No. 20-1195

In the Supreme Court of the United States

KANSAS NATURAL RESOURCE COALITION,
Petitioner,

v.

UNITED STATES DEPARTMENT OF INTERIOR, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE IN SUPPORT OF PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI

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INTERESTS OF THE *AMICUS CURIAE*

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy.[1] The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals.

The Buckeye Institute is dedicated to promoting free- market policy solutions and protecting individual liberties, especially those liberties guaranteed by the Constitution of the United States, against government overreach. More and more often, that government overreach comes in the form of agency rules and regulations imposed by unelected bureaucrats. The result is not just government overreach, but the insulation of important public policy decisions from any political or judicial accountability. This is incompatible

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[1] Pursuant to Rules 37.2(a) and 37.3(a), The Buckeye Institute states that it has given timely notice and obtained written consent to file this amicus brief from all parties in the case. Further, pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission.

with the representative democracy guaranteed by the Constitution.

The Buckeye Institute has advocated for the roll-back of government regulations in Ohio and across the country that unnecessarily burden and discourage private industry and initiative.

Judicial enforcement of the Congressional Review Act (CRA) provides an important check on the kinds of unnecessary or ill-conceived rules and regulations that The Buckeye Institute opposes. More importantly, it allows citizens to assert their right to self-government in the regulatory process.

SUMMARY OF ARGUMENT

In 1996, Congress enacted the Congressional Review Act (CRA or Act) to inject much needed political accountability into the rulemaking process. The CRA's command to Federal agencies appears in its first sentence and is unambiguous: "Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General" a copy of the rule, a concise statement explaining whether it is a "major" rule under the Act, the rule's proposed effective date, and any regulatory analyses required by law. 5 U.S.C. § 801, *et seq.*; See Sean D. Croston, *Congress & the Courts Close Their Eyes: The Continuing Abdication of the duty to Rev. Agencies' Noncompliance with the Congressional Rev. Act*, 62 ADMIN. L. REV. 907, 908 (2010). Ideally, providing Congress with the opportunity to exercise its legislative power to prevent agency overreach would restore some measure of "the delicate balance between

the appropriate roles of the Congress in enacting laws, and the Executive Branch in implemental those laws." 142 Cong. Rec. S3683, (daily ed. Apr. 18, 1996).

Yet, the promise of the CRA remains unfulfilled. Despite its straightforward directive, Federal agencies have for two and half decades consistently ignored their legal obligations under the CRA. The reasons for this are three-fold. First, Congress has all too frequently abdicated its constitutional role as the legislative branch and outsourced the drafting of substantive law to administrative agencies. Second, Congress, collectively, frequently sees no political benefit in asserting its oversight role under the CRA. Third, and most relevant to this case, circuit courts are split on whether private actors who seek to make agencies accountable to Congress, and hence, accountable to the people, may enforce the CRA's provisions through the courts. Simply put, agencies feel free to violate the CRA because they are confident that no one can or will enforce its provisions against them.

The Tenth Circuit's decision holding that § 805 of the CRA prohibits any form of judicial review effectively insulates federal agencies from political accountability and allows them to continue to flout the requirements of the CRA.

The Tenth Circuit failed to properly apply the strong presumption of judicial review that attaches to agency actions. Both the Founding generation and this Court have considered judicial review to be an essential guarantor of American liberties.

The CRA's text, legislative history, and the Court's strong presumption of reviewability support the narrow reading of § 805 that allows for judicial review of agency action. Moreover, two decades of experience teach that if agencies are completely insulated from judicial review, the CRA was essentially a dead letter upon enactment and that it exists today merely as a vestigial nod to quaint democratic principles no longer convenient to the modern administrative state.

Further, the application of judicial review to the CRA will have another salutary effect. It will make both Congress and the Executive branch more cognizant of and more attentive to their respective roles in the Constitution's separation of powers. Our Constitutional order is ill-served when Congress abdicates its role as the legislative branch and allows the Executive to legislate by rule. Recognizing the judicial branch's authority to enforce the Constitution's structural boundaries will encourage its coequal branches to confine their activities to the roles the Framers assigned them.

ARGUMENT

I. THE PETITION FOR CERTIORARI PRESENTS A QUESTION OF GREAT IMPORTANCE

This case presents a problem as old as the Nation, and one which implicates the U.S. Constitution's fundamental promise of self-governance. Madison described the challenge aptly in Federalist 51:

> "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

THE FEDERALIST NO. 51, (James Madison), New York Packet, (1788).

