No. __________

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

PETITION FOR A WRIT OF CERTIORARI

JONATHAN WOOD
Counsel of Record
TODD GAZIANO
Pacific Legal Foundation
3100 Clarendon Blvd.,
Suite 610
Arlington, VA 22201-5330
Telephone: (202) 888-6881
JWood@pacificlegal.org
TGaziano@pacificlegal.org

KENNETH W. ESTES
Calihan Law Firm
P.O. Box 1016
Garden City, KS 67846
Telephone: (620) 276-2381
kestes@calihanlawfirm.com

JEFFREY W. MCCOY
CALEB R. TROTTER
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
JMccoy@pacificlegal.org
CTrotter@pacificlegal.org

Counsel for Petitioner

QUESTIONS PRESENTED

To ensure democratic accountability over the administrative state and respect for the separation of powers, the Congressional Review Act (CRA) provides that no agency rule can take effect until the agency submits it to Congress for review. 5 U.S.C. § 801(a)(1). The Department of the Interior has violated the CRA by withholding from Congress a rule encouraging voluntary conservation of wildlife. Kansas Natural Resource Coalition (KNRC) has developed a conservation plan for the lesser prairie chicken that relies on the unsubmitted rule to incentivize landowner participation. KNRC timely challenged Interior's CRA violation, alleging a procedural injury affecting KNRC's interest in the species, its conservation plan, and the proper consideration of that plan in Interior's upcoming decision whether to list the species under the Endangered Species Act. Contrary to decisions of this Court and several other circuits, a panel of the Tenth Circuit held, over a dissent, that KNRC lacks standing because the outcome of that listing decision is uncertain and that agency violations of the CRA are not reviewable.

The questions presented are:

1) Whether a party vindicating a procedural injury lacks standing unless it can establish with certainty that procedural compliance would change the outcome of subsequent agency action.

2) Whether, under the strong presumption favoring judicial review of agency action, agency violations of the CRA's rule-submission requirement are subject to judicial review.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner, which was Plaintiff-Appellant below, is Kansas Natural Resource Coalition (KNRC), a nonprofit membership organization representing Kansas counties on conservation and natural resource issues. It is not a publicly traded corporation, issues no stock, and has no parent corporation. No publicly held corporation holds more than a 10% ownership in the organization.

Respondents, who were Defendants-Appellees below, are: the U.S. Department of the Interior; Scott de la Vega, in his official capacity as Acting Secretary of the Interior; the U.S. Fish and Wildlife Service; and Martha Williams, in her official capacity as Principal Deputy Director of the U.S. Fish and Wildlife Service.

RULE 14.1(b)(iii) STATEMENT

The proceedings in the district court and Tenth Circuit identified below are directly related to the above-captioned case in this Court.

Kansas Natural Resource Coalition v. U.S. Department of the Interior, 382 F. Supp. 3d 1179 (D. Kan. 2019).

Kansas Natural Resource Coalition v. United States Department of Interior, 971 F.3d 1222 (10th Cir. 2020).

Kansas Natural Resource Coalition v. United States Department of Interior, No. 19-3108 (10th Cir.). The Tenth Circuit denied Appellant's petition for panel rehearing en banc on October 19, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kansas Natural Resource Coalition respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's opinion is available at 971 F.3d 1222 (Aug. 24, 2020) and is reproduced in the Appendix at A-1. The order denying rehearing *en banc* is reproduced in the Appendix at C-1.

The district court's opinion is reported at 382 F. Supp. 3d 1179 (Apr. 8, 2019) and is reproduced in the Appendix at B-1.

JURISDICTION

On April 8, 2019, the district court dismissed KNRC's complaint. App. B-1. On August 24, 2020, a panel of the Tenth Circuit affirmed that dismissal, over a dissent. App. A-1. KNRC filed a petition for rehearing *en banc*, which was denied on October 19, 2020, with Judge Lucero voting to rehear the case. App. C-1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

5 U.S.C. §§ 801, 802, 805, and 806 can be found at Appendix D.

INTRODUCTION

As Judge Lucero's dissent in the court below explains, "Congress enacted the CRA to restore democratic accountability to agency rulemaking." App. A-30. "The majority's holding"—that courts are powerless to enforce the CRA's requirements against recalcitrant agencies—"does not give effect to Congress' intent; it undermines it." *Id*. This petition presents two important questions that the Tenth Circuit decided contrary to decisions of this Court and other circuits.

First, the Tenth Circuit held that a procedural-injury plaintiff lacks standing unless it can show with certainty that procedural compliance would change the outcome of a subsequent agency action affecting the party's interests. This holding conflicts with this Court's suggestion and holdings of at least four circuits that procedural-injury standing requires only that procedural compliance *could* protect the party's interests. *See*, *e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-73 & nn.7-8 (1992); *Nat. Res. Defense Council, Inc. v. Securities & Exchange Commission*, 606 F.2d 1031 (D.C. Cir. 1979).

Second, the petition presents a significant question about the presumption favoring judicial review of agency action and its application to the CRA. The Tenth Circuit's decision, contrary to this Court's decisions and those of several circuits, relegates the presumption to an afterthought in cases where an agency claims a statute precludes review. *See, e.g., Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069-70 (2020); *El Paso Nat. Gas Co. v. United States*, 632 F.3d 1272, 1276 (D.C. Cir. 2011). On the specific question whether agency violations of the CRA are reviewable,

the Tenth Circuit's holding conflicts with decisions from two other circuits, the CRA's text, structure, purpose, and an unambiguous statement by the CRA's sponsors. *See Nat. Res. Defense Council v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004); *Liesegang v. Secretary of Veterans Affairs*, 312 F.3d 1368, 1374 (Fed. Cir. 2002). The Tenth Circuit's decision leaves agencies "to police their own conduct" with no consequence when they fail to do so. App. A-57. That holding renders a federal statute intended to constrain federal agencies "ineffectual." App. A-54. It will also likely worsen the already significant problem of agencies ignoring the CRA, thereby thwarting democratic accountability and the separation of powers. A decision with such weighty consequences merits review.

