No. 07-1239

IN THE

Supreme Court of the United States

DONALD C. WINTER,
SECRETARY OF THE NAVY, ET AL.,

Petitioners,

v.

NATIONAL RESOURCES DEFENSE COUNCIL, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICI CURIAE BRIEF OF LAW PROFESSORS MICHAEL C. SMALL, JONATHAN D. VARAT, AND ADAM WINKLER IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are professors at UCLA Law School. Each of the *amici* has particular expertise and interest in the area of the separation of powers among the branches of the national government. *Amici* believe that, if it is adopted, Petitioners' position would threaten the integrity of injunctions of Article III courts by empowering executive branch agencies to defy judicial rulings with which they disagree.[1]

INTRODUCTION

The case poses an important constitutional question: whether a federal agency may effectively nullify an Article III court's injunction, entered under a federal statute, by issuing a subsequent ruling in an administrative tribunal that disagrees with the factual basis of the injunction. This question implicates vital safeguards that are intended to protect the federal judiciary from encroachments by the political branches of the national government -- and, in the process, to protect the liberty of us all. *Amici* submit that the executive branch exceeded separation of powers boundaries here in seeking to vitiate a district court's injunction through a later contrary administrative ruling of its own that redetermined the factual issues decided by the district court.

Injunctions issued by a district court under federal statutes may be reversed in two ways: by an order of a "superior court[] in the Article III hierarchy"

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[1] This brief is filed with the written consent of all parties. Pursuant to Rule 37.6, no counsel for either party authored this brief in whole or in part, nor did any party make a monetary contribution to the preparation or submission of this brief.

disagreeing with the district court's interpretation of what is required by the law on which the injunction rests, *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 219 (1995), or by an act of Congress, in the exercise of its lawmaking powers under Article I of the Constitution, that prospectively changes the law and thereby eliminates the legal basis of the injunction going forward. *Id.* at 232; *Miller v. French*, 530 U.S. 327, 347 (2000).

Petitioners are advocating a new, third way in which injunctions of Article III courts entered under federal statutes may be overturned: through a waiver issued by an executive branch officer in an administrative tribunal when the officer disagrees with the district court's application of the law to the facts of the case. Specifically, Petitioners maintain that the injunction entered by the district court here must be vacated by dint of a pronouncement of the Council on Environmental Quality ("CEQ"), an Article II agency created by Congress to assist in the implementation of the National Environmental Policy Act ("NEPA"), the very law on which the injunction is predicated. According to Petitioners, the CEQ's administrative ruling exempts them from compliance with NEPA, as construed and applied by the district court, and thereby requires nullification of the injunction. Petitioners' position has no moorings in this Court's separation of powers precedents.

Petitioners' position contravenes the two-centuries-old teaching of *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792), that decisions of Article III courts may not be overruled by Article II officers. *See also Plaut*, 514 U.S. at 218. This bedrock principle ensures that, consistent with Article III's case or controversy requirement, the federal judicial power is not utilized for the purpose of providing purely advisory opinions on

the meaning of the law and the application of the law to a given set of facts, which litigants are free to ignore. On Petitioners' theory of executive review of judicial decisions, however, Article III courts would be pressed into the service of authoring advisory opinions because the final word on the application of the law in a particular case would not be found in what federal judges say, but rather, in what executive branch officers, sitting as veritable courts of errors, say afterwards.

This is not a case in which the prospective effect of an injunction was altered by a subsequent change in the underlying law on which the injunction rests. *Compare Miller*, 530 U.S. at 347. The CEQ did not change NEPA. Nor could it, for only Congress may amend the nation's laws. Rather, the CEQ simply disagreed with the factual predicate of the district court's injunction. This Court has never held, however, that Congress could delegate authority to executive branch officers to convene administrative tribunals and therein issue rulings that nullify the factual basis of injunctions -- and the Court's precedents suggest that Congress could do no such thing. In any event, whether Congress could give that power to an agency is not raised by this case because NEPA does not license the CEQ to overturn the decisions of Article III courts.