Judging by the system of checks and balances he championed in the Constitution, Madison appreciated that the second task was more difficult than the first. But for a republican form of government to survive, it was also the more important one.

The government's need for self-control is all the more apparent now. In 1802, the United States government had 3,905 employees. Peter Kastor, *The Early Federal Workforce*, BROOKINGS INSTITUTION (May 2018), *available at* https://tinyurl.com/3rpv55s2. Roughly 700 of those employees were clerks in the Federal government; the rest were postal workers. Peter Onuf, *Thomas Jefferson: Domestic Affairs,* UNIVERSITY OF VIRGINIA MILLER CENTER, (Mar. 25, 2021), *available at* https://tinyurl.com/6jmm4nze. By contrast, today, the federal government employs 2.3 million civilians. More significant than the number of employees, however, is the influence that this unelected branch of government has over national policy. In 2015, Federal agencies issues 3,410 new rules, which equates to 30 rules for every piece of congressionally passed legislation in that same year. C.W. Crews, Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, COMPETITIVE ENTERPRISE INSTITUTE (Mar. 8, 2015),

available at https://cei.org/studies/ten-thousand-commandments-2015/.

The expanding regulatory state is nothing new. In the 1970s, critics raised concerns of Congressional "delegation as abdication," arguing that "an unaccountable and headless fourth branch of government—the bureaucrats—had come to run American politics." Susan Webb Yackee, *The Politics of Rulemaking in the United States*, 22 ANNU. REV. POLITICAL SCI. 37, 39 (2019) (*internal citations omitted*). In the mid-1980s, commentators observed that "[a]dministrative agencies today have enormous power to make fundamental policy decisions that the Constitution assigns to Congress as the branch of government most representative of the majority's views." *Id.* "More and more legislation has been originating with the executive branch of government." *Id.*

Yet, despite these concerns, legislative delegation of regulatory authority to agencies continues unabated, with the result that modern governance relies heavily on the public policy decisions generated by agency rulemaking.

Independent agencies "hold enormous power over the economic and social life of the United States." *PHH Corp. v. CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). Administrative law "constrain[s] Americans in all aspects of their lives, political, economic, social, and personal," having become "the government's primary mode of controlling Americans." Philip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL? 1 (2014). Administrative processes intrude upon many facets of American life that may well have been thought

the proper province of private life and business, including brushing one's teeth, 606 C.M.R. § 7.11(11)(d); selling fresh milk, Stephen Dinan, *Feds Shut Down Amish Farm for Selling Fresh Milk*, WASH. TIMES (Feb. 13, 2012); or filling holes on one's land, see *Sackett v. EPA*, 566 U.S. 120, 124-25 (2012). With literally "hundreds of federal agencies poking into every nook and cranny of daily life," "the danger posed by the growing power of the administrative state cannot be dismissed." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

Not surprisingly, the increase in government by rulemaking, rather than legislation, has coincided with a decrease in trust in the federal government. In 2019, nearly two-thirds of Americans surveyed said that this lack of trust in the federal government made it harder to solve many of the country's problems. Lee Raine and Andrew Perrin, *Key Findings about Americans' Declining Trust in Government and Each Other,* PEW RESEARCH CENTER (Jul. 22, 2019), https://www.pewresearch.org/fact-tank/2019/07/22/key-findings-about-americans-declining-trust-in-government-and-each-other/. More optimistically, 84% of those surveyed also said that they believed it was possible to improve public trust. *Id*. The written response to survey identified more disclosure of what the government does as a way to rebuild public confidence in its government. *Id.*

Unfortunately, the history of the CRA has demonstrated that without an enforcement mechanism, neither Federal agencies nor Congress can be trusted to take their obligations under the CRA seriously. From 1991 - 2010, the Code of Federal Regulations grew by

