UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

GBX Associates LLC, *Plaintiff*, v. United States of America, *et al.*, *Defendants*.	CASE NO. 1:22-cv-00401 (PAB) JUDGE PAMELA A. BARKER

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF ISSUE TO BE DECIDED

Whether Notice 2017-10, 2017-4 IRB 544, which the government admits was issued in violation of the Administrative Procedure Act (APA), should be vacated in whole or whether it should be set aside as to Plaintiff only?

SUMMARY OF ARGUMENT

This is an unusual case: The government has formally conceded, in its Answer to GBX's Verified Complaint for Injunctive and Declaratory Relief (Complaint), that under binding Sixth Circuit precedent, Notice 2017-10 was promulgated without the notice and comment procedures mandated by the APA and is, therefore, unlawful. The government maintains, however, that rather than providing the ordinary APA remedy—"hold[ing] unlawful and set[ting] aside [the] agency action," rendering it null and void (5 U.S.C. § 706(2))—the Court should instead "set[] IRS Notice 2017-10 aside *as to plaintiff GBX only*." Answer, Doc. 15, at 16 (emphasis added).

Notwithstanding a recent campaign by the Department of Justice to convince the judiciary otherwise (*see infra* n.1), the law is clear on this point: "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." *Nat'l Min. 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)) (emphasis added). Indeed, it is logically incoherent to speak of setting aside a rule—that is, vacating it—only "as to" a particular party; either the rule is vacated, or it is not. APA set-aside relief is directed to the action, not the actor, and is thus distinct from mandatory or prohibitive injunctive relief—and lacks many of the characteristics that judges and commentators have found troubling about nationwide injunctions. Myriad courts across the country have thus rejected the government's unprecedented contention that final APA relief must (or even may) be limited to the plaintiffs themselves.

This Court should do the same. It should instead issue the form of relief that the APA has been understood for decades to authorize: vacatur of the challenged agency action, not some novel form of quasi-vacatur that applies only to particular parties and would allow the government to enforce the rule against other parties under threat of civil penalties and criminal prosecution.

BACKGROUND

The Court is aware of the factual background to this case (*see* Memorandum Opinion & Order (Doc. No. 12), at 1-5). The material facts are not in dispute and the question presented is purely legal. GBX briefly recites the relevant facts below.

GBX is a real estate investment and development firm that focuses on the acquisition, preservation and rehabilitation of historic buildings in urban centers. Complaint (Doc. No. 1), ¶ 13. It utilizes a variety of federal, state and local tax incentives (including Historic Preservation Easements) to promote Congress's goal of rehabilitating and preserving historic structures. *Id.* ¶¶ 14-16. The Internal Revenue Service (IRS) is the federal agency tasked with prescribing rules and regulations for the enforcement of the Internal Revenue Code. 26 U.S.C. § 7805(a). On December 13, 2016, the IRS promulgated Notice 2017-10 requiring taxpayers and material advisors to report information about certain transactions involving the charitable contribution of a conservation easement. *Id.* ¶¶ 20-23. The government admits, based on controlling Sixth Circuit precedent, that the IRS violated the APA's notice-and-comment requirements when it issued Notice 2017-10. *See* Answer (Doc. No. 15), ¶¶ 48-63. Thus, the government concedes that "Notice 2017-10 is unlawful because the IRS and Treasury failed to comply with the notice-and-comment procedures and there is no applicable exception to those requirements." *Id.* ¶ 63.

Notice 2017-10's reporting requirements—which require dozens of hours of taxpayer compliance—mandate reporting: (i) by participants on Form 8886, Reportable Transaction Disclosure Statement, which must be included with the taxpayer's income tax return and separately submitted

to the IRS Office of Tax Shelter Analysis (OTS); and (ii) by material advisors on Form 8918, Material Advisor Disclosure Statement, which must be filed with the OTS. Complaint, ¶¶ 24-26, 28-31. Material advisors must also maintain certain records and provide certain information, which again requires several hours to complete, to all taxpayers and other material advisors for whom it acts as a material advisor. *Id.* ¶¶ 38, 30, 34-35. Under Notice 2017-10's reporting obligation regime, GBX is required to obtain a reportable transaction number that it must provide to its investors (participants) and other material advisors to a transaction, which those parties must include as part of their own Notice 2017-10 reporting obligations. *Id.* ¶ 30.

