ORAL ARGUMENT NOT YET SCHEDULED
No. 23-5220

In the United States Court of Appeals for the District of Columbia Circuit

CIGAR ASSOCIATION OF AMERICA, et al.,
Plaintiffs-Appellees,

v.

FOOD & DRUG ADMINISTRATION, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia

BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

A. ***Parties and Amici***. As of April 22, 2024, the date on which this *amicus* brief was filed, *amicus curiae* the New Civil Liberties Alliance is aware of no other parties, intervenors, or amici who have entered an appearance in this court, other than those listed in the Brief of Plaintiffs-Appellees at ii-iii. Nor is the NCLA aware of any parties, intervenors, or amici who appeared before the district court other than those listed in the Brief of Plaintiffs-Appellees at i-ii.

B. ***Ruling Under Review***. *Amicus curiae* the New Civil Liberties Alliance is aware of no rulings under review other than those listed in the Brief of Plaintiffs-Appellees at iii.

C. ***Related Cases***. *Amicus curiae* the New Civil Liberties Alliance is aware of no related cases other than those listed in the Brief of Plaintiffs-Appellees at iii-iv.

April 22, 2024

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel states that *amicus curiae* the New Civil Liberties Alliance is a nonprofit organization under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

/s/ John J. Vecchione
John J. Vecchione

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this brief.* Pursuant to Circuit Rule 29(d), NCLA certifies that a separate brief is necessary to provide an in-depth analysis of the "remand without vacatur" doctrine, which could affect not only the presently challenged rule, but also the more general right to be free from the FDA and other administrative agencies' continuing enforcement of rules a court has concluded are contrary to law.

* NCLA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. *See* Fed. R. App. P. 29(c)(5).

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GLOSSARY

APA	Administrative Procedure Act
FDA	Food & Drug Administration
FSPTCA	Family Smoking Prevention and Tobacco Control Act of 2009
NCLA	New Civil Liberties Alliance

INTEREST OF AMICUS CURIAE

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself: jury trial, due process of law, and the right to live under laws made by the nation's elected lawmakers through constitutionally and statutorily prescribed channels, which is at stake in this appeal. These rights are as applicable and important today as they were when recognized and codified in both our founding documents and our statutes. Frequent recourse to these foundational principles is essential to ensure that each branch exercises only the authority granted by the constitution.

NCLA aims to defend civil liberties—primarily by advocating the constraints the constitution imposes on administrative agencies. Without them, Americans would be left with merely a shell of their republic, rather than the government of limited, enumerated, and separated powers they created, maintained, and promised to their posterity. Unsettlingly, however, administrative agencies (sometimes

with the judiciary's intentional or unintentional blessing) have been asserting a right to exercise power the constitution authoritatively vests in other branches of government. It is this exercise of power without the consent of the governed that is the focus of NCLA's concern.

As relevant here, NCLA is interested in the rise of a doctrine that purportedly empowers an administrative agency to enforce unlawful rules—what has come to be known as the "remand without vacatur" doctrine. Here, the FDA asks this court (should it affirm the decision below) to engage this doctrine to allow the FDA to enforce its unlawful rule while it decides what to do in response to the Court's order. As this brief will explain, however, a rule promulgated contrary to the requirements of the Administrative Procedure Act never obtains the force of law, and so is void *ab initio*. No court doctrine, no matter how well intended, has the power to confer, even temporarily, the force of law on a rule that never had any.

STATEMENT OF THE CASE

NCLA's interest in this case lies only with the "vacatur without remand" doctrine; we take no position on the decision that the Final Deeming Rule was arbitrary and capricious. For that reason, our Statement of the Case is abridged so that we may focus on why it is essential to vacate rules the court concludes are unlawful.

The FSPTCA directed the FDA to regulate specific tobacco products, and granted it authority to "deem" other products, such as cigars, subject to the Act's provisions.[1] Several years later, the FDA commenced the rulemaking process to bring additional tobacco products within the Act's coverage.[2] It proposed two options—the first would encompass premium cigars, the second would not.[3] Ultimately, the FDA

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[1] "This subchapter shall apply to all cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco and to any other tobacco products that the Secretary by regulation deems to be subject to this subchapter." 21 U.S.C. § 387a(b).

[2] 79 Fed. Reg. 23,142 (Apr. 25, 2014).