In cases in which the legislative or executive branch (or both) of the national government has encroached on the constitutional authority of the federal judiciary, this Court frequently has returned to first principles, admonishing that, under Article III, "[i]t is . . . the province and duty [of the judicial department] to say what the law is." *Plaut*, 514 U.S. at 218 (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)); *see also City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). The district court carried out that core judicial function here. It said what the law is and applied that law to the

facts of this case. At that point, it was not for the CEQ to say otherwise in a post-hoc administrative tribunal that purported to jettison the district court's ruling in favor of the CEQ's preferred application of the law to the facts.

I. SEPARATION OF POWERS PRINCIPLES PRECLUDE EXECUTIVE AGENCIES FROM NULLIFYING AN INJUNCTION OF AN ARTICLE III COURT BY ISSUING A SUBSEQUENT RULING, AS A COURT OF ERRORS IN AN ADMINISTRATIVE TRIBUNAL, THAT DISAGREES WITH AND REDETERMINES THE FACTUAL BASIS OF THE INJUNCTION.

Congress has determined that the requirements of NEPA should apply to the Department of the Navy, just as they do to other federal agencies. Respondents brought this action against the Navy to enforce those requirements. After reviewing an extensive factual record, the district court found that the Navy violated NEPA by failing to prepare a statement on the environmental impact of certain training exercises that it intended to conduct off the coast of California. App. 195a-218a. To remedy that violation, the district court issued a preliminary injunction that enables the Navy to conduct its exercises, provided that it adheres to a concrete set of measures that the court adopted to mitigate the environmental impact of the exercises. App. App. 164a-174-a.

The Navy sought review of the district court's injunction in the court of appeals through the ordinary appellate process contemplated by Article III. Pet. Br. 14. *See Plaut*, 514 U.S. at 219 (federal district court rulings are subject to review by "superior courts in the Article III hierarchy"). But the Navy also simultaneously forged a separate and novel "appellate"

channel outside the bounds of Article III: it asked the CEQ, an executive branch agency charged by Congress with aiding other agencies in the implementation of NEPA, 42 U.S.C. § 4344, to review the factual basis of the district court's injunction. Pet. Br. 14-15.

The Navy treated both of its "appeals" equally. It made exactly the same pitch to the CEQ as it made to the court of appeals, arguing in both venues that compliance with the district court's injunction would compromise the proposed training exercises. And the Navy sought the same relief from the CEQ that it sought from the court of appeals: reversal of the injunction. Pet. Br. 14-15.

The CEQ proved to be a receptive audience for the Navy. It convened an ex parte administrative tribunal at which it heard the same evidence and arguments that the Navy had presented to the district court (but not the evidence and arguments Respondents had presented). Resp. Br. 11. Within a matter of days of that quasi-judicial hearing, and before the court of appeals could consider the matter, the CEQ expressed disagreement with the factual findings underpinning the district court's injunction, and issued counter-findings of its own, which were memorialized in a letter to the Navy. *Id.* The CEQ's letter stated that the Navy could disregard the environmental mitigation measures crafted by the district court and announced that the Navy was instead free to conduct its training exercises pursuant to "alternative arrangements" blessed by the CEQ. Pet Br. 15; Resp. Br. 11.

The CEQ's letter opined that its administrative ruling effectively overturning the district court's injunction was authorized by an existing agency regulation, which states that the CEQ may approve alternative arrangements for NEPA compliance in "emergency circumstances." Pet Br. 15 (quoting 40

C.F.R. § 1506.11). But Congress did not delegate power to the CEQ to sit in review of Article III courts. CEQ's primary function, as assigned by Congress, is to assist in implementing national environmental policy. Resp. Br. 21. Nor does the emergency regulation itself state that CEQ may countermand the ruling of an Article III court whenever the CEQ believes that the court got it wrong and that the circumstances warrant substitution of the CEQ's ruling for that of the court's. In fact, until this case, the CEQ had never invoked the emergency regulation as authority to declare that an agency could act contrary to the decision of an Article III court interpreting NEPA.