Failure to follow the requirements of Notice 2017-10 can lead to severe civil penalties and criminal prosecution. *Id.* ¶¶ 2, 26-27, 32-33, 37. GBX is a material advisor that spends significant time and money (both internally and through paid advisors) managing its own reporting and list maintenance obligations and providing the information necessary to comply with the reporting and list maintenance requirements to other material advisors, to the investors who participate in the funds GBX offers, and to the tax professionals who work with those material advisors and investors to avoid the imposition of any civil penalties and criminal prosecution. *Id.* ¶¶ 39-46.

GBX filed its Complaint with the Court challenging the validity of Notice 2017-10. GBX requested that the Court declare Notice 2017-10 unlawful and set it aside, permanently enjoin enforcement of Notice 2017-10, and order all other relief to which GBX may be entitled, including an award of attorneys' fees and costs. Complaint, at 10. As explained below, the government agrees that Notice 2017-10 is unlawful and should be set aside, but requests entry of a narrow final judgment that would allow the IRS to continue to enforce Notice 2017-10 against all other regulated parties. Answer, at 16.

ARGUMENT

GBX is entitled to summary judgment and an order "hold[ing] unlawful and set[ting] aside" Notice 2017-10 in whole under the APA. 5 U.S.C. § 706. In a district court proceeding for APA review, "[s]ummary judgment serves as the mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Roberts v. U.S. Dep't of Justice*, 507 F. Supp. 3d 864, 875 (E.D. Mich. 2020) (quotation marks omitted), *rev'd on other grounds*, 2021 WL 5164078 (6th Cir. Nov. 9, 2021); *accord, e.g., Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) ("[W]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal," and "[t]he 'entire case' on review is a question of law.").

Here, the government has formally conceded, in its Answer, that "Notice 2017-10 is unlawful because the IRS and Treasury failed to comply with the notice-and-comment procedures and there is no applicable exception to those requirements." Answer ¶ 63. The only remaining issue is the scope of relief.

I. The proper relief in an APA challenge to a generally applicable rule is to "set aside" the rule in whole, not restricted to the particular plaintiffs.

As courts around the country have explained time and again, "[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—*not* that their application to the individual petitioners is proscribed." *Nat'l Min. 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)) (emphasis added); *see also* pages 5-11, *infra*.

Here, however, the government requests a highly unusual and bizarre form of relief: "a final judgment that IRS Notice 2017-10 is declared unlawful *as to plaintiff GBX only*, and setting IRS Notice 2017-10 aside *as to plaintiff GBX only*, with the understanding[] that … this relief does

not apply to any parties not presently before the Court." Answer at 16 (emphases added). But this logically incoherent request flies in the face of decades of precedent and the very text of the APA itself.[1]

a. "We begin, as we must, with the text of the . . . statute." *In re Jackson Masonry, LLC*, 906 F.3d 494, 497 (6th Cir. 2018). As relevant here, the APA provides that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law." 5 U.S.C. § 706(2). "[A]gency action" is defined to "include[] the whole or part of an agency rule." *Id.* § 551(13). And the government here has conceded that Notice 2017-10 both is a "rule" for APA purposes (Answer ¶ 54) and was issued without the required notice-and-comment process (*id.* ¶¶ 55-63); thus, it was promulgated "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). The result is that Notice 2017-10 must be "set aside." *Id.* § 706(2).

