No. 21-15097

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN C., et al.,

Plaintiffs and Appellants,

vs.

BUREAU OF INDIAN EDUCATION, et al.,

Defendants and Appellees.

On Appeal from the United States District Court for the District of Arizona,
Hon. Steven Paul Logan, Case No. CV-17-08004

BRIEF OF AMICI CURIAE PROFESSORS OF ADMINISTRATIVE LAW IN SUPPORT OF PLAINTIFFS-APPELLANTS

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IDENTITY AND INTEREST OF AMICI[1]

Amici, who are listed in the Addendum to this brief, are professors and scholars of administrative law who have taught and studied the history and doctrines of judicial review of agency action under the Administrative Procedure Act (APA). They have a professional interest in judicial interpretation of the APA and are uniquely positioned to provide a scholarly perspective on the larger ramifications of the District Court's decision for the availability of judicial review to ensure that agencies comply with statutory and regulatory law. They file this brief urging reversal because they are concerned that the District Court's decision dismissing the Plaintiffs' first and second claims for relief is contrary to Supreme Court and Ninth Circuit precedent regarding the APA. While the parties' submissions naturally focus on the immediate issues in this case, Amici discuss the implications of the District Court's analysis for administrative law more generally.

[1] Pursuant to Federal Rule of Appellate Procedure 29, subdivisions (a)(2) and (a)(4)(E), Amici state that all parties have consented to the filing of this brief and no counsel for a party authored this brief in whole or in part, and no person other than the Amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This appeal's significance extends beyond the specific claims of the Plaintiffs—former and current Native American students at the Havasupai Elementary School in Arizona and the Native American Disability Law Center—who have alleged that Defendants—the Bureau of Indian Education and the United States Department of the Interior—have failed to comply with specific statutory and regulatory mandates under the Indian Education Act, 25 U.S.C. §§ 2000 et seq. The District Court dismissed Plaintiffs' first and second causes of action on the ground that they were not reviewable under section 10(e) of the Administrative Procedure Act (APA), 5 U.S.C. § 706. In dismissing these claims, the District Court found that "Plaintiffs' challenges, *when aggregated*, rise to the level of an impermissible, systematic challenge under the APA that should not be resolved by the courts." (1 ER-21[2], emphasis added.) It further suggested that the APA prohibited "any intervention by this court [which] may have *the effect* of requiring … a whole program to be revised by the agency" and went on to note that "more sweeping actions, as in this case, are for other branches." (1-ER-21, internal quotation marks omitted, emphasis added.) In holding that Plaintiffs' challenges "when aggregated" in terms of their sheer number or overall effect presented an

[2] All record citations are to Plaintiffs' Excerpts of Record (ER).

"impermissible, systematic challenge," the District Court misapplied the APA and misconstrued the Supreme Court cases on which it relied. Its ruling is also inconsistent with numerous decisions from this Court which have found claims reviewable under the APA notwithstanding the potential programmatic nature of any required remedy.

Under well-established principles regarding the reviewability of claims under the APA, the relevant question is whether Plaintiffs have identified discrete agency actions that the District Court should compel under Section 706(1) and/or a final agency actions that the District Court may review under Section 706(2). If the answer to this question is yes, the first and second claims for relief in this case are reviewable even if they require programmatic relief.[3] The District Court thus erred by assessing reviewability based on a wrong question, asking whether the Plaintiffs' claims for relief, if aggregated, were "systematic" and "sweeping."

The District Court's reliance on the Supreme Court's rulings in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) ("*Lujan*"), and *Norton v. Southern Utah Wilderness Alliance,* 542 U.S. 55 (2004) ("*SUWA*") to support its

[3] Plaintiffs' brief focuses, in relevant part, upon identifying specific regulatory obligations that the Defendants have allegedly violated and explains how the relief sought is narrow and focused. Amici take no position on the scope of relief necessitated in this action but agree with Plaintiffs that summary judgment was entered in error and that their claims are reviewable under the APA.

analysis is misplaced. These cases do not instruct reviewing courts to ask in the first instance whether a challenge is "systematic" or the claim for relief "sweeping." In *Lujan*, the Supreme Court made clear that a federal court may "intervene in the administration of the laws" when and to the extent that "a specific 'final agency action' has an actual or immediately threatened effect," even where "[s]uch an intervention may ultimately have the effect of requiring a regulation, a series of regulations, or even a whole 'program' to be revised by the agency in order to avoid the unlawful result that the court discerns." 497 U.S. at 894. In other words, programmatic relief *is* permissible when it is required to remedy the underlying claim which is held to be reviewable. And in *SUWA*, the Supreme Court reaffirmed that *Lujan* prohibits only the "kind of broad programmatic attack" that does not satisfy the "limitation to discrete agency action," not challenges to final agency action (or demands for discrete agency action) that might turn out to require programmatic remedies. 542 U.S. at 64.