Nevertheless, armed with the CEQ's letter, the Navy returned to the district court and asserted that the CEQ's approval, pursuant to its emergency regulation, of alternative NEPA arrangements for the conduct of the training exercises dictated that the district court vacate its injunction. Resp. Br. 11-12. The district court rejected the Navy's contention and it left the injunction in place. *Id.* 12. The court of appeals followed suit (albeit making slight modifications to the injunction). *Id.*

The Navy's insistence that the district court was obligated to vacate its injunction in light of the CEQ's ruling in an administrative tribunal disagreeing with the factual and legal basis of the injunction, Pet. Br. 23-24, conflicts with a venerable separation of powers tenet, dating back to the early days of the republic: decisions of Article III courts may not be subject to revision by executive officials and thereby converted into purely advisory opinions that lack any binding clout.

Petitioners' opening brief evades this constitutional issue altogether. To this point in the proceedings before this Court, all Petitioners have said about the constitutional issue is to claim that no separation of

powers problem exists here. Citing *Miller v. French*, *supra*, and *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992), in which this Court upheld against separation of powers challenges acts of Congress that vitiated the legal basis of existing federal court injunctions, Petitioners have argued that the CEQ's action is constitutionally tolerable because it merely "chang[ed] . . . the underlying law" on which the injunction was predicated, and thus sapped the "ongoing vitality of [the] prospective equitable relief" afforded by the injunction. Reply Supporting Cert. Pet. 6. Petitioners' reliance on *Miller* and *Robertson* is misplaced because the CEQ did not change the underlying law: it merely disagreed with the factual basis of the injunction and thus, in flat conflict with *Hayburn's Case*, sought to interpose its view in place of the district court's. In any event, the constitutional power to change a law, and thereby alter injunctions that rested on the law before it was changed, resides with Congress, not with administrative agencies.

A. Decisions Of Article III Courts May Not Be Subject To Revision By Executive Officers And Thereby Reduced To Purely Advisory Opinions.

Time and again, this Court has stated that the Constitution's enumeration and separation of the powers of the three branches of the national government bars Article II executive officers from revising the decisions of Article III courts. *See, e.g.*, *Plaut*, 514 U.S. at 218; *United States v. Mitchell*, 463 U.S. 206, 213 n.12 (1983); *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 113-14 (1948); *United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 400-01 (1934): *United States v. Waters*, 133 U.S. 208, 213 (1890); *see also Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 512 (2004) (Kennedy, J., dissenting).

This essential constitutional postulate is rooted in the Court's 1792 ruling in *Hayburn's Case*. There, this Court considered an act of Congress that authorized an executive officer, the Secretary of War, to review decisions of Article III courts related to pension claims and to set aside those court decisions as the Secretary saw fit. Sitting as Circuit Justices, five members of this Court stated emphatically that the legislation intruded on the power to resolve concrete legal disputes that is assigned to the judiciary (and to the judiciary alone) by Article III, because it made the outcome of court cases subject to the control of executive officers. The process of executive review of court decisions set up by the legislation was deemed to be "radically inconsistent with the independence of that judicial power which is vested in the courts." 2 U.S. at 410 n.d.

Hayburn's Case is a fixture of separation of powers jurisprudence. *See North Carolina v. Rice*, 404 U.S 244, 246 (1971); *Muskrat v. United States*, 219 U.S. 346, 351-53 (1911). It has long since stood for the proposition that executive officers are constitutionally forbidden from "annul[ing] a final judgment" of an Article III court and thereby taking over a quintessential judicial function. *Plaut*, 514 U.S. at 224. *See Loving v. United States*, 517 U.S. 748, 757 (1996) ("Although separation of powers does not mean that these three departments ought to have no partial agency in, or no control over the acts of each other, it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another.") (internal quotations omitted).

The proscription on executive action reversing or otherwise revising the decisions federal courts that is traceable to *Hayburn's Case* reinforces the case or controversy requirement of Article III, which limits the exercise of the judicial power to the resolution of

concrete legal disputes, *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1996), and precludes the judiciary from issuing advisory opinions – that is, rulings that are "not binding and conclusive on the parties. . . ." *Chicago & Southern Air Lines*, 333 U.S. at 114. *See Plaut*, 514 U.S. at 219 ("Judicial power is one to render dispositive judgments. . . ."); William Baude, *The Judgment Power*, 96 Geo. L.J. 1807, 1811 (2008) ("[T]he judicial power is the power to issue binding judgments and to settle legal disputes within the court's jurisdiction.").