To "set aside" means "to annul or vacate." *Set Aside*, Black's Law Dictionary (11th ed. 2019). Critically, the term had that same meaning when the APA was enacted in 1946. *See Set Aside*, Black's Law Dictionary (3d ed. 1933) ("To set aside a judgment, decree, award, or any proceedings is *to cancel, annul, or revoke them* at the insistence of a party unjustly or irregularly affected by them.") (emphasis added); *Set Aside*, Black's Law Dictionary (4th ed. 1951) (same);

[1] As one court has explained, arguments against broad-based relief in challenges to agency action "have been urged only recently by the federal government and have taken up space in ensuing district court, court of appeals, and Supreme Court opinions since 2018. That year, federal agencies began opposing the issuance of nationwide injunctive relief against federal policies, essentially as a matter of course." *District of Columbia v. U.S. Dep't of Agric.*, 444 F. Supp. 3d 1, 46 (D.D.C. 2020); *see also id.* at 46 n.29 (discussing DOJ guidance instructing lawyers defending agency action to routinely oppose nationwide relief). That court was not persuaded: "The agency's objection to the issuance of a nationwide preliminary injunction should be seen for what it is: a bold and bald-faced effort to restrict the exercise of Article III judicial power to aggrandize that of the executive branch. This Court declines the invitation." *Id.* at 55.

see also, e.g., *Delek US Holdings, Inc. v. United States*, 32 F.4th 495, 498 (6th Cir. 2022) ("[W]e can discern th[e] ordinary meaning" of a statutory term "by reference to dictionaries in use at the time the statute was enacted.") (quoting *In re Application to Obtain Discovery*, 939 F.3d 710, 717 (6th Cir. 2019)).

It is, therefore, incoherent for the government to request that Notice 2017-10 be set aside (that is, annulled, revoked, or vacated) as to a single party. Unlike an injunction, which acts upon government *entities*—and can thus be tailored to preclude those entities from acting either against individual parties, or more broadly—the set-aside remedy of vacatur acts against the *agency action itself*, nullifying it. *Cf. Nken v. Holder*, 556 U.S. 418, 428 (2009) (distinguishing stays from injunctions, explaining that "an injunction . . . operate[s] *in personam*" and thus "tells someone what to do or not to do," while "[b]y contrast, instead of directing the conduct of a particular actor, a stay operates upon the judicial proceeding itself") (quotation marks omitted); *see* 5 U.S.C. § 706 (requiring the reviewing court to "set aside agency action"—defined to include "the whole or part of an agency rule" (*id.* § 551(13))—not simply to preclude the agency from applying that rule). The result of APA vacatur is that the action is rendered null and void, for *any* purpose.

Multiple district courts have rejected the government's current position for exactly that reason: An agency action cannot be vacated as to one party but remain in force as to another because that is not how vacatur works; the rule either exists or it does not. *See e.g.*, *O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019) ("[T]he Court would be at a loss to understand what it would mean to vacate a regulation, but only as applied to the parties before the Court. . . . [H]ow could this Court vacate the Rule with respect to the organizational plaintiffs in this case without vacating the Rule writ large? What would it mean to 'vacate' a rule as to some but not other members of the public? What would appear in the Code of Federal Regulations?"); *Cook Cty. v. Wolf*, 498 F. Supp. 3d 999, 1006 (N.D. Ill. 2020) (rejecting the notion "that an agency rule can be vacated

only as to certain plaintiffs or certain States," because "[b]y the APA's plain terms . . . an agency rule found unlawful is not 'set aside' just for certain plaintiffs or geographic areas; rather, the rule 'shall' be 'set aside,' period."); *Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 52 (D.D.C. 2020) (Ketanji Brown Jackson, J.) ("[C]ontrary to Defendants' representations, it is the long-held understanding that once a rule is vacated, it is vacated for everyone," and the government's contrary position "defies both law and logic.") (quotation marks omitted).

b. The government's position also flies in the face of longstanding and widespread precedent. The D.C. Circuit has made explicit for decades 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 individual petitioners is proscribed." *Nat'l Min. Ass'n*,145 F.3d at 1409 (quoting *Harmon*, 878 F.2d at 495 n.21) (emphasis added); *see also, e.g.*, *Humane Society of U.S. v. Zinke*, 865 F.3d 585, 614 (D.C. Cir. 2017) ("A common remedy when we find a rule invalid is to vacate."); *Ala. Ass'n of Realtors v. HHS*, 539 F. Supp. 3d 211, 216 (D.D.C. 2021) ("[T]he law is clear that when a court vacates an agency rule, the vacatur applies to all regulated parties, not only those formally before the court.") (quoting *D.A.M. v. Barr*, 486 F. Supp. 3d 404, 415 (D.D.C. 2020)).