To the extent the Supreme Court in these cases raised a concern about "systematic" or "sweeping" remedies, it was only for the purpose of explaining why the discreteness and finality requirements exist. But the Supreme Court never indicated that—as the District Court seemed to suggest—otherwise reviewable challenges to agency action (or inaction) are somehow rendered unreviewable by the fact that they might result in the granting of programmatic relief. By focusing

on the number of specific deficiencies challenged by the Plaintiffs or the potential scope of relief required by these challenges rather than the APA's specific requirements for reviewability, the District Court put the cart before the horse.

The District Court's analysis is also inconsistent with the balance struck in the APA between agency discretion and accountability. By making the scope of required relief *the determinative inquiry* in assessing reviewability under the APA, the District Court's approach would have the perverse effect of rendering courts incapable of addressing the most egregious and systematic forms of agency lawbreaking. Under the District Court's analysis, courts may intervene only if the agency's alleged violations are limited in scope and easily remediated, but they must stay their hand when the violations become more pervasive and wide-ranging. This would undermine, among many other things, the long-standing presumption in favor of APA reviewability, which was intended to be a central means of ensuring agency accountability.

Finally, the District Court's decision is erroneous because it would empower the executive branch to insulate its own actions from judicial review. The District Court's interpretation of the APA provides agencies a road map for avoiding judicial scrutiny of violations of federal law. The ruling incentivizes agencies to craft their actions, both in terms of their timing and effect, to render any subsequent effort to undo them "systematic" and hence beyond the court's ability

to review. For instance, the closer in time separate and distinct agency violations occur, the more likely they would be challenged in the same lawsuit and the more likely that such a lawsuit would fail on the ground that the challenged deficiencies are too pervasive. (This is what happened with Plaintiffs' lawsuit in the District Court.) Alternatively, an agency might seek to insulate itself from judicial review by ensuring that its unlawful action or inaction has broad and far-reaching effect, thereby increasing the likelihood of dismissal on the ground that the necessary relief from the court would require programmatic change. This is not how the APA was intended to work.

For the foregoing reasons, Plaintiffs' first and second claims for relief are reviewable under the APA. Moreover, since the District Court recognized that "there is no genuine dispute as to the material facts of this case" and the "Defendants admitted that they have failed to provide basic education as required by the law" (1 ER-19), Amici urge the Court to reverse the grant of summary judgment and allow Plaintiffs to litigate their claims on the merits at trial.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT FEDERAL COURTS MAY NEVER ADJUDICATE "SYSTEMIC" CHALLENGES TO AGENCY ACTION UNDER THE APA.

A. A Case is Reviewable Under the APA Where a Plaintiff Has Identified a Discrete Agency Action to be Compelled or a Final Action to be Reviewed, Regardless of the Scope of Relief Required to Remedy the Agency's Violation of Law.

The test for determining whether a case is reviewable under the APA is well-established. "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." 5 U.S.C. § 702. Where no other statute provides a private right of action, as is the case for the first two counts of the Plaintiffs' complaint, any "agency action" to be reviewed must be a "final agency action." § 704. A reviewing court "shall … compel agency action unlawfully withheld or unreasonably delayed" under Section 706(1), or "hold unlawful and set aside agency action, findings, and conclusions found to be— … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under Section 706(2). To bring an actionable claim under Section 706(1), therefore, a plaintiff must "assert[] that an agency failed to take a *discrete* agency action that it is *required to take*." *SUWA*, 542 U.S. at 64 (emphasis in original). And, under Sections 704 and 706(2), the APA allows judicial review of a final agency action that has a direct or immediate effect. *Lujan*, 497 U.S. at 890-93.