40,000 pages to a total of 146,000 pages. Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 126 (2016). Approximately 250,000 federal regulations have been added in those thirty years, bringing the corpus of federal administrative law alone to a total of over 1 million regulations. Mark L. Rienzi, *Administrative Power and Religious Liberty at the Supreme Court*, 69 CASE W. RES. L. REV. 355, 381 (2018). The CRA was enacted in the midst of the administrative boom. And yet a study of Federal agency actions between 1996 (when the CRA was enacted) to 2009 concluded that more than 1,000 final rules had not been submitted to the GAO—and presumably not to Congress. Curtis W. Copeland, *Congressional Review Act: Rules Not Submitted to GAO and Congress 10*, CONG. RESEARCH SERV., R40997 (2009). Judge Lucero, dissenting from the decision of the Tenth Circuit below, noted that "[w]e need not doubt an agency's fidelity to the law to know that "legal lapses and violations occur, and especially so when they have no consequence." Pet. App. at 45 (citing *Weyerhouser Co. v. U.S. Fish & Wildlife Serv.*, — U.S. —, 139 S. Ct. 361, 370, 202 L.Ed.2d 269 (2018)). A single lapse is one thing; more than one thousand "lapses" effectively thwarts the CRA as a meaningful check.

The problem, then, is more systemic, and signals a breakdown in political checks and balances. In *Federalist 51*, the Founders argued that "[t]he great security against a gradual concentration of the several powers in the same department consist in giving to those who administer each department, the necessary constitutional means and personal motives to resist

encroachments of the others." Or, to put it more bluntly, "[a]mbition must be made to counteract ambition." THE FEDERALIST NO. 51, (James Madison), New York Packet, (1788).

But the rise of the modern administrative state creates incentives to shift quasi-legislative functions to politically unaccountable agencies. Not surprisingly then, Congress often has little interest in enforcing the CRA. Croston, *supra*, at 909. First, because the agencies are in the Executive Branch and at least nominally under the President's control, "Congress rarely is held accountable for agency decisions." Croston, *supra* at 910 (quoting Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2347 (2001)). Regulated parties will blame burdensome or unpopular rules on the agencies or the President, "which are naturally at fault" rather than Congress. *Id.* The general result is a congressional "lack of interest" in CRA enforcement. *Id.*

Further, the "partisan and constituency interests of individual members of Congress usually prevent them from acting collectively to preserve congressional power—or, what is almost the same thing, to deny authority to the other branches of government." Kagan, *Presidential Administration*, 114 HARV. L. REV. at 2347. As Professor Croston explains:

> Certainly, some members of Congress who might be in the minority but who agree with the agencies' policy decisions will be pleased that the agencies are circumventing Congressional review. Or at least they will not object. Nor will other members of Congress, who might not be

> thrilled with the substantive decisions reflected in the agencies' actions, but have bigger fish to fry—they will be more concerned with immediate constituent concerns and the weightier policy issues of the day.

Croston, *supra*, at 910.

This breakdown in checks and balances calls for a *more robust* application of the strong presumption for judicial review—not a less robust one—in order to prevent the CRA and its purpose of providing a modicum of oversight over agency regulators from becoming a dead letter.

II. THE IMPORTANCE OF JUDICIAL REVIEW OF AGENCY ACTIONS IN OUR CONSTITUTIONAL SYSTEM

In Federalist No. 78, Alexander Hamilton explains the federal judiciary's duty to interpret the laws and thus keep the other branches within their assigned limits:

> [T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts.

THE FEDERALIST NO. 78, (Alexander Hamilton) (McLean ed. 1788).

But given the profound shift to administrative lawmaking, "public administrators, not elected

legislators, issue over 90% of the laws that govern American life." Yackee, *supra* at 39 (citing Kenneth F. Warren, ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM, WESTVIEW PRESS, (5th ed. 2010)). Were the courts to allow administrative rulemaking to evade judicial scrutiny, the very purpose of judicial review—outlined by Hamilton and affirmed by this Court since *Marbury v. Madison,* 5 U.S. 137 (1803)—in providing a meaningful check on lawmaking effectively would be gutted through the legerdemain of delegation.

Notwithstanding the decision of the Tenth Circuit below, this Court has not been dissuaded from its core function. From the time of Chief Justice Marshall, this Court has expressed that the judiciary must be able to effectively review administrative actions:

> "It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process ... leaving to the debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist . . . ."

United States v. Nourse, 34 U.S. 8, 28–29 (1835).

Against this historical backdrop and understanding of judicial review as fundamental to checks and balances, this Court has adopted a strong presumption of reviewability of administrative actions. *See*

Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967) ("[o]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review.") In recognizing this strong presumption, the *Abbott* Court explained that the language of the Administrative Procedure Act (APA) "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . so long as no statute precludes such relief or the action is not one committed by law to agency discretion." *Id.* (*internal citations omitted*).

