Circuit and nationally, establishes that § 706(2) vacatur unwinds the underlying agency action and reestablishes the status quo *ex ante*.

The effect of vacatur is directly implicated by Mr. Khalil’s petition for review because, in *AAUP*, the District of Massachusetts concluded that the Rubio Determination Letter—which was specifically issued as to Mr. Khalil—constituted APA-reviewable final agency action. Following a bench trial in October 2025, the court concluded that the Rubio Determination Letter violated the First Amendment and was also arbitrary and capricious as contrary to existing agency policy. Accordingly, the court vacated the action under § 706(2). As a result, the Rubio Determination Letter did not exist as valid agency action and could not be relied on

by the BIA in its April 2026 decision. Indeed, the federal government did not move to stay the vacatur following the *AAUP* court’s decision, it did not argue on appeal that the District of Massachusetts erred in finding an APA-reviewable final agency action, and the First Circuit has not reversed *AAUP*. But the BIA relied on the Rubio Determination Letter nonetheless.

That is an important separation-of-powers violation that this Court should address. Permitting the BIA to rely on a vacated final agency action would undermine the finality of judicial orders and severely undermine the APA’s remedial scheme. It would also upend the Article III hierarchy by injecting this Court into the First Circuit’s review of the *AAUP* decision. *Amici* urge the Court to vacate the BIA’s decision and, in doing so, to reaffirm that an agency may not circumvent the judiciary’s authority by relying on a vacated final agency action.

ARGUMENT

I. VACATUR IS A STATUTORY REMEDY NECESSARY TO THE APA’S REMEDIAL SCHEME

There is a “strong presumption that Congress intends judicial review of administrative action.” *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986). Accordingly, “[f]rom the beginning,” the Supreme Court has made clear that “judicial review of final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe such was the purpose of Congress.” *Id.* (citation omitted). Although the strong presumption of judicial review of final

agency action runs as far back as *Marbury v. Madison*, 5 U.S. 137 (1803), the enactment of the APA “reinforced” this “basic presumption.” *Abbott Lab’ys v. Gardner*, 387 U.S. 136, 140 (1967). The APA “command[s] . . . that ‘the reviewing court’—not the agency whose actions it reviews—is to ‘decide *all* relevant questions of law.’” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 389 (2024) (citing 5 U.S.C. § 706) (alterations adopted, emphasis in *Loper Bright*). Illustrating the strength of the presumption, this Court has, for example, held that 8 U.S.C. § 1252(f)(1), the INA provision that typically strips federal courts of jurisdiction to enjoin agency action under the INA, does **not** apply in the context of APA review and vacatur. *Texas v. United States*, 40 F.4th 205, 219-20 (5th Cir. 2022) (noting that “doing so would be contrary to the strong presumption favoring judicial review of administrative action”) (citation omitted); *see also* 8 U.S.C. § 1252(f)(1).

Section 706(2) operationalizes the presumption of judicial review by authorizing a court reviewing final agency action under the APA to “hold unlawful and set aside agency actions, findings, and conclusions found to be” contrary to law. 5 U.S.C. § 706(2). This statutorily authorized remedy of “set[ting] aside” the unlawful agency action is commonly known as “vacatur.” *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 830 (2024) (Kavanaugh, *J.*, concurring) (“When a federal court sets aside an agency action, the federal court vacates the order[.]”). Vacatur is “the only statutorily prescribed remedy for a

successful APA challenge to a regulation.” *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 374-75 (5th Cir. 2022). As such, vacatur is essential to vindicating the “basic presumption of judicial review” for parties who have been “adversely affected or aggrieved” by federal agency action. *Abbott Lab ’ys*, 387 U.S. at 140 (citing 5 U.S.C. § 702).

Because it “formally nullif[ies] and revoke[s] . . . an unlawful agency action,” *Data Mktg. P’ship, LP v. U.S. Dep’t of Lab’y*, 45 F.4th 846, 859 (5th Cir. 2022), by its very nature, vacatur has universal effect.¹ See *In re Clarke*, 94 F.4th 502, 512 (5th Cir. 2024). As the Supreme Court has explained, “[t]he term ‘set aside’ means invalidation—and an invalid rule may not be applied to anyone.” *Griffin*, 144 S. Ct. at 2 n.1 (citations omitted); see also *Career Colls. & Schs. of Tex. v. U.S. Dep’t of*