These limits on actions under the APA do not preclude a plaintiff from asserting claims that may require programmatic relief. There are myriad Supreme Court and Ninth Circuit cases in which the plaintiff's claims qualified as reviewable even though the required remedies could have had a programmatic effect. Last term, for example, in *Department of Homeland Security v. Regents of the University of California et. al.*, __ U.S. __, 140 S.Ct. 1891 (2020), the Supreme Court considered challenges to the Department of Homeland Security's decision to rescind the Deferred Action for Childhood Arrivals (DACA) program which impacted more than 700,000 DACA recipients. The Supreme Court rejected the government's contention that the agency's decision was not reviewable and, indeed, further went on to hold that the decision was "arbitrary and capricious" under Section 706(2)(A). *Id.* at 1905-15.

Similarly, in numerous cases, the Ninth Circuit has reached the merits of section 706(1) claims that might have required programmatic relief. *See*, *e.g.*, *Vietnam Veterans of America v. CIA*, 811 F.3d 1068, 1075-79 (9th Cir. 2016) (plaintiffs sought to compel the Army to notify tens of thousands of individuals who were subject to chemical and biological weapons experiments about new scientific and medical information relating to their health); *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 577 (9th Cir. 2000) (plaintiffs sought to compel agency to provide drainage services at the nation's largest federal reclamation

project, which impacted three large counties in California); *see also Al Otro Lado, Inc. v. Nielson*, 327 F. Supp. 3d 1284, 1308-11 (S.D. Cal. 2018) (plaintiffs sought to compel U.S. Customs and Border Protection to comply with legal duties in treatment of asylum applicants at U.S.-Mexico border).

The Ninth Circuit has similarly treated as reviewable a variety of section 706(2) claims with the potential to require broad relief. *See*, *e.g.*, *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 639 (9th Cir. 2004) (plaintiffs challenged final agency actions related to the U.S. Forest Service's management of two wilderness areas spanning 800,000 acres); *Oregon Natural Disaster Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 983-85, 991, n. 10 (9th Cir. 2006) (plaintiffs challenged final agency action by the U.S. Forest Service involving the issuance of annual operating instructions for grazing livestock on thousands of acres of national forest land); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1510, 1519 (9th Cir. 1992) (plaintiffs challenged final agency action by the U.S. Forest Service regarding its designation of 43 out of 47 zones in a national forest area spanning over 800,000 acres); *Laub v. United States Dept. of Interior*, 342 F.3d 1080, 1083, 1088 (9th Cir. 2003) (plaintiffs challenged final agency action by an interagency program in its management of the largest estuary on the West Coast, which supplied drinking water to two-thirds of California residents and irrigation water for over seven million acres of agricultural land).

Under the APA, then, the potential for broad programmatic relief to remedy agency violations is not relevant to the reviewability inquiry. Instead, the reviewability of Plaintiffs' Section 706(1) claim depends on whether they target discrete agency action. And the reviewability of Plaintiffs' Section 706(2) claim depends on whether they have challenged final agency action. Since Plaintiffs have alleged that Defendants failed to comply with their mandatory legal obligations under specific regulations set forth in 25 C.F.R. § 36, *et seq.* (1 ER-19-20; see also Plaintiffs' Opening Brief at 5-7), their claims are reviewable. Moreover, since the District Court found that, "there is no genuine dispute as to the material facts of this case" and "Defendants admitted that they failed to provide basic education as required by law" (1 ER-19), the District Court erred in granting summary judgment in favor of Defendants on these claims. Plaintiffs should be allowed to litigate their claims on the merits at trial.

B. Neither *Lujan* nor *SUWA* Supports the District Court's Unprecedented Approach to Assessing Reviewability under the APA.

The District Court held that neither of Plaintiffs' claims was actionable because "Plaintiffs' challenges, when aggregated, rise to the level of an impermissible systematic challenge" and seek "sweeping" relief. (1 ER-21.) On this basis—and this basis alone—the District Court held that the Plaintiffs had failed to identify discrete actions the Defendants were required to take and to

identify a final agency action that was unlawful. In so holding, the District Court relied exclusively on the Supreme Court's decisions in *Lujan* and *SUWA*. But neither decision directs a reviewing court to aggregate a plaintiff's claims for relief and dismiss them if the alleged deficiencies were pervasive or remedying them might require a programmatic or systematic change to an agency policy or program. Rather, the core question is always whether the claim for relief identifies discrete agency action that is required by law or final agency action that was in violation of law.