[3] "Option 1 would apply this proposed rule to all products meeting the statutory definition of "tobacco product," except accessories of a proposed deemed tobacco product, to be subject to the FD&C Act. Option 2 would propose to deem a certain subset of cigars (not including premium cigars),

opted for the former and incorporated it in the Final Deeming Rule it promulgated on May 10, 2016, which the Plaintiffs-Appellees duly challenged.[4]

The District Court observed that "one of the central questions in the rulemaking process was whether 'different kinds of cigars … may have the potential for varying effects on public health, if there are differences in their effects on youth initiation, the frequency of their use by youth and young adults, and other factors.'" Mem. Op. on Remedy, ECF276 at 3 ("Remedy Op.") (quoting Mem. Op. and Order, ECF268 at 3 ("Substance Op."). With respect to this issue, the FDA claimed that "notwithstanding '[its] explicit requests in the [Notice of Proposed Rulemaking], the comments did not include data indicating that premium cigar smokers

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as well as other products meeting the definition of "tobacco product," but excluding the accessories of a proposed deemed tobacco product." *Id*. at 23,148.

[4] *Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products*, 81 Fed. Reg. 28,974 (May 10, 2016) (codified at 21 C.F.R. pts. 1100, 1140, 1143) (the "Final Deeming Rule").

are not subject to disease risk and addiction.'" Remedy Op. at 3 (quoting 81 Fed. Reg. at 29,024) (alterations in original). The District Court, however, "found these assertions not supported by the record," *id.* at 4, and so concluded the FDA had acted "arbitrarily and capriciously" by failing to account for the evidence of record before promulgation. Substance Op. at 14-15.

Plaintiffs-Appellees asked the court to vacate the Final Deeming Rule, while the FDA requested remand without vacatur. Remedy Op. at 1. The court noted that "when a reviewing court determines that the agency regulations are unlawful, the ordinary result is that the rules are vacated." Remedy Op. at 5 (internal marks and citation omitted). It also recognized that this Circuit's opinions have held that, in "exceptional circumstances," "remand without vacatur is an available remedy" depending on "(1) the seriousness of the [rule's] deficiencies, and (2) the disruptive consequences of vacating the rule." Remedy Op. at 5 (internal marks and citation omitted). The District Court concluded this case presents no such exceptional circumstances, and so vacated the Final Deeming Rule "insofar as it applies to premium cigars." Remedy Op. at 12.

ARGUMENT

In the words of the Administrative Procedure Act, it is a court's duty to hold unlawful and set aside an unlawfully promulgated rule[5]—or, as courts commonly style the remedy, to vacate it.[6] This is not a discretionary decision. It is, instead, a duty that necessarily follows from the basic principles underlying the rule of law and a constitutional form of government. Specifically, setting aside an unlawful rule vindicates our foundational understanding that every exercise of governmental power must flow, both substantively and procedurally, from a proper grant of authority. Failure to set aside unlawful rules, on the other hand, would recognize a status unknown to the law: An enforceable but unlawful rule.

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[5] "The reviewing court shall … hold unlawful and set aside agency action, findings, and conclusions found to be" contrary to one of six listed conditions. 5 U.S.C. § 706(2).

[6] Vacating a rule "requir[es] the agency to initiate another rulemaking proceeding if it would seek to confront the problem anew." *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 854 (D.C. Cir. 1987); *see also* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 1015 (2018) ("[A] court that has 'set aside' an agency action has formally vetoed the agency's work in the same way that a President vetoes a bill.").

Such a status would be entirely inconsistent with a government that obtains its just powers from the "consent of the governed." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

The FDA, however, asks for this very thing. It asserts that, if the Final Deeming Rule is unlawful, the Court should nonetheless grant it permission to continue enforcing it while considering its options. This is not, to be sure, a novel request. At least since *Indep. U.S. Tanker Owners Comm.*, this Court has said there are circumstances under which, having concluded a rule is unlawful, it will nonetheless remand without vacatur so that the administrative agency may attempt to cure the condition. *Id.* at 854-55.

This "remand without vacatur" option, however, rests on the unexplored assumption that a rule promulgated in violation of the Administrative Procedure Act nonetheless carries the force of law from the point of promulgation. How else could an agency continue enforcing it after a court has declared it unlawful? Although the Supreme Court has never directly considered this question, it has unequivocally established all the analytical propositions necessary to conclude that unlawful rules do not—and never could—enjoy the force of law. Indeed,

should the Supreme Court ever address the "remand without vacatur" option, it could not approve the doctrine without reversing itself on what it means for an administrative rule to be properly promulgated and, therefore, binding.