This presumption is an adaptation of Madison's vision of separate branches checking and balancing one another to the blurred constitutional realities of the modern administrative state. *See Stark v. Wickard*, 321 U.S. 288, 309 (1944) (acknowledging the supervisory authority of Congress and the Executive, but noting, "under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power.") And while this presumption can be overcome, to do so requires "specific language or specific legislative history that is a reliable indicator of congressional intent," or a specific congressional intent to preclude judicial review that is "'fairly discernible' in the detail of the legislative scheme." *Block v. Community Nutrition Institute,* 467 U.S. 340, 349, 351 (1984).

Judge Lucero's dissent and the Petitioners ably have detailed the ways in which the Tenth Circuit's

majority failed to properly apply this standard and how it conflicts with other circuits' application. See Pet. App. at 50-56. But the dissent's refrain that the Department of the Interior bears a "heavy burden" to overcome the "strong presumption" of judicial review merits another mention. The presumption is strong and the burden is heavy because "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York,* 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). While the Framers carefully separated the legislative, executive, and judicial functions, administrative agencies have blended them in new and dangerous ways. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2437-39 (2019) (Gorsuch, J., dissenting). And with that blending comes "a significant threat to individual liberty." *PHH Corp.*, 881 F.3d at 165 (Kavanaugh, J., dissenting). Indeed, the risk is great to liberties in administrative rulemaking because "it is much easier to impose burdens on civil liberties if those burdens do not need to be approved by those accountable to the voters." Robert Alt, *2018 Bradley Symposium: The State of the Constitution,* THE HERITAGE FOUNDATION (May 15, 2018), *available at* https://www.heritage.org/sites/default/files/2019-01/HL1302.pdf. To offset this risk, the need for an effective check is also great.

As Justice Gorsuch recently noted, "enforcing the separation of powers isn't about protecting institutional prerogatives or governmental turf." *Gundy v. United States*, — U.S. —, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, concurring). Rather, restricting the branches in their assigned orbits is vital to preserving liberty.

"So when a case or controversy comes within the judicial competence, the Constitution does not permit judges to look the other way . . . ." *Id.*

Judicial review, particularly regarding the proper roles of the competing branches, is fundamental to liberty, and as the widening girth of the Federal Register attests, should not tossed aside lightly.

III. THE IMPORTANCE OF JUDICIAL REVIEW OF AGENCY ACTIONS TO THE CRA

As Judge Lucero noted in dissent below, removing judicial review from the CRA "raises separation-of-powers concerns because it "place[s] in executive hands authority to remove cases from the Judiciary's domain." Pet. App. at 55.

The Act's animating provision—the prime mover of the CRA—is its command that agencies "shall submit to each House of the Congress and to the Comptroller General" certain materials before a rule can take effect. "The word *shall* is a sign of the future tense, and implies an imperative mandate, obligatory upon those to whom it is addressed." *Martin v. Hunter's Lessee*, 14 U.S. 304, 314 (1816); *see also, Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) ("The word 'shall' is ordinarily 'the language of command.'"). If the directive is merely advisory, or subject to the agency's discretion, the Act is rendered meaningless.

By reading § 805 to preclude all judicial review or enforcement of the CRA, including a court's ability to enforce the CRA's "shall submit" clause, the Tenth Circuit's decision reads that first and primary

command out of the Act. It effectively removes the congressional review requirement from a statute entitled the "Congressional Review Act."

Agencies can ignore Congress's unambiguous directive, knowing that they can never be held accountable for its violation, and draft rules that, if submitted, would likely not be approved. This allows both agencies and Congress to evade any political accountability for significant substantive changes to the law. For citizens concerned about regulatory overreach, this not only puts the fox in charge of the henhouse, it removes any avenue by which the chickens might complain about the fox's management.

And while judicial remedies exist under the Administrative Procedures Act (APA) in cases where a rule is contrary to law, the APA does not serve the CRA's prophylactic intent by preventing rules that are burdensome, ill-conceived, or simply unpopular, from taking effect. The problem of lack of political accountability remains.

The Tenth Circuit's decision allows Congress to abdicate legislative authority, ensures agency noncompliance with the provisions of the CRA that were, after all, designed to enhance the public's right of self-government by providing greater political accountability, and deprives the judiciary of its proper and established role in our tripartite government.

CONCLUSION

For the reasons stated in the Petition for Writ of Certiorari and this amicus curiae brief, this Court should grant the Petition for Writ of Certiorari.

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