¹ The fact that Congress authorized vacatur under § 706(2) distinguishes it from universal or nationwide injunctive remedies arising out of equity. See *Griffin v. HM Florida-ORL, LLC*, 144 S. Ct. 1, 2 & n.1 (2023) (mem.) (the issue of whether a court may “enjoin the government from enforcing [a] law against non-parties to the litigation” is “distinct from the issue of a court’s setting aside a federal agency’s rule under the [APA]” because the “APA expressly authorizes a court to ‘hold unlawful and set aside agency action’ that violates the Act”) (citing 5 U.S.C. § 706(2)); *Corner Post*, 603 U.S. at 838 (vacatur is not “akin to a nationwide injunction” because “in the APA, Congress did in fact depart from that baseline and authorize vacatur”). The Supreme Court has consistently recognized this distinction, as has this Court. See *Griffin*, 144 S. Ct. at 2 & n.1; *Corner Post*, 603 U.S. at 838; *Trump v. CASA, Inc.*, 606 U.S. 831, 847 n.10 (2025) (excluding § 706(2) vacatur from *CASA*’s analysis); *Louisiana v. Food & Drug Admin.*, 175 F.4th 310, 323 (5th Cir. 2026) (“In *CASA*, the Supreme Court was addressing only equitable relief and not remedies under the APA.”); *Tex. Med. Ass’n v. HHS*, No. 23-40605, slip op. at 21 (5th Cir. Aug. 11, 2026) (Ho, J., concurring) (under circuit precedent, universal vacatur of agency action is lawful).

Educ., 98 F.4th 220, 255 (5th Cir. 2024) (explaining that “[n]othing in the text of . . . Section 706[] suggests that . . . relief under the APA needs to be limited to [parties]” and that, “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”) (citing *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989); *see also O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019) (limiting vacatur to the plaintiffs in a case is “at odds with settled precedent”).

Whereas an *in personam* action for injunctive relief seeks to compel or restrain individual conduct, a challenge seeking to vacate and set aside agency action operates on the action itself. *See Braidwood Mgmt., Inc. v. Becerra*, 104 F.4th 930, 951 (5th Cir. 2024) (“[U]nlike an injunction, which operates *in personam*, vacatur operates on the status of agency action in the abstract.”), *rev’d and remanded on alternate grounds sub nom. Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748 (2025); *Texas*, 40 F.4th at 220 (“[A] vacatur does nothing but re-establish the status quo absent the unlawful agency action.”). Indeed, the “text of § 706(2) directs federal courts to vacate agency actions in the same way that appellate courts vacate the judgments of trial courts”—in other words, to total effect. *Corner Post*, 603 U.S. at 838; *see also O’Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975) (“[O]ur decision vacating the judgment of the Court of Appeals deprives that court’s opinion of precedential effect, leaving this Court’s opinion and judgment as the sole law of

the case.”); *Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 522 (7th Cir. 2021) (“Vacatur [of an agency action] retroactively undoes or expunges a past [agency] action. . . . Unlike an injunction, which merely blocks enforcement, vacatur unwinds the challenged agency action.”); *Data Mktg. P’ship*, 45 F.4th at 859 (similar); Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 1012-13 (2018) (following vacatur, the “disapproved agency action is treated as though it had never happened”).

Critically, since a claim compelling or enjoining agency action is *in personam*, see *Braidwood*, 104 F.4th at 951, Section 706(2) is the only remedy available to parties who are not directly regulated but who retain a right of review under the APA because they have been “adversely affected or aggrieved” by final agency action. 5 U.S.C. § 702; see also *Corner Post*, 603 U.S. at 828-29 (an adversely affected unregulated party can “obtain relief . . . only because the APA authorizes vacatur of agency rules”). Because an agency action that regulates others “is not and cannot be enforced against” an unregulated party, a person or entity adversely affected by agency action may not seek an injunction barring enforcement. *Corner Post*, 603 U.S. at 828; see also *AAUP*, 802 F. Supp. 3d at 198-99 (noting the limitations on granting injunctive relief). Thus, without vacatur, an agency that acts unlawfully “could face litigation only from regulated parties,” *Corner Post*, 603 U.S. at 836, thereby limiting the right of review under § 702 to persons “suffering legal wrong