An improperly promulgated rule is a legal orphan. The defect in its origin means it can claim no lawful power from a congressional delegation of authority, and there is no alternate reservoir of authority a court may tap to give it a life it never had. So when a court concludes an administrative rule was improperly promulgated, its only option is to recognize the rule's unlawfulness and set it aside. *Amicus* urges the Court, should it entertain the FDA's request for a remand without vacatur, to consider the damage to the rule of law occasioned by allowing an administrative agency to continue enforcing a rule the court has just declared unlawful.[7]

[7] The panel, of course, does not have the authority to overrule prior circuit decisions addressing the "remand without vacatur" doctrine, *Brewster v. Comm'r of Internal Revenue*, 607 F.2d 1369, 1373 (D.C. Cir. 1979), but nor must it choose to engage the doctrine in this case.

I. "REMAND WITHOUT VACATUR" AND THE FORCE OF LAW

The integrity of the "remand without vacatur" doctrine depends on whether a rule, notwithstanding its unlawfulness, nonetheless carries the force of law. If it does, there can be no legal (as opposed to prudential) objection to its continued enforcement while the administrative agency endeavors to remedy the court-identified defects. But if it doesn't, there can be no reconciling "remand without vacatur" with the rule of law.

There are two possible options with respect to the legal status of an unlawfully promulgated rule. The first is that all rules, those that are lawfully promulgated and those that are not, obtain the force of law at the point of promulgation and keep that status unless and until a court revokes it. This is a "judicial-centric" model inasmuch as it presumes a court has the discretionary power to remove the force of law from a rule that would otherwise maintain that status notwithstanding its unlawfulness. The second option focuses on the agency and the legal sufficiency of its rulemaking activity. It recognizes that a rule either obtains the force of law at the point of promulgation or it does not. The difference depends not on what a court subsequently says about the rule's status, but on whether the agency complied with the substantive and

procedural requirements necessary to create a binding rule. Under this agency-centric model, when an agency fails to comply with the requirements of the APA, the rule never obtains the force of law; it is and was a legal nullity. There is, therefore, no force of law to strip from the unlawful rule because it never had it in the first place. A reviewing court's duty in such a circumstance is to do as the APA requires: declare the rule's unlawfulness and set it aside.

The "remand without vacatur" doctrine relies on the unexplored assumptions of the judicial-centric model. When a court concludes that a rule is unlawful and fails to vacate it, it is telling the promulgating agency—perhaps *sotto voce*—that it may continue enforcing the rule notwithstanding its unlawfulness. It would be an offense to the dignity of the court to suggest that it would intentionally authorize an agency to enforce a rule that lacks the force of law, so *amicus* presumes that a "non-vacating" court relies on the assumption that an unlawful rule nonetheless obtains the force of law at the point of promulgation and maintains that status simply by virtue of not having been vacated.

So, whether courts should follow the judicial-centric model underlying the "remand without vacatur" doctrine or, instead, the

agency-centric model depends entirely on whether an unlawful rule obtains the force of law at the point of promulgation. Because this is really just a particularized inquiry into how governments obtain the lawful power they exercise, the analysis must start there.

A. The Irreducible Necessity of Affirmative Authority

Legitimate exercises of governmental power proceed from an unbroken chain of authority between the original source and the action in question. When the Declaration of Independence said "Governments are instituted among Men, deriving their just powers from the consent of the governed," *id.* at para. 2, it was not proffering a platitude, it was acknowledging the most basic truth about the rule of law: Legitimacy of governmental power, whether legislative, executive, or judicial, rests on a proper grant of authority. Although at this late date in our republic it is a commonplace to observe that the people are sovereign and that all authority found in the government's hands must first have been held in theirs, it nevertheless bears repeating:

> [W]hen, 'in order to form a more perfect union,' it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them,

> was felt and acknowledged by all. The government of the Union, then … , is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. … Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

M'Culloch v. Maryland, 17 U.S. 316, 404–05 (1819).