The Third and Ninth Circuits hold the same. *See Pennsylvania v. President of the United States*, 930 F.3d 543, 575 (3d Cir. 2019) ("[O]ur APA case law suggests that, at the merits stage, courts invalidate—without qualification—unlawful administrative rules as a matter of course, leaving their predecessors in place until the agency can take further action.") (collecting cases), *rev'd on other grounds*, 140 S. Ct. 2367 (2020); *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 681 (9th Cir. 2021) (holding that "[v]acatur of an agency rule prevents its application to all those who would otherwise be subject to its operation" and indirectly quoting *National Mining*

Ass'n for the proposition that "the ordinary result" in an APA challenge "is that the rules are vacated—not that their application to the individual petitioners is proscribed."). So do district courts in other circuits. *See, e.g.*, *Franciscan Alliance, Inc. v. Azar*, 414 F. Supp. 3d 928, 944-945 (N.D. Tex. 2019) (same); *Tex. Med. Ass'n v. HHS*, 2022 WL 542879, at *15 (E.D. Tex. Feb. 23, 2022) (same).

At the Supreme Court, Justice Blackmun similarly explained—while "writing in dissent but apparently expressing the view of all nine Justices on this question" (*Nat'l Min. Ass'n*, 145 F.3d at 1409)—that:

> [t]he Administrative Procedure Act permits suit to be brought by any person "adversely affected or aggrieved by agency action." In some cases the "agency action" will consist of a rule of broad applicability; and if the plaintiff prevails, *the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual.* Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain "programmatic" relief that affects the rights of parties not before the court.

Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting) (emphasis added); *see id.* at 890 n.2, 894 (majority opinion) (agreeing that "[i]f there is in fact some specific order or regulation . . . it can of course be challenged under the APA by a person adversely affected—and the entire [regulation] . . . would thereby be affected," and that APA "intervention may ultimately have the effect of requiring a regulation . . . to be revised by the agency in order to avoid the unlawful result the court discerns").

More recently, the Court has affirmed vacatur of agency action, while making clear that vacatur was not somehow limited to the parties before the Court. *See DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1916 n.7 (2020) ("Our affirmance of the . . . order [in one companion case]

vacating the [challenged agency action] *makes it unnecessary to examine* the propriety of the nationwide scope of the injunctions issued by the District Courts in [the other companion cases]" against enforcement of the same agency action) (emphasis added).[2]

And it is also worth noting that the Sixth Circuit itself, in the very case that the government agrees controls the result here (*see* Answer ¶ 6), concluded that "[b]ecause the IRS's process for issuing Notice 2007-83 did not satisfy the notice-and-comment procedures for promulgating legislative rules under the APA, *we must set it aside*," with no indication that the resulting vacatur would be limited to the taxpayers who brought suit. *Mann Constr. Inc. v. United States*, 27 F.4th 1138, 1148 (6th Cir. 2022); *see also id.* at 1143 ("Courts must 'set aside' agency actions that fail to follow [the APA's notice-and-comment] requirements.") (quoting 5 U.S.C. § 706(2)(D)); *Tenn. Hosp. Ass'n v. Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018) ("If an agency attempts to issue a legislative rule without abiding by the APA's procedural requirements, *the rule is invalid*.").