Indeed, this Court frequently has linked the ban on executive revision of judicial decisions to the ban on advisory opinions. *Chicago & Southern Air Lines* is illustrative. Writing for the Court in that case, Justice Jackson stated unequivocally that a federal court decision on the legality of executive branch action that, in turn, is subject to review and reversal by the executive branch itself would be diametrically at odds with the Article III case or controversy requirement. As Justice Jackson bluntly put it, such a decision would possess "only the force of a recommendation to the [executive branch]," and, as such, would amount to "an advisory opinion in its most obnoxious form. . . ." *Chicago & Southern Air Lines*, 333 U.S. at 114.

The actions of the CEQ and the Navy in this case ran afoul of these basic separation of powers precepts. The Navy was dissatisfied with the district court's injunction conditioning the conduct of the Navy's proposed training exercises on compliance with specified measures to remedy the Navy's NEPA violation. For relief from the injunction's strictures, the Navy turned not just to the court of appeals, but to a fellow executive branch agency -- the CEQ, which agreed with the Navy's plea, lock, stock, and barrel. In an ex parte administrative proceeding, the CEQ ruled that the Navy

had license to disregard the injunction by virtue of alternative NEPA arrangements devised by the CEQ under its "emergency" regulatory authority.

In short, at the Navy's urging, the CEQ disagreed with the basis of the district court's injunction and purported to reverse it in violation of the cardinal rule that executive branch officers may not revise the decisions of Article III courts. And if the district court were required to honor the CEQ's contrary determination and vacate its injunction on account of the agency's divergent findings, this would, in effect, convert the district court's initial decision concerning the application of NEPA to a particular set of facts into a mere advisory opinion. At the same time, the CEQ's proclamation, issued after the fact in an administrative tribunal, would be elevated to be the definitive word on the Navy's compliance with NEPA. Simply put, under the scheme of agency review of judicial decisions advocated by Petitioners, the district court proceedings were just a side show -- all that really mattered is what the CEQ subsequently said when it placed itself in judgment of the injunction and nullified it. Our system of separation of powers does not, however, countenance such a scheme. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 99 (1996) (Stevens, J., dissenting) ("[I]t is extremely doubtful that the obviously dispensable involvement of the judiciary in the intermediate stages of a procedure that begins and ends in the Executive branch is a proper exercise of judicial power.").

An executive branch agency that is on the losing end of a court decision may not seek to evade the decision by appealing to another executive branch agency to reverse it. *See* Baude, 96 Geo. L. J. at 1810 ("Just as the loser cannot respond to a judgment on the merits by saying 'but the law is on my side! he cannot appeal to the

Executive. . . to overrule it."). Executive branch agencies are not situated within the Article III chain of command. They therefore have no constitutional authority to act like appellate judges and "reverse" lower court injunctions of which they disapprove.

Ultimately, Petitioners fall back on the notion that because the country presently is at war, the CEQ's action in permitting the Navy to conduct its training exercises unfettered by the district court's injunction must be sustained to serve pressing national security interests. Pet. Br. 32-34. But as this Court observed just last Term, "security subsists . . . in fidelity to freedom's first principles." *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008). Among those first principles is that the Framers' purpose in separating and dividing the powers of the branches of the national government was "to secure liberty," not for the sake of the government's branches themselves, but for the sake of the people the government serves. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see also Clinton v. New York*, 524 U.S. 417, 452 (1997) (Kennedy, J., concurring). This Court repeatedly has warned that our liberties are threatened when one branch of the national government encroaches on another branch's powers and seeks to aggrandize its own. *See Mistretta v. United States*, 488 U.S. 361, 380-81 (1989); *Bowshar v. Synar*, 478 U.S. 714 722 (1986); *Buckley v. Valeo*, 424 U.S. 1, 122 (1976); *see also Clinton*, 524 U.S. at 449 (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress separation of powers.")