STATEMENT OF THE CASE

A. The Congressional Review Act

Congress enacted the CRA to restore the "delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws." 142 Cong. Rec. S3683, S3683 (daily ed. Apr. 18, 1996). The problem Congress aimed to address is immensely important: federal agencies issue countless rules of great economic, social, and political significance without any direct accountability to the American people. *See* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999, 1000 (2015). The CRA restores a modicum of oversight to the administrative state by affording Congress and the President a convenient process to review and potentially disapprove rules. 142 Cong. Rec. at S3684.

The CRA requires agencies to submit to Congress every rule before it may go into effect. 5 U.S.C. § 801(a)(1)(A). The CRA establishes temporary, streamlined procedures through which Congress can review the rule and, if it wishes, pass a joint resolution disapproving the rule. *See, e.g.*, 5 U.S.C. § 802(a) (limiting time for debate and barring use of the filibuster in the U.S. Senate). These procedures are contingent on agencies submitting their rules as required. *See* 5 U.S.C. §§ 801(a)(1), 802(a).

If a resolution is enacted and signed by the President, the disapproved rule cannot take effect and the agency is barred from issuing any rule that is "substantially the same" as the disapproved rule unless "specifically authorized" to do so. *Id.* § 801(b). If a rule is given effect prior to Congress' review, the enactment of a joint resolution requires that the rule "be treated as though such rule had never taken effect[.]" *Id.* § 801(f).

The CRA also states that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review." 5 U.S.C. § 805. This provision was intended to ensure that Congress, by inserting itself into the rulemaking process for the first time, was not also subjecting its actions to judicial review under the Administrative Procedure Act. *See* 142 Cong. Rec. at S3686.

However, according to the CRA's sponsors, § 805 does not insulate from review agency violations of the rule-submission requirement: "The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect[;]" instead, Congress "expect[s] that a court might recognize that a rule has no legal effect due to 801(a)(1)(A) . . . ." *See*

id. Indeed, in the same bill, Congress repealed the Regulatory Flexibility Act's judicial-review bar, recognizing that agencies may ignore regulatory reform statutes unless they are judicial enforceable. App. A-55–A-56. *See* 142 Cong. Rec. H3016 (daily ed. Mar. 28, 1996) (statement of Rep. Ewing) ("It is because the agencies know their decision to ignore the RFA cannot be challenged that they almost always do ignore the act.").

B. The Policy for Evaluating Conservation Efforts When Making Listing Decisions

The U.S. Fish and Wildlife Service's "Policy for Evaluation of Conservation Efforts When Making Listing Decisions" (PECE Rule) encourages states, local governments, conservationists, and landowners to work collaboratively on species recovery. 68 Fed. Reg. 15,100, 15,100 (Mar. 28, 2003). It allows the Service to forego listing species under the Endangered Species Act (and thereby avoid the burdensome regulations such listing would trigger) if other conservation plans can adequately reduce threats to species. *Id.* at 15,102.

Under the PECE Rule, the Service evaluates conservation efforts according to: (1) the likelihood that conservation measures will be implemented; and (2) the likelihood that they will be effective. *Id.* The rule further identifies factors that inform the analysis under each criterion. *Id.* at 15,114-15. These standards are intended to incentivize participation in conservation plans "by increasing the likelihood that parties' voluntary efforts and commitments . . . will play a role in a listing decision." *Id.* at 15,104.

By encouraging proactive conservation and avoiding the ESA's strictures, the PECE Rule benefits the recovery of at-risk species. "Addressing the needs of species before the regulatory protections associated with listing under the [Endangered Species] Act come into play often allows greater management flexibility in the actions necessary to stabilize or restore these species and their habitats." *Id.* at 15,103. *See* Jonathan H. Adler, *The Leaky Ark: The Failure of Endangered Species Regulation on Private Land*, *in* REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED SPECIES ACT REFORM (2011) (explaining that, by making listed species a significant liability for landowners, the Endangered Species Act can discourage habitat conservation and restoration on private land).

Despite the CRA's clear command and the PECE Rule's importance, Interior has not submitted the rule to Congress. App. E-11. Therefore, under the CRA's explicit text, the rule is not lawfully in effect. 5 U.S.C. § 801(a)(1).

C. The Lesser Prairie Chicken and KNRC's Conservation Plan

The lesser prairie chicken is a species of prairie grouse whose range includes more than 17 million acres of grasslands in Kansas, Colorado, New Mexico, Oklahoma, and Texas. Determination of Threatened Status for the Lesser Prairie-Chicken, 79 Fed. Reg. 19,974, 20,009-10 (Apr. 10, 2014). Wary of people and man-made structures, the species has seen a substantial reduction in suitable habitat in recent decades. *Id.* at 20,016-30. This loss of habitat led Interior to propose listing the species as threatened in 2012. Proposed Rule Listing the Lesser Prairie-

Chicken as a Threatened Species, 77 Fed. Reg. 73,828 (Dec. 11, 2012).[1]

The proposed listing spurred states, local governments, industry, landowners, and conservation groups to develop plans to recover the species. *See* 79 Fed. Reg. at 19,988-98. KNRC, a nonprofit group formed by county governments to address conservation and natural resource issues, developed such a plan. App. E-4, E-14–E-16. KNRC's plan calls for counties to develop and implement policies to control invasive species encroaching on lesser prairie chicken habitat, to better mark fences to prevent entanglement or injury, and to encourage habitat restoration. App. E-15. A majority of prime lesser prairie chicken habitat is in Western Kansas and covered by KNRC's plan. App. E-14. The plan also encourages counties to take steps compatible with a five-state plan developed by the Western Association of Fish and Wildlife Agencies. App. E-12–E-13, E-15.