This delegated authority follows the well-trodden path from the original source through division and—with respect to the law-making aspect—vesting in the legislature and subsequent sub-delegation to the Executive Branch so that administrative agencies may, through APA-compliant processes, "fill up the details" of congressional policies. *Wayman v. Southard*, 23 U.S. 1, 43 (1825). Acting outside this chain of delegation, either substantively or procedurally, prevents a legislative or administrative act from acquiring the force of law. This is true not just with respect to the great charter of our national government, but also at each step of the law-making process all the way down to the least of the administrative agencies promulgating the most innocuous of substantive rules. Indeed, just like a statute, an administrative rule cannot achieve the status of law unless it is the product of an unbroken chain of authority traceable to the original source.

For purposes of evaluating the "remand without vacatur" doctrine, and specifically the question of whether an unlawfully promulgated rule may carry the force of law, this principle can be more helpfully restated in the negative. That is, every failure to create binding law, whether statutory or regulatory, represents a lack of substantive or procedural authority, the deficit of which can produce nothing but a legal nullity.

The most cogent explanation of this principle appears in *Marbury v. Madison*, 5 U.S. 137 (1803). Although that opinion addressed the relationship between legislative enactments and the constitution, its principles hold true with respect to the relationship between rules and the APA. So after a brief rehearsal of this well-known case (and its contemporary restatement), the analysis will turn to the Supreme Court's largely parallel treatment of administrative rulemaking.

The *Marbury* analysis commenced with the proposition that, when it comes to legislating, the whole purpose of adopting a written constitution is to set limits on the authority to make the law:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended

> to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.

Id. at 176–77. "Acts prohibited" are not, of course, of "equal obligation" with "acts allowed" because a statute's authority, to the extent it has any, is entirely derivative of the constitution. To legislate outside the boundaries that charter established is to legislate without authority. That's why, in a contest between contradictory legislative and constitutional provisions, "[i]t is a proposition too plain to be contested that the constitution controls any legislative act repugnant to it … ." *Id.* at 177.

Having established the constitution's paramount authority, the Court turned to the implications for the status of contravening statutes. If the constitution truly limits the legislature's authority, it follows that, in the Court's words, "a legislative act contrary to the constitution *is not law*." *Id.* at 177 (emphasis supplied). This is so because "all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the

theory of every such government *must* be, that an act of the legislature, repugnant to the constitution, *is void*." *Id*. (emphasis supplied).

It could hardly be otherwise. Rejecting this principle, *Marbury* said, would mean that notwithstanding the statute's unconstitutionality, it would still carry the force of law. An anti-*Marbury* position would presume the superior has no ability to constrain the scope of authority it delegates, which would effectively mean that the subordinate is not really subordinate at all, but is instead plenipotentiary:

> It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits.

Id. at 178.

This foundational principle is as true today as it was all those years ago. Just last term, the Supreme Court commented once again on the status of unconstitutional statutes. Not only did it carry forward *Marbury*'s analysis, but it did so using *Marbury*'s own words, recounting that "an act of the legislature, repugnant to the constitution, is void."

Moore v. Harper, 600 U.S. 1, 20 (2023) (quoting *Marbury*, 5 U.S. at 177). It then elaborated on the sound historical foundation for the principle, noting that during the Constitutional Convention, James Madison asserted that a "law violating a constitution established by the people themselves, would be considered by the Judges as null & void." *Id.* at 21-22 (quoting 2 Records of the Federal Convention of 1787, p. 28 (M. Farrand ed. 1911)). And it observed that, in an essay meant to convince the people to adopt the proposed constitution, "Alexander Hamilton maintained that 'courts of justice' have the 'duty … to declare all acts contrary to the manifest tenor of the Constitution void.'" *Id.* at 22 (quoting The Federalist No. 78, p. 466 (C. Rossiter ed. 1961)).

But the courts do not *make* such statutes void, they merely recognize them to be so and declare that status in their opinions. Or, to put it another way, unconstitutional statutes are void *ab initio* because the legislature has no authority to legislate beyond the boundaries set by the constitution. Which is why the Court in *Collins v. Yellen* said "an unconstitutional provision is never really part of the body of governing law (because the Constitution automatically displaces any conflicting

statutory provision *from the moment of the provision's enactment*) … ." 141 S. Ct. 1761, 1788–89 (2021) (emphasis supplied).

The displacement is automatic, and it occurs at the point of enactment, because the failure to comply with the source of authority prevents the statute from obtaining the force of law in the first place, not because a Court revoked a status it otherwise enjoyed. The Supreme Court has not addressed the consequences of a rule promulgated in violation of the APA as extensively as it has the enactment of a statute in violation of the constitution. But what it *has* said is entirely consistent with its position on the status of unconstitutional statutes—they cannot carry the force of law.