Finally, a district court in the Sixth Circuit, relying on *Mann Construction*, recently granted a taxpayer's motion for summary judgment and "vacat[ed]" a similar IRS Notice "in its entirety" for failure to comply with the APA's notice-and-comment procedures. *CIC Servs., LLC v. Internal Revenue Serv.*, 2022 WL 985619, at *7 (E.D. Tenn. Mar. 21, 2022), *modified by CIC Servs., LLC v. Internal Revenue Serv.*, No. 3:17-cv-110 (E.D. Tenn., June 2, 2022) (modifying terms of injunctive relief regarding return of records, but clarifying that "nonparty taxpayers and material advisors necessarily benefit from CIC successfully demonstrating that the Notice must be set aside and are

[2] The Supreme Court has likewise invalidated agency regulations, in their entirety, under the APA without any indication that relief was limited only to the named plaintiffs. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 131 (2000); *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 216 (1988); *Motor Vehicle Manufacturer's Ass'n of the United States, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 34 (1983); *FCC v. Midwest Video Corp.*, 449 U.S. 689, 708 n.18 (1979); *Abbot Laboratories v. Gardner*, 387 U.S. 136, 154 (1967).

no longer required to produce documents and information pursuant to the notice."). This Court should follow its sister court and the Sixth Circuit and set aside Notice 2017-10 in its entirety and not just as to GBX.

c. Nor is the APA set-aside remedy vulnerable to the same criticisms that have been leveled at so-called nationwide or universal injunctions.

First, "no less an authority than the Supreme Court has made it abundantly clear that injunctions and vacaturs are distinct remedies, and that the latter is considered substantially less intrusive." *Kiakombua*, 498 F. Supp. 3d at 52; *see Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-166 (2010) ("If a less drastic remedy (such as partial or complete vacatur of [the agency's] decision) was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted.")[3]; *see also, e.g.*, *Cook Cty.*, 498 F. Supp. 3d at 1007 ("A nationwide injunction is a drastic and extraordinary remedy residing at the outer bounds of the judicial power. Vacatur, by contrast, is the ordinary remedy—again, precisely the remedy demanded by the APA's text when a rule is held to violate the APA.") (quotation marks and citations omitted). As noted above, an injunction prospectively restrains a government actor from doing something he would otherwise have the power to do; APA vacatur, by contrast, acts retrospectively against a discrete agency action already taken, rendering it without effect.

Second, and relatedly, one critique of nationwide injunctions is that district courts simply lack a font of authority to issue them. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) ("If district courts have any authority to issue universal injunctions, that authority

[3] Importantly, "partial . . . vacatur" in this context (*id.*) "mean[s] a circumstance where a court invalidates the unlawful parts of an agency action and leaves the valid parts in place"; it does *not* suggest "that an agency rule can be vacated only as to certain plaintiffs." *Cook Cty.*, 498 F. Supp. 3d at 1006.

must come from a statute or the constitution."). But that criticism cannot be leveled at APA set-aside relief, which quite plainly is grounded in—indeed, mandated by—the statutory text. *See* page 5, *supra*.

Finally, nationwide injunctions have been characterized as judicial overreach, in tension with the separation of powers. But again, here it is *Congress*—not the judiciary—that has set up the APA's system of appellate-type review of agency actions and mandated the appellate-type remedy of vacatur. *See Cook Cty.*, 498 F. Supp. 3d at 1006-1007 ("Although vacatur will prevent DHS from enforcing the Rule against nonparties, that is a consequence not of the court's *choice* to grant relief that is broader than necessary, but of the APA's *mandate* that flawed agency action must be 'h[e]ld unlawful and set aside.'"); Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121, 1133 (2020) (discussing "the appellate review model that supplied the rubric for judicial review of administrative action in the pre-APA period and then was incorporated into the APA").[4] And it is Congress to whom agencies like the IRS owe whatever powers they may have in the first place. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661, 665 (2022) ("Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.").