Under the five-state plan, companies and landowners pay a fee to offset activities that disturb habitat which funds habitat conservation and restoration elsewhere. App. E-12–E-14. As of July 2018, that plan had raised $64 million for lesser prairie chicken conservation and secured conservation agreements covering 150,000 acres. *See* Okla. Dep't of Wildlife Conservation, *Lesser Prairie-chicken*

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[1] Interior's decided to list the species as threatened in 2014, a decision that was set aside because Interior failed to follow the PECE Rule. *See Permian Basin Petroleum Ass'n v. Dep't of the Interior*, 127 F. Supp. 3d 700, 707-08 (W.D. Tex. 2015). No party raised Interior's CRA violation or its effect on the PECE Rule in *Permian Basin*.

Numbers Improve Again in Annual Survey (July 19, 2018).[2]

Due in part to conservation efforts undertaken by states, local governments, landowners, and conservationists, the estimated size of the lesser prairie chicken population increased from 15,397 in 2013 to 34,408 in 2020. *See* Western Ass'n of Fish & Wildlife Agencies, *Range-wide Population Size of the Lesser Prairie-Chicken: 2012 to 2020* ii (Oct. 12, 2020).[3] However, additional petitions to list the species have been filed and Interior will decide soon whether to again propose the species for listing. Dkt. No. 6 at 2, *Defenders of Wildlife v. Bernhardt*, No. 1:19-cv-1709 (D.D.C. Sept. 12, 2019). The PECE Rule must be lawfully in effect to govern Interior's subsequent consideration of KNRC's conservation plan when deciding whether to list the species.

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[2] https://www.wildlifedepartment.com/outdoor-news/lesser-prairie-chicken-numbers-improve-again-annual-survey. A 2019 audit of the five-state plan found alleged financial mismanagement by the organization administering the plan. *See* Western Ass'n of Fish & Wildlife Agencies, *2019 Annual Report for the Range-wide Oil and Gas Candidate Conservation Agreement with Assurances for the Lesser Prairie-Chicken* Apps. E & F (Apr. 20, 2020), https://wafwa.org/wp-content/uploads/2020/07/LPCRWP_AnnualReport_2019.pdf. It remains to be seen what effect this will have on the long-term future of that plan.

[3] https://wafwa.org/download/range-wide-population-size-of-the-lesser-prairie-chicken-2012-to-2020/?ind=1603459108986&filename=2020%20LEPC%20Range%20Wide%20Report%2012%20October%202020.pdf&wpdmdl=13483&refresh=5f92dcd057c181603460304

D. Proceedings Below

The district court dismisses KNRC's complaint

In April 2018, KNRC filed this lawsuit challenging Interior's failure to submit the PECE Rule to Congress and seeking an order directing submission. App. E-1. This, KNRC alleges, is necessary to protect KNRC's interest in the lesser prairie chicken, its conservation plan, and consideration of that plan in the listing decision. App. E-14–E17.

Interior moved to dismiss KNRC's complaint, arguing that KNRC lacked standing, that its claim was time-barred, and that the CRA precludes judicial review of KNRC's claim. App. B-2. The district court dismissed the case, ruling that judicial review is precluded by 5 U.S.C. § 805. App. B-1–B-2. The district court did not address Interior's standing or statute-of-limitations arguments. App. B-7.

The Tenth Circuit affirms, over a dissent

On appeal, a panel of the Tenth Circuit affirmed, holding that KNRC lacks standing to challenge Interior's CRA violation and that judicial review is precluded. App. A-1. Judge Lucero dissented. App. A-30.

On standing, the majority first faulted KNRC for not specifically alleging that any county or landowner has refused to implement KNRC's conservation plan due to Interior's CRA violation. App. A-15. "But such specific allegations are unnecessary for standing purposes at this stage of litigation," Judge Lucero responded. App. A-37–A-38. On a motion to dismiss, "'[g]eneral factual allegations of injury resulting from the defendant's conduct may suffice'" because courts

"presum[e that] general allegations embrace those specific facts [that are] necessary to support the claim." *Id.* (quoting *Lujan*, 504 U.S. at 561, and *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448 (10th Cir. 1996)).

Second, the majority determined that KNRC could not assert any procedural injury because the only interest protected by the CRA's procedures is Congress' interest in oversight of the Executive Branch. App. A-17. Judge Lucero responded that the CRA's procedures are intended to protect private interests and, besides, the zone-of-interests test does not apply because KNRC does not rely on third-party standing and the government forfeited the argument. App. A-36 n.4.

Next, the majority held that, even assuming the CRA's procedures protect private interests, KNRC's procedural injury is too speculative because the outcome of Interior's listing decision is unknown. App. A-19–A21. However, Judge Lucero would have ruled that KNRC established standing based on its interest in the "proper consideration" of its conservation plan under the PECE Rule's "specific criteria for evaluating whether a conservation plan like KNRC's obviates the need for a federal listing." App. A-41–A-42. The PECE Rule's submission would ensure that these specific criteria govern Interior's review of KNRC's plan, which could better protect[4] KNRC's interest in

[4] The panel majority acknowledged the body of judicial authority supporting this standard but dismissed its relevance here. *See* App. A-17 n.5. But the majority "fail[ed] to explain this *ipse dixit*." App. A-35 n.2 (Lucero, J., dissenting).

conserving the lesser prairie chicken and avoiding the consequences of a listing. App. A-40–A-42.

Recognizing that the district court's decision rendered futile a remand to cure any standing defects, *see* App. A-20–A-21, the majority proceeded to consider whether the CRA precludes judicial review. It held that it does. App. A-21–A-24. In reaching that conclusion, the majority interpreted § 805 in isolation, dismissing the relevance of other statutory text, legislative history, or the statute's purpose. App. A-25–A-28.