B. Unlawful Rules Never Achieve the Force of Law

Just as it is axiomatic that the legislature's power to enact statutes is limited to the authority the people delegated through the constitution, "[i]t is [also] axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). In the context of statutes, the source of substantive authority and procedural requirements is, of course, the

same—the constitution. For administrative rules, however, the sources are bifurcated. The FDA's substantive authority to regulate tobacco products comes from the FSPTCA, while the procedural requirements it must satisfy in doing so appear in the APA. As discussed below, when an agency fails to comply with either substantive or procedural requirements in promulgating a rule, the result is the same as a congressional failure of the same type: Nothing with the force of law has been made.

Just like statutes, rules cannot obtain the force of law unless the promulgating agency has been granted the appropriate substantive authority, *and* the agency has complied with all relevant APA procedural requirements: "It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) (internal marks and citation omitted). The Court's use of "properly" to qualify "promulgated" was not inadvertent. It was instead the result of a thorough inquiry into what that term means as a precondition to a rule obtaining the force of law.

Resolution of the *Brown* matter turned, in part, on whether the disclosure requirements of the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) carried the force of law. *Id.* at 312. The Court commenced its analysis with the recognition that valid rules must comply with both substantive and procedural requirements: "In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites." *Id.* at 301. Amongst the substantive requirements, the Court said, is the existence of delegated authority on the subject addressed by the rule: "The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Id.* at 302.

Substantive authority over the subject the rule addresses is not, however, sufficient to confer the force of law—the agency must also have complied with procedural requirements in promulgating the rule.

> Likewise the promulgation of these regulations must conform with any procedural requirements imposed by Congress. *Morton v. Ruiz, supra*, 415 U.S. at 232, 94 S.Ct. at 1073. For

> agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which "assure fairness and mature consideration of rules of general application." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969).

Id. at 303. The relevant procedural limitations appear, of course, in the APA. *Id.*

The *Brown* Court concluded that the OFCCP's disclosure requirements could not carry the force of law because of a procedural defect, and "[t]hat defect [was] a lack of strict compliance with the APA." *Id.* at 312. It concluded that procedural failures, no less than failures of delegated subject-matter authority, prevent the creation of a legally binding rule: "Certainly regulations subject to the APA cannot be afforded the force and effect of law if not promulgated pursuant to the statutory procedural minimum found in that Act." *Id.* at 313.

Amongst those procedural minimums for the promulgation of a valid rule is the requirement that it not be the product of an arbitrary and capricious process. "One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). That encompasses a duty to "examine the relevant data and

articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (internal marks and citation omitted). If the agency does not satisfy this procedural requirement, its action is "arbitrary and capricious" and, as particularly important to this analysis, the resulting rule "cannot carry the force of law." *Encino Motorcars, LLC*, 579 U.S. at 221.

There can be no doubt about the status of a rule promulgated in violation of the APA. It does not now have, nor could it ever have had, any binding effect. To conclude otherwise would assume, without any demonstrated jurisprudential rationale, that an administrative agency's rule may violate substantive and procedural requirements without suffering the same fate as legislative acts that are similarly defective.

C. "Remand Without Vacatur" Is Inconsistent with the Rule of Law

For "remand without vacatur" to be an appropriate option with respect to an unlawfully promulgated rule, the rule must have carried the force of law from the point of its inception. But if that is true, then

all of what has been discussed above would have to be negated—whether it relates to the need for an unbroken chain of authority to create a rule, or the procedural requirements an agency must follow, or the Supreme Court's unequivocal statements about the conditions precedent to a binding agency action, or the basic principles undergirding the rule of law. What follows is just a partial list of jurisprudential propositions that would need to change to make room for the "remand without vacatur" doctrine, starting with the Supreme Court's pronouncements on what makes for a force-of-law carrying rule.