The resolution of separation of powers questions must be informed by considerations of the practical needs of the national government to carry out its responsibilities, particularly when the nation is at war.

Boumediene, 128 U.S. at 2276; *Youngstown*, 343 U.S. at 611-12 (Frankfurter, J, concurring). Indeed, the district court took those considerations into account in fashioning the scope of equitable relief here. Resp. Br. 51-52. Asserted wartime exigencies are not, however, reason to abandon the guarantees of liberty that our system of separation of powers affords. *See Boumediene*, 128 S. Ct. at 2277 ("The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled, and in our system they are reconciled within the framework of the law."); *see also Clinton*, 524 U.S. at 449 (Kennedy, J., concurring) ("The Constitution's structure requires a stability which transcends the convenience of the moment.")

The CEQ's power grab is antithetical to that system. Condoning the CEQ's action would be an invitation to every agency of the federal government to declare an "emergency" any time the agency thinks that an Article III court has impeded activities that the agency deems essential, especially in wartime. A key function of an independent judiciary is to ensure that the executive branch does not stray from the law, be it in wartime or not. Under Petitioners' theory of executive review, however, the executive itself gets to decide what is within the bounds of the law and to take any action that it considers necessary, even when an Article III court has declared those actions to be out of bounds.

B. The CEQ's Administrative Ruling Disagreeing With The Factual Basis Of The District Court's Injunction Did Not Change The Law On Which The Injunction Rests, And, In Any Event, The Power To Effect Such Legislative Changes Resides With Congress, Not With Administrative Agencies.

Like executive agencies, Congress too generally may not annul the judgments of Article III courts. *Plaut*, 514 U.S. at 224. This rule gives way, however, in the narrow circumstance in which Congress passes, and the President signs into law, legislation that "alter[s] the prospective effect of previously entered injunctions." *Id.* at 232. The enactment of such legislation does not impermissibly encroach on the judicial power, even if the consequence of the legislation is to require the district court to terminate an existing injunction. As this Court has explained, "[p]rospective relief under a continuing, executory decree remains subject to alteration due to changes in the underlying law." *Miller*, 530 U.S. at 345. Thus, if "Congress has altered the relevant law" on which an injunction rests, the injunction must be modified -- and perhaps even vacated -- by the district court to take those changes of law into account. *Id.* at 345-46. *See* Laurence H. Tribe, 1 *American Constitutional Law* 284 (3d.ed. 2000) ("Congress is not barred by separation-of-powers considerations from changing the law applicable to an identifiable set of cases pending in the federal courts, even when that is Congress' clear purpose, provided it does so by altering the background law *itself* . . . .") (emphasis in original).

The Court has applied this separation of powers principle in only a few instances. The leading case is *Pennsylvania v. Wheeling & Belmont Bridge*, 59 U.S. (18 How.) 421 (1855). It arose from legislation passed

by Congress declaring a particular bridge across the Ohio River to be a lawful structure. *Id.* at 429. Previously, this Court had held, under a then-existing law, that the bridge was an unlawful structure, and ordered that the bridge be raised or removed. Pennsylvania argued that the later act of Congress deeming the bridge to be lawful was unconstitutional on separation of powers grounds because it annulled this Court's earlier judgment declaring the bridge to be unlawful. This Court rejected Pennsylvania's challenge. It held that the legal foundation of the Court's injunction against the bridge was eliminated once Congress changed the law via the intervening statute. *Id.* at 431-32. *See Miller*, 530 U.S. at 345-46 (discussing *Wheeling & Belmont Bridge* and stating that "[w]hen Congress altered the underlying law such that the bridge was no longer an unlawful obstruction, the injunction against the maintenance of the bridge was not enforceable.").

The Court also had occasion to apply the principle that Congress may cause the termination of an injunction by changing the law on which the injunction rests in *Robertson v. Seattle Audubon Soc'y*, *supra*. That case arose from litigation that had resulted in the entry preliminary injunctions against the government under federal environmental statutes. In response to the litigation, Congress passed a new law that modified the criteria for assessing whether the government was in compliance with those statutes. 503 U.S. at 431-34. The Court held that new law did not violate the separation of powers because it merely changed the legal standards under which the courts could maintain prospective relief in the pending litigation that had prompted Congress to act, and in future litigation involving the relevant statutes as well. *Id.* at 439-40.