But as Judge Lucero noted in his dissent, "Throughout its analysis, the majority fails to apply" the presumption favoring judicial review of agency action. App. A-50. "Not once does [the majority] acknowledge the government's 'heavy burden' to show that Congress intended to 'prevent courts from enforcing its directive[]' that agencies submit proposed rules for approval." App. A-50 (quoting *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015)).

Applying that presumption, Judge Lucero would have held that 5 U.S.C. § 805 does not preclude judicial review of KNRC's claim. App. A-44–A-63. According to the dissent, the majority's reading of § 805 is inconsistent with the text of the statute, statutory structure, an unambiguous and uncontroverted statement from the CRA's sponsors, and the statute's purpose. *Id.*[5]

On October 8, 2020, KNRC petitioned for rehearing *en banc*. App. C-1. The panel denied that

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[5] Although the majority did not reach the issue, Judge Lucero also concluded that KNRC's challenge is timely. App. A-67–A-69.

petition on October 22, 2020, with Judge Lucero voting for rehearing. *Id*.

REASONS FOR GRANTING THE PETITION

This petition should be granted because the Tenth Circuit decided important questions of federal law that this Court has not settled but should. Sup. Ct. R. 10(c). The Tenth Circuit's decision also conflicts with this Court's precedents and those of other circuits on the same important matters. Sup. Ct. R. 10(a)

I.

The Tenth Circuit Resolved an Important Standing Question Contrary to Decisions of This Court and Other Circuits

As this Court recently observed, "[c]ourts sometimes make standing law more complicated than it needs to be." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1622 (2020). That is a fit description of the majority's standing analysis below. This case is at the pleading stage, KNRC is an object of the rule at issue, and it seeks to vindicate a procedural injury, each of which lighten its standing burden.[6]

Here, KNRC asserts a procedural injury based on its interest in the lesser prairie chicken, its conservation plan, and proper consideration of that plan in the decision whether to list the species under

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[6] *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883-89 (1990) (At the pleading stage, "general factual allegations" are presumed to embrace "those specific facts that are necessary to support the claim."); *Lujan*, 504 U.S. at 561 (If "the plaintiff is himself an object of the action . . . there is ordinarily little question" of his standing.); *id.* at 572-73 (When a party is seeking to enforce a procedural requirement, it is enough that the violation "could" impair its interests.).

the Endangered Species Act. App. E-2–E4, E-14–E-17. KNRC alleges that Interior has not submitted the PECE Rule for congressional review and, therefore, the rule is not lawfully in effect and its conservation incentives are thwarted. App. E-11–E-12, E-17. If the rule is submitted, however, KNRC's interests could be vindicated by certainty in the rule's incentives, proper consideration of KNRC's plan in the decision whether to list the lesser prairie chicken, and a favorable outcome in that decision. App. A-40–A-42. Therefore, KNRC has standing to pursue its CRA claim. *Id.*

The Tenth Circuit's contrary holding is not only in error, but independently merits review and reversal because it conflicts with this Court's cases, decisions of at least four other circuits, and is unworkable.

A. The Tenth Circuit's Decision Is Contrary to This Court's Cases

The Tenth Circuit's standing analysis is contrary to this Court's precedents in at least two respects and, for that reason, merits review and reversal.

First, the majority's denial of KNRC's standing because the CRA "seems designed" to protect only Congress' interest in "oversight of the executive branch" fundamentally misunderstands the interests protected by the separation of powers. App. A-17. "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others." *Bond v. United States*, 564 U.S. 211, 222 (2011). But "the structural principles secured by the separation of powers protect the individual as well" and individuals have standing to vindicate that interest. *Id.* To be sure, the CRA is a statute, rather than a constitutional provision. But it

is no less aimed at enforcing separation of powers principles. *See* 142 Cong. Rec. at S3684. And Congress intended it to protect individual interests, not just Congress' power for its own sake. App. A-36 n.4.[7]

Second, the majority's analysis is contrary to this Court's recognition that, in a procedural-injury case, it is enough that "plaintiffs are seeking to enforce a procedural requirement the disregard of which *could* impair a separate concrete interest[.]" *Lujan*, 504 U.S. at 572-73 (emphasis added). *See Massachusetts v. EPA*, 549 U.S. 497, 517-18 (2007) (In a procedural-injury case, a litigant has standing "if there is some possibility" that the requested relief could avoid the injury.).

KNRC does not assert a procedural violation *in vacuo*, which would be insufficient. *See Summers v. Earth Island Institute*, 555 U.S. 488, 496-97 (2009). Instead, the procedural violation directly relates to KNRC's interests, including the prevalence of lesser prairie chicken habitat within member counties, KNRC's development and implementation of a conservation plan, and proper consideration of that plan in a listing decision that could have significant adverse consequences on member counties. App. E-2–E-4, E-14–E-17. *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013) (A procedural

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[7] This issue is also before the Court in *Biden v. Sierra Club*, 20-138 (cert. granted Oct. 19, 2020) (whether the zone-of-interests test precludes private parties enforcing separation-of-powers statutes). However, probable mootness may preclude the Court deciding the issue in that case. *See id.*, 592 U.S. ___, 2021 WL 357258 (Feb. 3, 2021) (removing the case from the Court's oral argument calendar).

injury claim "must be tethered to" some concrete interest.).

The Tenth Circuit did not discredit these interests. Instead, "the majority never identifies KNRC's legally protected *interest*. As such, its analysis of the concreteness of KNRC's alleged *injury* is unmoored from the interest allegedly harmed." App. A-35–A-36 (emphasis in original).

The majority nonetheless denied KNRC's standing because submission of the PECE Rule might not result in a different outcome in the listing decision. *See, e.g.*, App. A-19–A-20 (The PECE Rule "does not foreordain any particular outcome" in the listing decision and, therefore, KNRC "cannot show a certainly impending injury when the outcome of that analysis is unknown."). Under *Lujan*, this uncertainty is no obstacle to KNRC's vindication of its procedural injury. *See* 504 U.S. at 572 n.7 (In procedural injury cases, standing is satisfied "even though" a party "cannot establish with any certainty" the outcome of following the required procedure.)