The most obvious change would address the Court's holding that rules that do not comply with the APA's procedural requirements cannot carry the force of law. So *Brown* would need to be reversed inasmuch as the resolution of the case depended, at least in part, on the principle that "regulations subject to the APA cannot be afforded the 'force and effect of law' if not promulgated pursuant to the statutory procedural minimum found in [the APA]." 441 U.S. at 313. At a more granular level (and as specifically applicable to this case), the court would need to say that arbitrary and capricious rules, contrary to *Encino Motorcars, LLC* and *State Farm,* do indeed carry the force of law. Also, the idea upon which

that conclusion rests would have to go—that is, that procedural requirements limit what agencies may do: "[A]gency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which assure fairness and mature consideration of rules of general application." *Brown*, 441 U.S. at 303. (internal marks and citation omitted). So it would no longer be true that "[o]ne of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions," *Encino Motorcars, LLC*, 579 U.S. at 221, and that the failure to satisfy that requirement results in nothing but an "arbitrary and capricious" agency action that is definitionally incapable of ever acquiring the "force of law" in the first place. *State Farm*, 463 U.S. at 43.

Those changes would then ripple through the foundational concepts on which the rejected principles rested. Thus, for example, if an arbitrary and capricious rule can carry the force of law, it could only do so if agencies may act beyond the authority Congress delegated to them. Congress has not authorized administrative agencies to create rules arbitrarily and capriciously, so if rules created in such a way are nonetheless enforceable, it can only be because Congress cannot place

enforceable limits on what agencies promulgate. This court would have to dispense with the *Bowen* Court's observation that "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." 488 U.S. at 208. So too *Brown*'s assertion that "[t]he legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and *subject to limitations which that body imposes*." *Id*. at 302 (emphasis supplied). The *Morton* Court said much the same thing, so its overruling would also need to be recognized. What was once axiomatically true would not only lose its axiomatic status, it would no longer be true at all.

The failure of that axiom would, in turn, require differential treatment between unlawful rules and unconstitutional statutes, even though the operative error in both cases stems from action exceeding delegated authority. It would confer on the former a status that is inapplicable to the latter: The force of law from the point of promulgation until a judicial decree to the contrary. The "remand without vacatur" doctrine would substitute its own "valid from the point of promulgation"

formula for the *Collins* formulation that "an unconstitutional provision is never really part of the body of governing law (because the Constitution automatically displaces any conflicting statutory provision *from the moment of the provision's enactment*)." 141 S. Ct. at 1788-89 (emphasis supplied).

The *Collins* Court was not expressing a new principle. The "remand without vacatur" formulation for when a rule obtains the force of law thus would require abolishing principles recognized from the earliest days of our republic. A court opting not to vacate could only do so if it first concluded that *Marbury*'s observation that a "legislative act contrary to the constitution *is not law*," 5 U.S. at 177 (emphasis supplied), applies to statutes, but not rules. And it would have to further conclude that the *Marbury* Court's mistaken view of history caused the erroneous belief that "the theory of every [constitutional] government must be, that an act of the legislature, repugnant to the constitution, *is void*." *Id.* (emphasis supplied). Not void*able*, but *void*. Giving effect to the "remand without vacatur" doctrine would reverse those terms (as applicable to the regulatory context) as well as *Marbury*'s impeccable logic. Ultimately, this would make "acts prohibited" carry the same obligation as "acts

allowed" (at least until a court decides to change the status quo), a circumstance that *Marbury* said would abolish the "distinction[] between a government with limited and unlimited powers." *Id.* at 176.

The list of propositions endorsed by history, the Supreme Court, and logic that would need to be set aside to avoid setting aside an unlawful rule could be further supplemented at length. But that would just add unnecessarily cumulative weight to the immutable truth that a rule that does not comply with the APA's procedural requirements cannot, and never will, obtain the force of law.

II. "REMAND WITHOUT VACATUR" AND THE APA

That truth is decidedly problematic for the "remand without vacatur" doctrine. An unlawful rule is a legal nullity, so not only can it not be enforced during remand (even if a court may wish otherwise), there is nothing to remand. It's not like it's underbaked and can benefit from a little more attention in the rulemaking process. The rulemaking failed, like a soufflé, and there is no fixing a fallen soufflé; one must start over. Which is why the APA doesn't have any procedure by which an agency

can re-open the file and add the missing ingredients that might have averted the rule's unlawfulness.[8]

So a court's duty upon encountering a rule promulgated in violation of either substantive or procedural requirements is unambiguous: It must declare it unlawful and set it aside. In relevant part, the APA describes this duty in mandatory terms: "The reviewing court *shall* … hold unlawful and set aside agency action, findings, and conclusions found to be[]" contrary to one of six conditions, the first of which is an action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law … ." 5 U.S.C. § 706 (emphasis supplied). Although it is true that the term "shall" can variably mean "must" or

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[8] This contrasts with rules that do not comply with, for example, the Regulatory Flexibility Act, which need not be set aside and can be remanded for further action. Specifically, that Act provides that "[i]n granting any relief in an action under this section, the court shall order the agency to take corrective action consistent with this chapter and chapter 7, including, but not limited to-

> (A) remanding the rule to the agency, and
> (B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest."