More recently, in *Miller v. French*, *supra*, the Court considered a separation of powers challenge to an act of Congress, the Prison Litigation Reform Act ("PLRA"), that set forth new legal standards for the entry and maintenance of injunctive relief in prison conditions litigation in federal courts. The PLRA required federal courts to suspend, and, in some instances, terminate, injunctions issued under prior legal standards. 530 U.S. at 333-35. Citing *Wheeling & Belmont Bridge*, this Court held that the PLRA did not offend separation of powers principles because in "establishing new standards for the enforcement of prospective relief . . . Congress ha[d] altered the relevant underlying law," and therefore pre-existing injunctions affording such relief under the old standards were "no longer enforceable to the extent [they were] inconsistent with the new law." *Id.* at 347.

Petitioners' attempt to fit the CEQ's actions here within the ambit of the separation of powers principle articulated in *Wheeling & Belmont Bridge*, *Robertson*, and *Miller* is unavailing for two reasons.

First, the CEQ did not effect a change in the underlying law in declaring an emergency and issuing its letter exempting the Navy from compliance with the injunction. Rather, the CEQ just disagreed with the district court's factual determination that compliance with the injunction would not impede the ability of the Navy to carry out the sonar exercises. Such executive redetermination of the bases of decisions of Article III courts and revision of those decisions is exactly what is forbidden by *Hayburn's Case*.

Second, in *Wheeling & Belmont Bridge*, *Robertson*, and *Miller*, it was *Congress*, through the exercise of its Article I lawmaking power, that changed the underlying

law on which pre-existing injunctions had rested.[2] There is absolutely no suggestion in those cases, or anywhere else in this Court's jurisprudence for that matter, that an executive agency can compel district courts to terminate injunctions by issuing a ruling in a quasi-judicial administrative tribunal that changes "the law" on which the injunctions are predicated.[3]

The proposition that only Congress, and not the executive, can direct the termination of injunctions through changes in relevant underlying legislation is in keeping with the division of functions between the two political branches. As the Court repeatedly has emphasized, "[t]he lawmaking function belongs to Congress," not to the executive. *Loving*, 517 U.S. at 758.

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[2] In such cases, Congress does not itself reverse the injunction, but instead, establishes grounds for the district court to modify the injunction, in accord with the court's traditional authority to alter an injunction in response to changed legal or factual circumstances. *See Railway Employees v. Wright*, 364 U.S. 642, 646-47 (1961).

[3] As Respondents point out, Congress could have exempted the Navy's sonar training exercises from NEPA before the district court entered its preliminary injunction; Congress did not do so, however. Resp. Br. 33. By the same token, Petitioners could have sought a NEPA exemption from Congress after entry of the injunction, and then, based on the *Wheeling & Belmont Bridge* line of cases, could have requested that the district court terminate the injunction in light of Congress' modification of NEPA. Even then, however, it would not be clear whether those cases actually would support termination of the injunction in circumstances in which a change in law applies only to one injunction in a single court case. *See Robertson*, 503 U.S. at 441 (noting that Court did not decide whether a "change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly than the range of applications at issue in pending cases"). That is precisely what CEQ has sought to do here. Its purported "change in the law" is not cross-cutting. It is good for just this one set of training exercises, and for just this one injunction barring those exercises.

This lawmaking function encompasses the power to "unmake" laws, *i.e.* to amend or repeal them. *Clinton v. New York*, 524 U.S. 417, 438 (1997); *INS v. Chadha*, 462 U.S. 919, 954 (1983). Congress may not abdicate its legislative power to make or unmake laws and pass it off to the executive. *Clinton*, 524 U.S. at 438; *Loving*, 517 U.S. at 771.