B. The Tenth Circuit's Decision Conflicts With Decisions of at Least Four Other Circuits

The Tenth Circuit's holding also conflicts with the holdings of at least four other circuits, all of which hold that in procedural-injury cases standing is unaffected by the uncertainty of future agency action. *See, e.g.*, *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 28 (1st Cir. 2007); *Sierra Club v. Marita*, 46 F.3d 606, 611-12 (7th Cir. 1995); *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1082-83

(9th Cir. 2015); *Nat. Res. Defense Council*, 606 F.2d at 1036.

In *Nulankeyutmonen Nkihtaqmikon*, for instance, tribal members brought a procedural injury claim against Interior for approving development of a liquid natural gas terminal on tribal land. 503 F.3d at 23-24. Interior challenged the tribal members' standing because the terminal would only be built—and, therefore, would only affect the tribal lands—if the Federal Energy Regulatory Commission also issued a permit, agency action "which is unpredictable." *Id.* at 28. The First Circuit rejected the argument. *Id.* Given the risk of harm to the tribal members' interests, they could pursue their procedural claims because "there is at least a chance" that procedural compliance could protect those interests. *Id.*

Perhaps most closely analogous to this case are the D.C. Circuit's rulemaking-petition cases. *Cf.* 5 U.S.C. § 553(e) (recognizing a procedural right to petition agencies for rulemaking). In *Natural Resources Defense Council*, for instance, an environmental organization petitioned a federal agency to issue a rule requiring corporations to disclose environmental information about their activities. 606 F.2d at 1036. If the agency issued the rule and if corporate disclosures revealed environmental misdeeds, the organizations alleged that they and their members could use this information when voting their shares in companies for which they owned stock. *Id.* at 1042-43. Although any effect on the organizations' interests depended on future agency- and corporate-actions, the D.C. Circuit found standing because, in not issuing the rule, the agency "arguably impaired" the organizations'

interest in voting their shares consistent with their environmental values. *See id*. *See also Amer. Road & Transp. Builders Ass'n v. E.P.A.*, 588 F.3d 1109, 1111-12 (D.C. Cir. 2009); *College Sports Council v. Dep't of Education*, 465 F.3d 20, 23 (D.C. Cir. 2006); *Nat'l Min. Ass'n v. U.S. Dept. of Interior*, 70 F.3d 1345, 1349 (D.C. Cir. 1995). *Cf. In re A Community Voice*, 878 F.3d 779, 784-85 (9th Cir. 2017); *Gulf Restoration Network v. McCarthy*, 783 F.3d 227 (5th Cir. 2015).

The Tenth Circuit dismissed KNRC's analogy to these rulemaking-petition cases because KNRC is not "independently entitle[d] . . . to relief" under the APA's petition provision. App. A-16. But the majority "misses the point." App. A-40 n.5. "[T]he analogy to § 555 [shows] that the uncertainty of an agency's ultimate determination" in a forthcoming agency action "does not dispositively mean an asserted procedural injury is speculative." *Id*.

This split of authority goes to the very core of judicial review of agency action. Courts "rarely know when [they] entertain a case . . . whether the agency's ultimate action will be favorable to the petitioner or appellant." *Akins v. F.E.C.*, 101 F.3d 731, 738 (D.C. Cir. 1996), *aff'd on other grounds* 524 U.S. 11 (1998). Therefore, denying parties standing for this reason constitutes "a breathtaking attack on the legitimacy of virtually all judicial review of agency action." *Id.*

C. The Tenth Circuit's Approach Is Unworkable

Finally, the Tenth Circuit's decision provides no standard by which to determine whether a party has procedural-injury standing. Therefore, its holding will lead to unpredictable results.

Consider, for instance, the majority's unexplained assertion that KNRC lacks standing because its injury is less concrete than the "environmental harms" asserted in *WildEarth Guardians v. EPA*, 759 F.3d 1196, 1205 (10th Cir. 2014). App. A-17–A-18 n.5. In that case, an organization challenged a procedural violation in the issuance of an air-pollution rule. 759 F.3d at 1205-06. The organization's standing was based on a single member's stated interest in visiting a river and viewing fish that could be harmed by air pollution. *Id.*[8] How is the mere desire to look at a species a more concrete interest than KNRC's investment of time and resources to develop and implement a plan to recover a species? The Tenth Circuit does not say. App. A-35 n.2 (The majority "fails to explain this *ipse dixit*.").[9]

The Tenth Circuit also based its holding in part on speculation that Interior may apply the PECE rule in the upcoming listing decision. *See* App. A-20 n.7

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[8] *WildEarth Guardians* was decided on summary judgment, which imposes a higher standing burden than applies here. *See National Wildlife Fed'n,* 497 U.S. at 883-89.

[9] As here, the process at issue in *WildEarth Guardians* did not foreordain any particular outcome. *See* 759 F.3d at 1205 (WildEarth "need not establish with certainty that adherence to the procedures would necessarily change the agency's ultimate decision." (quoting *Utah v. Babbitt*, 137 F.3d 1193, 1216 n.37 (10th Cir. 1998))).

("DOI might ultimately consider KNRC's plan in precisely the fashion KNRC desires."). This assertion is befuddling because, if the Complaint's allegations are taken as true (as they must), the PECE Rule is not lawfully in effect. 5 U.S.C. § 801(a)(1). *See* App. E-17. Therefore, were Interior to apply it in the listing decision, it would be acting unlawfully. The majority cites no precedent for the proposition that standing can be defeated by speculation that an agency may act unlawfully in the future to the plaintiff's benefit. Instead, the general rule is that agencies behave lawfully except to the extent a complaint alleges otherwise. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (Federal agencies enjoy a "presumption of regularity[.]").[10]

None of these problems arise under *Lujan* or the other circuit cases cited above. Instead, KNRC has standing because submission of the PECE Rule would ensure that the rule is lawfully in effect and will govern the decision whether to list the species, a result which indisputably "could" benefit KNRC's interests. *See Lujan*, 504 U.S. at 572-73.