because of agency action,” 5 U.S.C. § 702. That would render the APA’s statutory right of review for parties “adversely affected or aggrieved by agency action,” *id.*, hollow. *See Corner Post*, 603 U.S. at 829, 830-33 (noting the “radical consequences for administrative law and individual liberty that would ensue if vacatur were suddenly no longer available” to unregulated third parties); *Abbott Lab’ys*, 387 U.S. at 140. It therefore makes sense that “the Federal Government and the federal courts have long understood § 706(2) to authorize vacatur of unlawful agency rules, including in suits by unregulated parties who are adversely affected by an agency’s regulation of others.” *Corner Post*, 603 U.S. at 826. Such is the position of this Circuit, as well. *Career Colls.*, 98 F.4th at 255 (“Section 706 . . . is not party-restricted and allows a court to ‘set aside’ an unlawful agency action.”).

Thus, where a court orders § 706(2) vacatur of a final agency action, the vacatur is universally applicable—including as to the regulated persons, any person “adversely affected or aggrieved” by the agency action, and any other persons. *See In re Clarke*, 94 F.4th at 512 (vacatur “affects persons in all judicial districts equally”). That is the case not because equity so requires but because the legal effect of the statutory remedy is to nullify the final agency action *ab initio* and restore the status quo *ex ante*. *See Braidwood*, 104 F.4th at 952 (vacatur does not “require consideration of the various equities at stake” because it is not a remedy rooted in equity); *Texas*, 40 F.4th at 220 (vacatur reestablishes the status quo). If vacatur

restores the status quo to a world *ex ante* the final agency action, no person is, or could be, affected by it, irrespective of their relationship to the litigation that produced that result. *See Braidwood*, 104 F.4th at 952 (vacatur is a universal remedy because it “operates on the status of agency action in the abstract”).

In re Clarke illustrates this principle. There, unregulated parties (users of a prediction market) sought APA review of the Commodity Futures Trading Commission’s decision to rescind a no-action letter previously issued to the regulated party (the prediction market). *In re Clarke*, 94 F.4th at 507. In a writ of mandamus reviewing the lower court’s transfer decision, this Court observed that “the effect of this suit is completely diffuse” because, “[s]hould plaintiffs prevail on their APA challenge, this court must ‘set aside’ CFTC’s *ultra vires* . . . action, **with nationwide effect. That affects persons in all judicial districts equally.**” *Id.* at 512 (bold emphasis added). *In re Clarke* demonstrates this Circuit’s understanding that vacatur is universally applicable, even where the challenged agency action is targeted at a specific individual. *See also, e.g., Am. Fed’n of Tchrs. v. Dep’t of Educ.*, 796 F. Supp. 3d 66, 97 n.6, 122 (D. Md. 2025) (observing, in action brought by unregulated parties, that an injunction forbidding enforcement of the vacated regulation against the regulated parties was unnecessary because “vacating a rule means that it is void, null, and nonexistent; the government cannot continue to enforce it, implement it, or otherwise use it”), *appeal docketed*, No. 25-2228 (4th

Cir. Oct. 15, 2025); *Green v. Perry's Rests. Ltd.*, 758 F. Supp. 3d 1312, 1317-18 (D. Colo. 2024) (noting, without deciding, the possibility that the defendant, a regulated party, could rely on the Fifth Circuit's vacatur of an agency regulation as a defense to liability where the Fifth Circuit vacated the regulation pursuant to a lawsuit brought by an unregulated third party); *D.A.M. v. Barr*, 486 F. Supp. 3d 404, 415 (D.D.C. 2020) ("The universal nature of vacatur means that after a court vacates an agency rule, that agency may not apply that rule *to anyone* in subsequent adjudicative decisions, even if those adjudications involve facts that predate the vacatur.") (emphasis in original).

II. THE DISTRICT OF MASSACHUSETTS VACATED THE RUBIO DETERMINATION LETTER

AAUP is a quintessential example of an unregulated party, adversely affected by agency action, exercising its right of review under the APA. The plaintiff in *AAUP*,² a national "nonprofit membership association and labor union of faculty, graduate students, and other academic professionals," alleged that its members' freedom of speech had been chilled by the deportability determinations made against five foreign nationals, including against Mr. Khalil in the Rubio Determination

² The Middle East Studies Association ("MESA") was also a plaintiff.