To be sure, this Court has held that Congress may delegate authority to the executive to suspend the operation of laws in the event that future contingencies, specified in advance by Congress, are later found by the executive to have occurred. *Field v. Clark*, 143 U.S. 649, 693 (1897) (upholding statute directing President to suspend tariff exemptions for particular imports if the President determined that certain conditions delineated by Congress in the tariff statute subsequently came to pass); *see also Clinton*, 524 U.S. at 444-45. But these precedents do not support the idea that Congress can delegate authority to the executive to convene administrative tribunals for the purpose of revisiting the propriety of injunctions and suspending those judgments by suspending the legislation on which they rest. Put another way, this Court has never suggested that an injunction of an Article III court, predicated on the application of an existing federal statute, can itself be a "future contingency" that Congress may direct the executive to consider in deciding whether to suspend that statute. Any such delegation of power to the executive would run head on into the well-established maxim, derived from *Hayburn's Case* itself, that "Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." *Plaut*, 514 U.S. at 218. For Congress to call on the executive to treat an Article III court's injunction as a future contingency warranting the suspension of a law on which the injunction is based would be tantamount to

calling on the executive to review the Article III court's ruling and reverse it.

This Court need not decide, however, in this case whether Congress could delegate authority to the executive branch to effectively suspend an injunction of an Article III court by issuing an administrative ruling suspending the relevant law on which the injunction rests, because no such authority has been granted to CEQ.[4]

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4 By contrast, in the Coastal Zone Management Act ("CZMA"), Congress has expressly delegated the authority to the President to exempt federal agency activities from compliance with that statute when a federal court previously has determined that the agency's activities do not comply with the statute and issued an injunction requiring the agency to take measures to come into compliance. The President is authorized to issue such post-hoc exemptions if he determines that the agency activity that the federal court found to be out of compliance with the CZMA is 'in the paramount interest of the United States." 16 U.S.C. § 1456(c)(1). Respondents originally brought this action under both NEPA and the CZMA, and the district court originally entered its injunction under both statutes. Pet. Br. 11-12. The President subsequently invoked the CZMA exemption, and thus sought to waive the Navy's compliance with the portions of the CZMA that the district court had said that the Navy had violated. *Id.* 14. The issuance of the presidential exemption under the CZMA occurred contemporaneously with the issuance of the CEQ's purported NEPA-based exemption *Id.* In the district court, Petitioners cited both the presidential and CEQ exemptions as a basis for vacating the injunction. *Id.* 15. The district court questioned the constitutionality of the CZMA exemption on the grounds that it vests the executive with power to revise injunctions of Article III courts. App. 126-135a. The district court did not decide that constitutional question, however, because it concluded that the injunction could rest on NEPA alone. Pet. Br. 15. And as it comes to this Court, the injunction is not based on the CZMA. Accordingly, this Court need not resolve the constitutionality of the CZMA exemption.

Nor does this Court have to decide whether an agency could, through notice and comment rulemaking under the Administrative

And at the end of the day, this Court could avoid constitutional questions altogether by holding that the CEQ's emergency regulatory authority does not encompass the power to assume the judicial-like mantle of overruling injunctions of Article III courts. The doctrine of avoiding constitutional questions is particularly well-suited for application here because this Court should presume that Congress acted against the backdrop of the bars on executive review of judicial decisions and on advisory opinions, and thus, in creating the CEQ, did not give that agency power that collides with those critical separation of powers limitations. *See United States v. X-Citement Video, Inc.,* 513 U.S. 64, 73 (1994) ("We do not impute an intent of Congress to pass legislation that is inconsistent with the Constitution.").

Procedure Act ("APA"), modify a regulation on which an injunction is based and thereby work a modification of the injunction. Under that scenario, where the injunction itself was predicated on an agency regulation, the agency's change in the regulation resulting in a corresponding change to the injunction might be akin to a congressional change in legislation resulting in a corresponding change to an injunction of the sort upheld in *Wheeling & Belmont Bridge*. Here, however, the district court's injunction was not based on a regulation; it was based on a statute (NEPA). And, in any event, CEQ did not comply with APA requirements when issuing its quasi-judicial administrative ruling. Resp. Br. 37-38.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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