II.

The Tenth Circuit's Holding That the CRA Precludes Judicial Enforcement Merits Review

The Tenth Circuit's holding that the CRA precludes judicial review contravenes this Court's strong presumption favoring judicial review of agency action, which requires limits on review of agency action to be construed narrowly. *See, e.g.*, *Salinas v.*

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[10] If the majority's speculation proves unfounded, it is unclear that KNRC could challenge an adverse listing decision for failing to apply a rule that was not lawfully in effect at the time.

U.S. Railroad Retirement Bd., No. 19-199, 2021 WL 357253 (U.S. Feb. 3, 2021); *Guerrero-Lasprilla*, 140 S. Ct. at 1069-70; *El Paso Nat. Gas Co.*, 632 F.3d at 1276. The Tenth Circuit relegates the presumption to an afterthought in cases where an agency claims a statute precludes review. *See* App. A-28. *See also* App. A-49 n.9.

On the narrower question whether the CRA precludes review, the Tenth Circuit's decision also conflicts with Second Circuit and Federal Circuit precedent, the CRA's text, its structure, a clear statement from its sponsors, and the statute's purposes. *See* App. A-44–A-63. *See also Abraham*, 355 F.3d at 202; *Liesegang*, 312 F.3d at 1374. Moreover, by ensuring that agencies violating the CRA face no consequence, the Tenth Circuit's decision will worsen the already significant problem of agencies ignoring the CRA. *See* Curtis W. Copeland, Cong. Research Serv., *Congressional Review Act: Rules Not Submitted to GAO and Congress* (Dec. 29, 2009).[11] Therefore, the decision will undermine the democratic accountability and the separation of powers values that motivated Congress to enact the CRA. App. A-61–A-63.

Due to these significant doctrinal and practical consequences, this Court should grant review to settle the important question whether courts can enforce the CRA's rule-submission requirement against recalcitrant agencies.

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[11] http://www.thecre.com/forum2/wp-content/uploads/2014/08/CRS-Report-GAO.pdf.

A. The Tenth Circuit's Relegation of the Presumption Conflicts With This Court's Decisions and Those of Other Circuits

As Judge Lucero observed in dissent, "the majority fails to apply" the presumption favoring judicial review of agency action. App. at A-50. "Not once does [the majority] acknowledge the government's 'heavy burden' to show that Congress intended to 'prevent courts from enforcing its directive[]' that agencies submit proposed rules for approval." *Id.* Instead, the majority below dismissed the presumption in passing, concluding that it need "only" consider the presumption to resolve any lingering doubt after interpreting § 805 without reference to the presumption. App. A-28. For that reason, the Tenth Circuit's decision conflicts with decisions of this Court and other circuits.

1. The Tenth Circuit's approach is contrary to this Court's precedents

In *Block v. Community Nutrition Institute*, this Court held that "[w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action." 467 U.S. 340, 345 (1984). Ignoring this guidance, the Tenth Circuit considered § 805 in isolation and gave no weight to the rest of the statute's text, its structure, its objectives, unambiguous and uncontroverted statements from the CRA's sponsors, and the nature of the administrative action. App. A-25–A-28.

Each of these factors support the availability of judicial review in this case. Even construing § 805 in isolation, as the majority below did, the text is ambiguous. App. A-51–A-58. The text does not expressly address agency action and the list of actions excluded from judicial review suggests a narrower interpretation. *Id.*

However, § 805 must not be interpreted in isolation. *See also King v. Burwell*, 576 U.S. 473, 486 (2015) ("Our duty, after all, is to construe statutes, not isolated provisions."). Instead, it must be read considering the statute as a whole. Other text in the CRA strongly supports the availability of judicial review because the Tenth Circuit's interpretation "renders the CRA ineffectual" and several of its provisions inoperable. App. A-54–A-55. *See supra* Part II.C.

Moreover, the CRA's sponsors in both houses of Congress issued an unequivocal, and uncontroverted statement that § 805 does not preclude judicial review when agencies violate the rule-submission requirement. App. A-58–A-61. *See* 142 Cong. Rec. at S3686. And this is the sort of agency action courts review routinely under the APA. App. A-63. Ultimately, withholding judicial review defeats the CRA's evident purpose, by leaving agencies to police their own compliance with a statute intended to constrain agency authority, increase democratic accountability, and secure the separation of powers. App. A-61–A-63.

There is, therefore, substantial doubt that Congress intended to leave agencies to police their own conduct under the CRA. *See* App. A-64. *See also Block*, 467 U.S. at 351 ("[W]here substantial doubt about congressional intent exists, the general presumption favoring judicial review of administrative action is controlling."). Interior does not dispute that most of these factors cut against its position, contesting instead only how damning each factor is in isolation. *See* App. A-65 (Interior "largely fails to make an affirmative case that Congress intended to strip courts of jurisdiction to review an agency's failure to submit a rule for approval[.]").

Contrary to *Block*, the majority below interpreted § 805 in a vacuum, without regard to the presumption of judicial review. App. A-28. *See* App. A-55 n.12. To justify its departure from this Court's precedents, the majority read *Kucana v. Holder* to reduce the presumption's significance where an agency asserts that a statute precludes review. App. A-28. *See Kucana*, 558 U.S. 233 (2010). According to the majority, *Kucana* requires the presumption to be applied in such cases "only to resolve any 'lingering doubt' after determining that the statute in question was susceptible to divergent interpretations." App. A-28 (quoting *Kucana*, 558 U.S. at 251). But "[t]he word 'only' is the majority's invention—it does not appear in *Kucana*." App. A-49 n.9.