In *Lujan*, the Supreme Court made clear that the APA prohibited the bringing of a generic challenge to all aspects of an agency program that was untethered to specific agency action. The plaintiff organization National Wildlife Federation sued the Bureau of Land Management (BLM), challenging its "land withdrawal review program." The Court concluded that the "land withdrawal review program" was not an "identifiable" final agency action within the meaning of Sections 702 and 704 of the APA and it held that the plaintiff's claims were not reviewable. 497 U.S. at 890-94. The program was not "a single [agency] order or regulation, or even … a completed universe of particular [agency] orders and regulations." *Id*. at 894. Rather, the plaintiff had impermissibly sought to challenge "the continuing (and thus constantly changing) operations" of an agency. *Id*. at 891. In other words, the plaintiff could not "seek wholesale improvement of

[BLM's land management] program by court decree" and was instead obligated to "direct its attack against some particular 'agency action' that causes it harm." *Id*. The Court further explained that the purpose of the discrete-action limitation in the APA was to ensure that "the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Id*.

Contrary to the District Court's reasoning, however, *Lujan* expressly did not foreclose judicial intervention whenever it might result in a programmatic change to an agency program. In response to the dissenting opinion, which had charged the majority with improperly focusing on the broad "scope of the relief" required by plaintiff's claims, the Court reaffirmed that a plaintiff may "of course" bring a claim for relief that might require programmatic change, so long as the plaintiff challenges a "particular action" taken by the agency and programmatic relief is directed towards remedying the agency's violation of law. *Id*. at 890 n.2. The Court emphasized that judicial review is required under the APA when a plaintiff challenges a final agency action *even if* the plaintiff's challenge would have the "effect of requiring a regulation, a series of regulations, or even a whole 'program' to be revised by the agency in order to avoid the unlawful result that the court discerns." *Id*. at 894. *Lujan* thus did not direct a reviewing court to dismiss a claim

for relief by "aggregating" the number of violations asserted or assessing the scope of potential relief. Rather, it simply provided that a plaintiff cannot request "wholesale correction" to an agency's program based upon a challenge to a single agency action that is a component of that program. *Id*.

SUWA reaffirmed *Lujan* and applied its principles to a claim under Section 706(1). In *SUWA*, the Supreme Court held that, in a suit under Section 706(1), the question is whether plaintiff has alleged "that an agency failed to take a *discrete* agency action that it is *required to take*." *SUWA*, 542 U.S. at 64 (emphasis in original). If the plaintiff does not identify a discrete agency action, then its challenge is the "kind of broad programmatic attack" that *Lujan* prohibits. *Id.* But if the plaintiff *does* identify a discrete agency action, then it may bring a challenge under Section 706 even if remedying the agency's violations of law would have a programmatic effect. *Id.* As the Court explained, "[t]he principal purpose of the APA limitations [for discrete-action under section 706] … is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Id*. at 66.

In sum, the District Court focused on the wrong question to assess reviewability. Its sole basis for dismissing Plaintiffs' first two claims for relief was its conclusion that those claims, when "aggregated," were "systematic" and sought

"sweeping" relief. But because Plaintiffs have identified discrete agency actions to be compelled under Section 706(1) and final agency actions to be reviewed under Section 706(2), their challenge is not one of the "broad programmatic attack[s]" that the Court rejected in *Lujan* and *SUWA*. And that remains true regardless of whether remediating Defendants' violations of law would have a programmatic effect. *See, SUWA*, 542 U.S. at 64 (citing *Lujan*, 497 U.S. 871).

II. THE DISTRICT COURT'S ANALYSIS UPSETS THE BALANCE STRUCK IN THE APA BETWEEN AGENCY DISCRETION AND ACCOUNTABILITY.

The District Court's misapplication of *Lujan* and *SUWA* undermines the APA's judicial review provisions, which were key to the balance struck by Congress between agency discretion and accountability.