Letter.³ *AAUP*, 802 F. Supp. 3d at 131, 141-151.⁴ The District of Massachusetts put it clearly: The final agency action under review was the action that marked “the consummation of [the Public Officials’] decision-making” regarding the five foreign nationals whose cases were examined at trial, including Mr. Khalil’s.⁵ *Id.* at 191

³ INA 237(a)(4)(C) states that “[a]n alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable.” 8 U.S.C. § 1227(a)(4)(C)(i). Aliens “shall not be excludable” under INA 237(a)(4)(C) “because of the alien’s past, current, or expected beliefs, statements, or associations, if such beliefs, statements or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien’s admission would compromise a compelling United States foreign policy interest.” 8 U.S.C. § 1182(a)(3)(C)(iii); *see also* 8 U.S.C. § 1227(a)(4)(C)(ii) (incorporating § 1182(a)(3)(C)(iii)).

⁴ *See also AAUP*, 802 F. Supp. 3d at 147 (noting testimony at trial that Mr. Khalil’s deportation chilled AAUP members’ speech); *id.* at 172-73 (describing the agency action under review as the “target[ing of] a few,” including Mr. Khalil, “for speaking out and then us[ing] the full rigor of the Immigration and Nationality Act (in ways it had never been used before) to have them publicly deported with the goal of tamping down pro-Palestinian student protests and terrorizing similarly situated non-citizen (and other) pro-Palestinians into silence because their views were unwelcome”); *Am. Ass’n of Univ. Professors v. Rubio*, 780 F. Supp. 3d 350, 385-86 (D. Mass. 2025) (“[H]ere, the Plaintiffs allege that the Public Officials are targeting noncitizens who engage in pro-Palestinian advocacy for visa revocation and deportation, not that they have become anti-Palestinian or suppressive of speech in some general way.”).

⁵ While the plaintiffs in *AAUP* argued against an “ideological deportation policy” of general applicability, the district court found that the reviewable final agency actions were the “discrete” deportability determinations made as to the five individuals, including Mr. Khalil, about whom evidence was presented at trial. *AAUP*, 802 F. Supp. 3d at 172-73, 187; *see also supra* n.4; *Carter/Mondale Presidential Comm., Inc. v. Fed. Election Comm’n*, 711 F.2d 279, 288 (D.C. Cir. 1983) (“An agency’s characterization of finality is not necessarily decisive.”); *cf.*

(describing the final agency action at issue as a “*discrete* enforcement initiative” and noting that evidence of trial of the final agency action included the “referral” of the Reports of Analysis to Secretary Rubio) (emphasis added)⁶; *see also id.* at 172-73 (concluding that there “was no ideological deportation policy” of general applicability and describing the agency action under review as the “target[ing of] a *few*,” including Mr. Khalil) (emphasis added). As relevant to Mr. Khalil and the case under review here, that final agency action was the Rubio Determination Letter. *See id.* at 141-145 (setting forth findings as to Mr. Khalil’s INA 237(a)(4)(C) determination); *see also Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (a final agency action “mark[s] the consummation of the agency’s decisionmaking process” and is an action “by which rights or obligations have been determined, or from which legal consequences will flow”) (citations omitted).

Following a nine-day bench trial, the district court concluded that the “final agency action” under review, including the Rubio Determination Letter, was “unlawful as contrary to constitutional right” because it was “intentionally

Gonzalez v. United States, 851 F.3d 538, 545 (5th Cir. 2017) (the reviewing court, not the parties, defines the “conduct” at issue).

⁶ The district court found that “Reports of Analysis” (“ROA”), Department of Homeland Security intelligence reports, are the first step in an INA 237(a)(4)(C) determination. *AAUP*, 802 F. Supp. 3d at 134. In the case of green card holders, like Mr. Khalil, a “recommendation” based on an ROA is made “to Secretary Rubio, so he may then make the statutorily required personal determination as to whether the non-citizen ought to be removed, under INA 237(a)(4)(C).” *Id.*

viewpoint-discriminatory.” *AAUP*, 802 F. Supp. 3d at 189-91; *see also id.* at 187 (“[T]he challenged enforcement steps w[ere] targeted intentionally at specific viewpoints in order to chill speech.”). The court also found that the final agency action was arbitrary and capricious as against past agency guidance. *Id.* at 191-92. Specifically, as to Mr. Khalil’s INA 237(a)(4)(C) determination, the Court found that Secretary Rubio had been “alerted . . . about the lack of alternative,” *i.e.*, non-protected-speech, “grounds for remov[al],” yet, nonetheless, issued the determination letter. *Id.* at 143-44.