Neither *Kucana* nor any other case has ever endorsed the proposition that the presumption is of lesser significance where an agency claims a statute precludes judicial review. Instead, both before and after *Kucana*, this Court has consistently applied the presumption in such cases the same as in any other.

See Salinas, 2021 WL 357253; *Guerrero-Lasprilla*, 140 S. Ct. at 1069-70 ("Consider first a familiar principle of statutory construction: the presumption favoring judicial review of administrative action." (cleaned up) (quoting *Kucana*, 558 U.S. at 251)); *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348, 1359 (2018) ("[W]e begin with the strong presumption of judicial review." (cleaned up)); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 430 (1995) ("We return now, in more detail, to the statutory language to determine whether it overcomes the presumption . . . ."). The Tenth Circuit's decision breaks from this uninterrupted line of precedent and, therefore, merits review.

2. The Tenth Circuit's holding that the presumption applies "only" to resolve lingering doubts conflicts with other circuits

The Tenth Circuit's downplaying of the presumption also conflicts with decisions of at least three other circuits, all of which hold that the presumption requires statutes limiting judicial review of agency action to be interpreted narrowly.

In *Make The Road New York v. Wolf*, for instance, the D.C. Circuit recently observed that the "'well-settled' and 'strong presumption' in favor of judicial review is so embedded in the law that it applies even when determining the scope of statutory provisions specifically designed to limit judicial review." 962 F.3d 612, 624 (D.C. Cir. 2020). "[T]he presumption dictates that such provisions must be read narrowly." *El Paso Nat. Gas Co.*, 632 F.3d at 1276.

The Third Circuit likewise recognizes that the presumption "favors construing jurisdiction-stripping provisions narrowly." *United States v. Dohou*, 948 F.3d 621, 626 (3d Cir. 2020). This rule of construction properly respects congressional intent. "To displace our presumption in favor of judicial review, Congress must speak clearly." *Id. See Kucana*, 558 U.S. at 252 ("[T]he Court assumes that 'Congress legislates with knowledge of' the presumption.'" (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991)). When the relevant factors provide clear and convincing evidence that Congress intended to dislodge the presumption, Courts will enforce that result. *Dohou*, 948 U.S. at 627. But where the text and other evidence of congressional intent is mixed—some factors support review while others point in the opposite direction—the presumption controls. *Id.*

Ninth Circuit precedent is in accord. In *Hyatt v. Office of Management and Budget*, for instance, the Ninth Circuit interpreted *Block* to require a holistic consideration of "the structure of a statutory scheme," the statute's "objectives," its "legislative history," and "the nature of the administrative action involved." 908 F.3d 1165, 1171 (9th Cir. 2018) (quoting *Block*, 467 U.S. at 345). A provision limiting review could not be interpreted "[i]n a vacuum," according to the Ninth Circuit, even though it acknowledged judicial review might be withheld under such an interpretation. *Id.* at 1172. Instead, "the statutory scheme . . . demands a narrower interpretation" than might result from construing the provision in isolation. *Id.*

The decision below is irreconcilable with the law in these other circuits. The majority construed § 805 in a vacuum, dismissing the relevance of the CRA's

other text, statutory structure, the sponsors' statement, and the statute's purpose. *See* App. A-55 n.12. For that reason, it adopted a broad reading of § 805 that "is neither the only plausible reading of § 805 nor the best one." App. A-58. The D.C., Third, and Ninth Circuits hold that provisions like § 805 must be interpreted narrowly in such circumstances.

B. The Split of Authority Over Judicial Review of Agency Violations of the CRA

Contrary to the Tenth Circuit's holding, several circuits have exercised judicial review under the CRA. *See Abraham*, 355 F.3d at 202; *Liesegang*, 312 F.3d at 1374. The majority below cited decisions from the Ninth and D.C. Circuits as purportedly aligning with its holding. *See Center for Biological Diversity v. Bernhardt*, 946 F.3d 553 (9th Cir. 2019);[12] *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 229 (D.C. Cir. 2009).[13] This Court should grant review to resolve this split among the courts of appeal.

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[12] *Center for Biological Diversity* was a challenge to Congress' enactment of a joint resolution rather than an agency's failure to submit a rule to Congress as required by the CRA. 946 F.3d at 559. It is, therefore, precisely the sort of case for which the CRA's text, legislative history, and purpose indicate judicial review is precluded. *See* 142 Cong. Rec. at S3686. So understood, KNRC embraces *Center for Biological Diversity*'s holding. To the extent anything in that decision could be read to effect judicial review of agency action, it is overbroad dicta.

[13] *Montanans for Multiple Use*'s analysis of this question consisted of only two sentences and "failed to apply the strong presumption of judicial review of agency action; cite any case law for its analysis; or consider any of the evidence identified in *Block*, *Mach Mining*, *Cuozzo*, and similar on-point cases." *See* App-65–App-66.

Attempting to dismiss this split of authority, the Tenth Circuit notes that no party raised the effect of § 805 in *Liesegang*. *See* App. A-28–A-29. However, the Tenth Circuit makes no such claim for *Abraham*; nor could it. In *Abraham*, several parties challenged the Department of Energy's indefinite suspension of an energy-efficiency rule while the agency considered replacing it with a less demanding version. 355 F.3d at 187-90. Citing the Energy Policy and Conservation Act's anti-backsliding provision, the challengers argued that the Department could not, for the purposes of relaxing the standard, change the effective date of the rule after it had been formally issued. *See id.* at 195-96. To defend its actions, the Department argued that the rule's original effective date violated the CRA and, therefore, had to be changed. *See id.* at 201-02. Citing § 805, the challengers argued that the Department could not invoke (and the Court could not consider) the CRA to excuse the agency's actions. *See* Corrected Br. for Petitioners, *Abraham*, 2002 WL 32395993, at *81 n.29 (2d Cir. Oct. 2, 2002). Rejecting the argument, the Second Circuit considered the Department's CRA defense and ruled against the agency on the merits. 355 F.3d at 201-02.[14]