Enacted in 1946, the APA followed on the heels of the explosive growth in the size of the administrative state and the powers of the executive branch. While the statute reflected a hard-fought compromise between opposing factions in Congress, all agreed that it was the "bill of rights for the new regulatory state," and that "it defined the relationship between the government and governed." George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1678 (1996). "The APA was the first statute to systematize administrative law on a government-wide basis. The timing of its enactment was not accidental; only after the enormous proliferation of

administrative governance under the New Deal was there a strongly felt need for systematic controls on agency behavior." Gary Lawson, Federal Administrative Law 322 (8th ed. 2018). The APA was enacted in response to "the expanding power of administrative agencies of all kinds" and as a means of protecting against "the abuse of administrative power." Roni A. Elias, The *Legislative History of the Administrative Procedure Act*, 27 Fordham Envtl. L. Rev. 207, 208 (2016).

"[T]he provision for substantial judicial review of agency action was a crucial part" of the APA and the primary tool for keeping agencies accountable. *Id.* at 221. Indeed, Section 702 of the act expressly recognizes a presumption of judicial review of agency action: "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." 5 U.S.C. § 702. This presumption can be rebutted only in two circumstances: (1) when the relevant statute precludes judicial review, or (2) where "agency action is committed to agency discretion by law." §§ 701(a)(1), (a)(2). The Defendants did not argue in the lower court that either of these exceptions is applicable here.

Over the years, the Supreme Court has consistently applied this presumption in favor of judicial review, recognizing its significance in promoting agency accountability. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) (recognizing that, under Section 702, the APA establishes a "basic presumption of

judicial review [for] one 'suffering legal wrong because of agency action'"); *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) (explaining that the APA "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts"). More recently, the Supreme Court explained *why* it has long honored the presumption, stating: "legal lapses and violations [by agencies] occur, and especially so when they have no consequence. That is why this Court has so long applied a strong presumption favoring judicial review of administrative action." *Weyerhauser Co. v. U.S. Fish & Wildlife Serv.*, ___ U.S. ___, 139 S.Ct. 361, 370 (2018) (quoting *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 487-88 (2015)).

In sum, the District Court's analysis is flawed because it undermines the APA's scheme of judicial review.

III. THE DISTRICT COURT'S INTERPRETATION OF THE APA WOULD ALLOW AGENCIES TO IMPROPERLY INSULATE THEIR REGULATORY ACTIONS FROM JUDICIAL REVIEW.

The District Court's interpretation of the APA also has the perverse effect of putting the most egregious and far-reaching violations by agencies beyond the reach of the courts. By treating the sheer number of challenges asserted by Plaintiffs or their purported aggregate effect as the determinative factor in assessing reviewability, the District Court's approach gives agencies both the incentive and ability to avoid judicial scrutiny of their actions. This is contrary to

the presumption of judicial review and raises serious separation-of-powers concerns.

Rarely does "Congress want[ ] an agency to police its own conduct," meaning that "the agency bears a heavy burden in attempting to show that Congress prohibit[ed] all judicial review of the agency's compliance with a legislative mandate." *Mach Mining*, 575 U.S. at 486 (internal quotations omitted). In the absence of such an extraordinary showing by an agency, courts have rejected any interpretation of the doctrine of reviewability that would vest authority *in the agency*, rather than Congress, to determine what is subject to judicial review.

The Supreme Court's ruling in *Kucana v. Holder*, 558 U.S. 233 (2010), is illustrative. At issue in that case was a provision in the Illegal Immigration Reform and Immigrant Responsibility Act, which limited the judiciary's authority to review any action of the Attorney General which was deemed discretionary by statute. *See*, 8 U.S.C. § 1252(a)(2)(B)(ii). The Court considered whether this statute also limited judicial review of actions by the Attorney General which were made discretionary *by regulation*, as the lower court had held. The Supreme Court reversed, holding that a "paramount factor" in its interpretation of the statute was Congress's apparent intent that "it, and only it, would limit the federal courts' jurisdiction." *Id.* at 252. To this end, it held that, if the lower court's interpretation of the statute were to prevail, "the Executive would have a free hand to shelter its

own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions 'discretionary.'" *Id*. It further stated that "[s]uch an extraordinary delegation of authority [to the agency] cannot be extracted from the statute Congress enacted." *Id*.