Consistent with the APA’s remedial scheme, the district court vacated the final agency action under review, including, as relevant here, the Rubio Determination Letter.⁷ *Am. Ass’n of Univ. Professors v. Rubio*, 2026 WL 524753, at *1 (D. Mass. Jan. 22, 2026) (vacating the “implementation of” the “Public Official’s enforcement policy . . . as set forth in the [court’s] findings”); *see also Data Mktg. P’ship*, 45 F.4th at 859 (noting that the “default rule is that vacatur is the appropriate remedy” where an agency action is deemed unlawful). The federal government only moved to stay the sanctions aspect of the *AAUP* judgment; it has

⁷ The district court’s judgment also granted AAUP and MESA members with a cause of action to seek sanctions in the event that their immigration statuses were altered in the future. *Am. Ass’n of Univ. Professors v. Rubio*, 2026 WL 524753, at *1-2. That aspect of the judgment is not pertinent to *amici*’s interests as expressed herein.

not moved to stay the vacatur. *See* Defs’ Mot. for Partial Stay Pending Appeal, *Am. Ass’n of Univ. Professors v. Rubio*, 1:25-cv-10685-WGY (D. Mass. Feb. 9, 2026), Dkt. No. 317 (seeking a partial stay as to the sanctions aspect of the judgment); *see also Griffin*, 144 S. Ct. at 2 n.1 (noting that “if a lower court sets aside an agency [action] under the APA, the Federal Government may promptly seek a stay”).⁸ Nor has it challenged the district court’s finding of an APA-reviewable final agency action on appeal. *See* Defs.-Appellants’/Cross-Appellees’ Principal Br. at 59, *Am. Ass’n of Univ. Professors v. Rubio*, No. 26-1141 (1st Cir. July 6, 2026), Dkt. No. 00118471807. The vacatur remains in effect and the Rubio Determination Letter is null and void unless and until the District of Massachusetts order is disturbed on appeal. *See Data Mktg. P’ship*, 45 F.4th at 859; *Valcq*, 16 F.4th at 522 (“vacatur unwinds the challenged agency action”); Mitchell, *The Writ-of-Erasure Fallacy*, 104

⁸ *See also* Pls.’ Resp. to Defs.’ Motion for Partial Stay Pending Appeal at 2, *Am. Ass’n of Univ. Professors v. Rubio*, No. 1:25-cv-10685-WGY (D. Mass. Feb. 10, 2026), Dkt. No. 322 (“Plaintiffs do not understand Defendants to be seeking a stay of anything beyond the sanction . . . and in particular they do not understand Defendants to be seeking a stay of the . . . order of vacatur[.]”); Unopposed Motion for Partial Stay Pending Appeal at 1-2, *Am. Ass’n of Univ. Professors v. Rubio*, No. 26-1141 (1st Cir. Mar. 25, 2026), Dkt. No. 00118422247 (seeking partial stay of sanctions portion of judgment); Pl.-Appellees’ Resp. to Motion for Partial Stay Pending Appeal at 1, *Am. Ass’n of Univ. Professors v. Rubio*, No. 26-1141 (1st Cir. Mar. 26, 2026), Dkt. No. 001184222802 (noting that, “contrary to Defendants’ assertion,” the defendants did not request a stay of “vacatur” from the district court); Order of Court at 2, *Am. Ass’n of Univ. Professors v. Rubio*, No. 26-1141 (1st Cir. Apr. 7, 2026), Dkt. No. 00118428074 (granting partial stay as to sanctions portion of judgment).

Va. L. Rev. at 1012-13 (following vacatur, the “disapproved agency action is treated as though it had never happened”).

III. THE BIA CANNOT RELY ON VACATED FINAL AGENCY ACTION AS EVIDENCE OF REMOVABILITY

The *AAUP* vacatur of the Rubio Determination Letter had taken effect well before April 29, 2026, when the BIA affirmed the immigration judge’s ruling that the letter is “presumptive and sufficient evidence that [Mr. Khalil] is removable under section 237(a)(4)(C)(i) of the INA.” *Matter of M-K*, 29 I&N Dec. 556, 559 (BIA 2026). The BIA’s holding is clearly erroneous because the *AAUP* order vacating the Rubio Determination Letter required the BIA to treat the Rubio Determination Letter as if it had never existed. *Supra* Section I; *see also Data Mktg. P’ship*, 45 F.4th at 859 (“[V]acatur unwinds the challenged agency action.”) (quoting *Valcq*, 16 F.4th at 522); *In re Clarke*, 94 F.4th at 512 (confirming vacatur has “nationwide effect”); *Career Colls.*, 98 F.4th at 255 (following vacatur, “the disapproved agency action is treated as though it had never happened”) (quoting Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. at 1012-13); *Texas*, 40 F.4th at 220 (vacatur “re-establish[es] the status quo”). Put simply, if the Rubio Determination Letter never existed, it cannot serve as “evidence” of Mr. Khalil’s removability, presumptive, sufficient, or otherwise.