5 U.S.C. § 611(a)(4).

"may," depending on the context,[9] the Supreme Court has given it the former meaning.

In *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), *abrogated (on other grounds) by Califano v. Sanders*, 430 U.S. 99 (1977), a case that turned specifically on the validity of administrative action, the Supreme Court addressed what must occur upon a finding of unlawfulness. It said the court "must"—not "shall," but "must"—set aside agency action that does not meet the standard of § 706:

> In all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements. 5 U.S.C. §§ 706(2) (A), (B), (C), (D) (1964 ed., Supp. V). In certain narrow, specifically limited situations, the agency action is to be set aside if the action was not supported by 'substantial evidence.' And in other equally narrow circumstances the reviewing court is to engage in a *de novo* review of the action and set it aside if it was 'unwarranted by the facts.' 5 U.S.C. §§ 706(2)(E), (F) (1964 ed., Supp. V).

[9] *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 112-13 (1st ed. Thomson/West 2012).

401 U.S. at 413-14.[10] More recently, the Court has said "[t]he Administrative Procedure Act *requires* federal courts to set aside federal agency action that is not in accordance with law … ." *F.C.C. v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 300 (2003) (internal marks omitted; emphasis supplied) (quoting 5 U.S.C. § 706(2)(A)). Unlike "shall," neither "must" nor "requires" is capable of connoting "may."

The "remand without vacatur" doctrine, however, inserts non-textual exceptions into the APA's direction that courts must set aside unlawful rules. Those exceptions, this court has said, comprise "the seriousness of the order's deficiencies and the likely disruptive consequences of vacatur." *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (internal marks and citation omitted). Those are perfectly reasonable considerations in formulating a remedy—if, that is, the rule otherwise enjoys the force of law during the remand period. The problem, of course, is that an unlawful rule does not. So, before

[10] Importantly, although the *Overton* Court remanded the matter, the remand was to the district court (not to the agency) for further consideration of *whether* the administrative action was unlawful (not to *fix* an unlawful action). There was no vacatur because there had been no declaration of unlawfulness.

remanding without vacatur, the court must identify something that would imbue the unlawful rule with the force of law while the agency works on fixing the defects.

The exceptions that purport to justify remand without vacatur under this doctrine don't fill that deficit. As applicable to this case, there is no meaningful gradation of how seriously arbitrary and capricious a rule might be. "Arbitrary and capricious" is a category, not a scale. There's no such thing as being a *little* inside that category. And even if there were, a rule that is just a little arbitrary and capricious does not create, by that "littleness," a reservoir of authority the court can tap to confer the force of law on the offending rule during the period of remand.

The "likely disruptive consequences of vacatur" consideration has the same problem. Although courts should always be aware of the effects of their orders, the concern for consequences must be cabined by the lawful parameters within which they may act. Before accounting for this consideration, a court must first assure itself there is authority for the proposed remedy. If there is, only then may the court calibrate its order to account for these concerns. The possibility of disruptive consequences, however, does not create authority where none otherwise exists. A rule

promulgated in violation of the APA is a legal nullity notwithstanding the consequences of the court's compliance with the APA's requirement.

In sum, if the court excuses an agency's failure to properly promulgate a rule by remanding without vacatur, it is in theory, in practice, and *de jure*, granting an agency permission to act contrary to law. No court has the authority to grant such dispensations, it would be entirely contrary to the rule of law to do so, and neither the seriousness of the rule's defect nor the consequences of its vacatur change that fundamental limitation on the court's power.

CONCLUSION

The "remand without vacatur" doctrine is contrary to the rule of law because it relies on the insupportable assumption that unlawful rules obtain the force of law at the point of promulgation and retain that status until judicially revoked. *Amicus* requests the court to consider the damage to the rule of law that would be occasioned by not vacating an unlawful rule.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of the Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 6,475 words. This brief also complies with the typeface and type-style requirements of the Federal Rule of Appellate Procedure because it was prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, a proportionally spaced typeface.

/s/ John J. Vecchione
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I hereby certify that on April 22, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

/s/ John J. Vecchione
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