For the same reason, the Supreme Court has squarely rejected interpretations of the APA that would put broad swaths of agency action beyond the reach of the courts. *See*, *e.g.*, *Weyerhauser*, 139 S.Ct. at 370 (holding that the exception to review under Section 701(a)(2) for agency discretion must be interpreted "quite narrowly" and noting that "a court could never determine that an agency abused its discretion if all matters committed to agency discretion were unreviewable").

Similarly, numerous lower courts have rejected reviewability arguments that would allow and incentivize agencies to take actions to immunize themselves from judicial review, contrary to the intent of Congress. *See, e.g.*, *Appalachian Power Co. v. E.P.A*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (criticized "familiar" trend of agencies modifying their regulations through informal process to gain the "advantage" of "immunizing its lawmaking from judicial review"); *Safe Extensions, Inc. v. F.A.A.*, 509 F.3d 593, 599-600 (D.C. Cir. 2007) (rejected defendants' interpretation of the APA because it "would create perverse incentives" by allowing agencies to "escape judicial review by simply refusing to create a record to support their decisions"); *Food & Water Watch v. United States*

Department of Agriculture, 451 F. Supp. 3d 11, 30 (D.D.C. 2020), *vacated on other grounds by* 2021 WL 2546671 (rejected defendants' interpretation of the APA because it would "permit agencies to self-immunize their conduct from judicial scrutiny"); *NAACP v. Trump*, 298 F. Supp. 3d 209, 233 (D.D.C. 2018) (rejecting defendants' interpretation because "an agency could insulate from judicial review any legal interpretation simply by framing it as an enforcement policy and then offering as an additional, 'discretionary' justification the assertion that a court would likely agree with the agency's interpretation").

Reviewability doctrines, including those in the APA context, may incentivize agencies to alter the form or timing of their actions to evade judicial review. *See*, *e.g.*, Bryan Clark and Amanda Leiter, *Regulatory Hide and Seek: What Agencies Can (And Can't) Do To Limit Judicial Review*, 52 B.C. L. Rev. 1687 (2011). As Bryan Clark and Amanda Leiter have explained, such "tactical activity" by agencies poses important constitutional questions about the degree to which an agency should be able to limit judicial oversight of its own activities. *Id*. at 1731. The separation-of-powers concern is especially acute "when Congress has created an administrative regime that expressly or implicitly anticipates expansive judicial review and an agency wields reviewability as a shield against court oversight, thereby threatening the legitimacy of both the governing regime and the agency's role in implementing that regime." *Id*. These concerns have full force

here, where the administrative regime created by Congress in the APA depends upon judicial review to hold agencies accountable to law.

By "aggregating" the scope of relief that might be necessary to redress agency violations, the District Court's ruling will likely have the unintended consequence of incentivizing agencies to avoid judicial review by structuring their actions—both in terms of their timing and effect—in ways that may cause courts to deny or delay review. Under the District Court's approach, agencies might manage to avoid judicial review by violating more laws more often, so that they can argue in court that any challenge to their actions would qualify as too pervasive to pass muster under Section 706. Alternatively, agencies might seek to avoid judicial review by ensuring that the effect of any single unlawful act or failure to act is broad and wide-ranging, so that they can argue in court that any challenge of this act should be dismissed because the court would be required to provide programmatic relief.

In sum, the District Court's analysis is flawed because it will allow agencies to avoid judicial scrutiny of their actions by amplifying the scope and prevalence of their lawbreaking. It is hard to imagine a more perverse set of incentives than this.

CONCLUSION

For the foregoing reasons, Amici urge the Court to hold that Plaintiffs' first and second claims are reviewable under the APA, reverse the grant of summary judgment in favor of Defendants and allow Plaintiffs to litigate their claims on the merits at trial.

DATED: July 2, 2021 BAHAR | LAW OFFICE

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ADDENDUM: LIST OF AMICI

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[4] Amici's titles and institutional affiliations are listed for identification purposes only. All signatories are participating in their individual capacity, not on behalf of their institutions.

CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) that the attached brief is proportionately spaced, has a typeface of 14 points, and, according to the word count feature of the word processing system used to prepare the brief, contains 4861 words.

DATED: July 2, 2021

By: */s/ Sarvenaz Bahar*
Sarvenaz Bahar

CERTIFICATE OF SERVICE

I certify that on July 2, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

DATED: July 2, 2021

By: *_/s/ Sarvenaz Bahar_*
Sarvenaz Bahar