Even if it could, the institutional harms of allowing the BIA to rely on vacated agency action as evidence of removability are serious and manifest. “It is

emphatically the province and duty of the judicial department to say what the law is.” *Marbury*, 5 U.S. at 177; *see also* The Federalist No. 78, at 525 (A. Hamilton) (J. Cooke ed. 1961) (“The interpretation of the laws is the proper and peculiar province of the courts.”); *cf. Tex. Med. Assoc.*, slip op. at 17 (“[A]dministrative agencies cannot survive judicial review simply by making mistakes that are so colossal that the sky will fall if a court reviews them.”). Accordingly, “[j]udgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government.” *Chi. & S. Air Lines v. Waterman dS.S. Corp.*, 333 U.S. 103, 113 (1948); *see also id.* at 113-14 (emphasizing that it is “the firm and unvarying practice” of Article III courts to issue judgments that are “binding and conclusive on the parties,” not judgments “subject to later review or alteration by administrative action”). And, in particular, review of an Article III court’s judgment may not be “vest[ed] . . . in officials of the Executive Branch.” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (citing *Hayburn’s Case*, 2 U.S. (2 Dall.) 408 (1792)). Thus, where an agency disagrees with a judicial order, the “proper procedure” is to “seek judicial review,” “not to disobey it, no matter how well-founded the[] doubts may be as to its validity.” *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 179 (1968).

Yet that is precisely what would result from affirming the BIA’s reliance on the Rubio Determination Letter here. *Cf. Whitmore v. Tarr*, 331 F. Supp. 1369, 1372 (D. Neb. 1971) (“The only protection the judicial branch has against impingement upon its authority by the executive branch, other than the traditional contempt power, is to refuse the enforcement in the courts of official actions taken in contravention of judicial power.”). The BIA cannot “refuse[] faith and credit,” to the judgment of an Article III court. *Waterman*, 333 U.S. at 113; *cf. Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 971 (3d Cir. 1979) (for an agency to “predicate an order on its disagreement” with an Article III judgment “is for it to operate outside the law,” and “[s]uch an order will not be enforced”). To hold otherwise would be a clear violation of separation-of-powers principles. *See Plaut*, 514 U.S. at 228 (“depriving judicial judgments of the conclusive effect that they had when they were announced” constitutes a “separation-of-powers violation”); *Loper Bright*, 603 U.S. at 413-14 (deference to agency interpretation of the law “violates our Constitution’s separation of powers” and “compels judges to abdicate their Article III ‘judicial Power’”) (Thomas, *J.*, concurring); *Chilcutt v. United States*, 4 F.3d 1313, 1327 (5th Cir. 1993) (“It would seriously erode our system of separation of powers if the executive branch [were] effectively immune from the judicial power.”) (citation omitted). The Constitution, and in particular, Article III, places the right to review, modify, or overturn an order of a District of Massachusetts court not in immigration judges, nor

in the BIA, but in the First Circuit. *See Plaut*, 514 U.S. at 218-19 (“The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy[.]”) (emphasis in original); *cf. Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 986 (11th Cir. 1982) (“Congress has not given us jurisdiction to review decisions of district courts outside this Circuit.”). The federal government may not acquiesce to vacatur in the First Circuit and ignore it here. *See supra* at 13-14 & n.8.

Affirming the BIA’s reliance on the vacated Rubio Determination Letter would also undermine Congress’s preferred remedial scheme. Where a statute, like the APA, establishes a specialized review scheme, that scheme “would fail of its purpose if, after the designated [federal] court invalidates a challenged order, the agency could enforce it nonetheless.” *Gorss Motels, Inc. v. Fed. Commc’n Comm’n*, 20 F.4th 87, 98 (2d Cir. 2021) (Hobbs Act). Here, the failure of the APA’s remedial scheme would be particularly profound because “[v]acatur is . . . *essential* to fulfill[ing] the basic presumption of judicial review for parties who have been adversely affected or aggrieved by federal agency action.” *Corner Post*, 603 U.S. at 832 (emphasis added).