II. Setting aside an unlawful rule "as to" only GBX would trigger absurd results and waste judicial resources.

In addition to the legal failings outlined above, the government's improperly circumscribed form of relief is unworkable in practice. A simple example, drawn from the facts of this case,

[4] See this article generally for an in-depth academic treatment of a court's power to vacate agency rules under the APA, concluding that "the APA allows universal vacatur of rules." Sohoni, *supra*, at 1126. Indeed, its author states that the article's "immediate aim is to help [] courts evaluate DOJ's contentions" to the contrary. *Id.* at 1129.

demonstrates the fatal flaws in the government's position. Historic preservation easement transactions each involve multiple entities, investors, and material advisors. The government admits (Answer ¶ 30) that a material advisor such as GBX must file Form 8918 with OTS and is required to provide a reportable transaction number to all taxpayers and other material advisors. Under the government's request for relief, Notice 2017-10 would be "set aside" as to GBX only—i.e., GBX would not have to file Form 8918 and obtain a reportable transaction number—leaving each investor and other material advisor in GBX's transactions without a reportable transaction number. Thus, each of these parties in GBX's transactions would be without the necessary information to comply with Notice 2017-10 and would be subject to civil penalties and criminal prosecution. While an order setting aside Notice 2017-10 as to GBX would technically relieve GBX of its own filing obligation, that technical relief would be meaningless because GBX would still need to comply in order to provide the reportable transaction number to the investors and other advisors.

Therefore, under the government's position, each participant in GBX's transactions and each material advisor would need to file a lawsuit to obtain a judgment that Notice 2017-10 is "unlawful" and should be "set aside." Only those who filed suit would be relieved of complying with the unlawful rule, leaving other investors in the exact same transaction to suffer the risk of civil penalties and criminal prosecution. Moreover, GBX is an ongoing real estate development business that routinely buys or forms entities that donate historic preservation easements, with new investors committing capital to those developments. Entities that do not yet exist and individuals who do not yet have any reporting obligation would be required to file future lawsuits to obtain their own judgments that Notice 2017-10 is "unlawful" and should be "set aside" if and when they participate in a transaction that falls within the scope of Notice 2017-10.

Granting the government's request for limited relief would thus create an untenable situation in which one advisor involved in a transaction would be relieved of the burdens imposed by

the rule in Notice 2017-10, while investors and other advisors involved in the exact same transaction could be criminally prosecuted for failure to comply. It would also create an unwieldly stream of litigation flooding the courts with requests for the same relief that the government has conceded is available here to GBX, based on identical facts and legal theories. There is no justification for requiring the courts to expend judicial resources on thousands of cases seeking to set aside a rule that the government has already acknowledged was promulgated unlawfully.

* * *

As then-Judge (now Justice-designate) Ketanji Brown Jackson put it in rejecting precisely the argument pressed by the government here: "Defendants have failed to provide any persuasive reason why the potential incidental benefit that is conferred to the rest of humanity when a court addresses unlawful agency action by vacating the agency's conduct is sufficiently problematic, under the Constitution or otherwise, to justify limiting a federal court's traditional power to nullify the actions of the [agency] defendant when that challenged conduct violates the law." *Kiakombua*, 498 F. Supp. 3d at 54.

We end where we began: It has long been understood 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 individual petitioners is proscribed." *Nat'l Min. Ass'n*,145 F.3d at 1409 (emphasis added); *accord, e.g.*, *E. Bay*, 993 F.3d at 681; *Ala. Ass'n of Realtors*, 539 F. Supp. 3d at 216. The Court should apply that well-accepted construction of the APA here, and vacate Notice 2017-10 in its entirety.

CONCLUSION

For the foregoing reasons, the Court should set aside, vacate, and annul Notice 2017-10 in whole, not limited to GBX.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Memorandum of Points and Authorities in Support of Plaintiff GBX Associates LLC's Motion for Summary Judgment* was filed electronically on June 10, 2022, in accordance with the Court's Electronic Filing Guidelines, and thereby served all counsel of record.

/s/ Sarah M. Raben
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LOCAL RULE 7.1(f) CERTIFICATION OF CASE TRACK AND PAGE LENGTH

In accordance with Local Rule 7.1(f), Plaintiff hereby certifies that the Court has not yet issued a track recommendation to the parties and this *Memorandum of Points and Authorities in Support of Plaintiff GBX Associates LLC's Motion for Summary Judgment* adheres to the page limitations.

/s/ Sarah M. Raben
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