Here, the consequences would be particularly “radical,” *id.* at 829, because affirming agency reliance on vacated actions would provide the executive branch with a veto right over the judicial review and remedy rights of unregulated parties. *AAUP* illustrates this principle well. There, plaintiffs sought review of the Rubio Determination Letter under the APA, alleging that it unconstitutionally targeted Mr. Khalil for deportation based on his protected speech in violation of the First Amendment, and that they were adversely affected or aggrieved by this agency action because it chilled their members’ free speech. *AAUP*, 802 F. Supp. 3d at 145-47, 172-73; *see also supra* Section II & n.4-5. Following a nine-day bench trial, the *AAUP* court found the final agency action violated the First Amendment and ordered that the unconstitutional action, *i.e.*, the Rubio Determination Letter, be vacated. *AAUP*, 802 F. Supp. 3d at 187, 189. The sole remedy for the injury to the plaintiffs’ free-speech rights was vacatur; by nullifying the final agency action that chilled their members’ speech, the plaintiffs were freed from the *in terrorem* effect of the unconstitutional action.⁹ *See id.* at 198. Permitting the BIA to continue to rely on that vacated action could, in effect, reinjure the *AAUP* plaintiffs by restoring the validity of the unconstitutional action that originally harmed them. And, because the Rubio Determination Letter does not regulate the *AAUP* plaintiffs directly, those

⁹ Certain non-citizen plaintiffs were also afforded the right to apply for a sanctions remedy. *Am. Ass’n of Univ. Professors v. Rubio*, 2026 WL 524753, at *1.

plaintiffs would not have a right to injunctive relief against this re-injury. *See supra* Section I. Their only path to relief would be to bring a second action to set aside the unlawful agency action.

Requiring adversely affected or aggrieved third parties like the plaintiffs in *AAUP* to return to court because an agency may disregard vacatur would render the right of review for anyone adversely affected by agency action under § 702 meaningless, undermine the finality of judicial orders, and illustrate the precise separation-of-powers issue identified above. *See Abbott Lab'ys*, 387 U.S. at 140; 5 U.S.C. § 702 (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to *judicial* review thereof.”) (emphasis added); *Corner Post*, 603 U.S. at 826 (a third party may “obtain relief” “only because the APA authorizes vacatur”). Indeed, allowing an agency to simply ignore the APA’s “only statutorily prescribed remedy,” *Franciscan All.*, 47 F.4th at 374-75, would render § 706 a nullity.

Finally, this Court need not—and, of course, may not—review the merits of the District of Massachusetts’ order and judgment; that falls within the First Circuit’s purview. *La Quinta Motor Inns*, 689 F.2d at 986. For as long as the vacatur remains in force, “[t]he principle of comity requires” this Court “to exercise care to avoid interference” with the jurisdiction of the District of Massachusetts and the First

Circuit’s review of *AAUP. Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 950 (5th Cir. 1997). Indeed, a “court that fails to give effect” to another court’s vacatur of an agency action “is launching a collateral attack on the earlier court’s judgment—and that is impermissible except in extremely rare circumstances.” Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. at 1015; *see also id.* at 1014 (“any court decision that ‘sets aside’ an agency action will bind other courts to the extent it pronounces an agency action invalid”) (emphasis in original).

Accordingly, the only question that should guide this Court’s review is whether the BIA could rely on the Rubio Determination Letter as evidence of removability after the District of Massachusetts ordered its vacatur. *See id.* at 1015 n.327 (“[O]ther courts won’t be bound to follow the rationale or opinion issued by the court that set aside the agency action. . . . They need only to regard the agency action as formally ‘set aside’ by the previous court’s decision.”). The answer to that question is undoubtedly “no” under the clear precedent governing APA vacatur. *Amici* submit that a contrary holding would cause great institutional erosion of our system of judicial review.

CONCLUSION

For these reasons, *amici* support vacating the BIA order insofar as it purports to rely on a vacated agency action as evidence of removability under 8 U.S.C. § 1227(a)(4)(C)(i).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,576 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman 14-point font.

/s/ Katherine Kelly Fell
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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using CM/ECF on August 24, 2026. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by CM/ECF.

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