Because agencies selectively appeal CRA cases, the circuit split obscures the depth of division over the question presented. Several district courts have also considered this question and those devoting

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[14] Although an agency rather than a private party invoked the CRA in *Abraham*, there is no basis in the CRA to allow judicial review when sought by an agency but not otherwise. Such a distinction would fundamentally conflict with the law's purpose of increasing agency accountability. *See* 142 Cong. Rec. at S3684.

substantial analysis to the question have held that § 805 does not bar review of agency compliance with the CRA's rule-submission requirement. *See Tugaw Ranches, LLC v. U.S. Dep't of Interior*, 362 F. Supp. 3d 879, 889 (D. Idaho 2019); *United States v. Reece*, 956 F. Supp. 2d 736, 743-44 (W.D. La. 2013); *United States v. S. Indiana Gas & Electric Co.*, No. IP99-1692-C-M/S, 2002 WL 31427523, at **4-6 (S.D. Ind. Oct. 24, 2002). Rather than appealing these adverse decisions, agencies have accepted defeat.

In so doing, agencies have demonstrated how little harm judicial review under the CRA poses to them. In response to its loss on a motion to dismiss in *Tugaw Ranches*, for instance, Interior was able to cure its CRA violation before its answer was due. *See* Def.s' Ans. ¶ 5, *Tugaw Ranches, LLC v. U.S. Dep't of Interior*, No. 4:18-cv-00159-DCN (D. Idaho Mar. 25, 2019), ECF No. 43. However, as discussed in the following sections, the consequences of withholding judicial review for the CRA's operation, regulated parties, and democratic accountability are considerably greater. This significant imbalance in the equities provides additional reason to doubt that Congress intended to leave agencies—and agencies alone—to police their own compliance with the CRA.

C. The Tenth Circuit's Decision Renders a Federal Statute Inoperable and Ineffective

The Tenth Circuit's decision renders the CRA's primary enforcement mechanisms inoperable and ineffective. 5 U.S.C. §§ 801(a)(1)(A), 801(b)(2). It also renders at least one other provision redundant or surplusage. 5 U.S.C. § 806.

The CRA provides that a rule cannot take effect until it has been submitted for congressional review. 5 U.S.C. § 801(a)(1)(A). However, under the Tenth Circuit's holding, this text has no effect. If an agency treats a rule as if it were lawfully in effect, a court must follow the agency's unlawful decision and ignore the unambiguous consequence of the CRA violation even if the violation is brought to the court's attention. *See* App. A-54–A.55. Indeed, the government has argued that § 805 forbids courts from considering an agency's CRA violation even where it seeks to criminally punish someone for violating a rule that is not lawfully in effect. *See Reece*, 956 F. Supp. 2d at 743-44.[15]

The Tenth Circuit's interpretation also renders the CRA's other primary enforcement mechanism inoperable. Congress' enactment of a joint resolution of disapproval is intended to have significant consequences. A disapproval resolution not only bars the disapproved rule from going into effect but also prospectively bars the agency from adopting any rule "substantially the same" as that disapproved. 5 U.S.C. § 801(b)(2). However, "this provision can only operate if courts can enforce it against recalcitrant agencies." *Tugaw Ranches*, 362 F. Supp. 3d at 883. "[I]n the absence of judicial review, an agency could avoid the statute simply by refusing to submit rules for approval, or it could re-issue a rule expressly

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[15] The doctrine of constitutional avoidance lends still further reason to interpret § 805 narrowly. Allowing an agency to enforce, including through criminal penalties, rules not lawfully in effect raises serious Due Process concerns. *See* Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 Harv. J.L. & Pub. Pol'y 187, 227 (2018).

disapproved by Congress and enforce it against private parties." App. A-54–A-55 (citing Michael J. Cole, *Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construe "Substantially the Same," and Decline to Defer to Agencies Under* Chevron, 70 Admin L. Rev. 53, 68 (2018), and Larkin, *Reawakening the Congressional Review Act*, 41 Harv. J.L. & Pub. Pol'y at 227, 230).

The Tenth Circuit's interpretation of § 805 likewise renders the very next clause in the statute, CRA's savings clause, meaningless. 5 U.S.C. § 806. That clause provides that if "the application of" any provision "is held invalid," other applications and other parts of the CRA shall not be affected. *Id.* This presumes that courts will review at least some issues arising under the statute. Moreover, this provision could only be implicated or have any force in a case concerning "the application of" the CRA to an agency rule, *i.e.* an action or omission relating to such a rule.

"Reading judicial review out of the CRA" also "foils its primary purpose." *Tugaw Ranches*, 362 F. Supp. 3d at 889. "[I]t is doubtful that Congress hamstrung its own efforts to restore democratic accountability[.]" App. A-63. *See* Paul J. Larkin, Jr., *The Trump Administration and the Congressional Review Act*, 16 Geo. J.L. & Pub. Pol'y 505, 518 (2018).When Congress enacted the CRA, it understood agencies may ignore regulatory reform statutes if they are not judicially enforceable. *See* 142 Cong. Rec. H3016. Yet there is no indication that Congress intended the CRA to be merely "advisory" for federal agencies. *See* App. A-57.

The Tenth Circuit's interpretation also "raises separation-of-powers concerns because it 'place[s] in executive hands authority to remove cases from the Judiciary's domain." App. A-55 (quoting *Kucana*, 558 U.S. at 237). *See* Larkin, *The Trump Administration and the Congressional Review Act*, *supra*, at 518. By removing any consequence from an agency's violation of the CRA, the Tenth Circuit's interpretation also empowers agencies to determine which of their rules Congress can review. *See* App. A-54–A-55. *See also* 5 U.S.C. § 802(a) (A rule's submission is the trigger allowing Congress to use the CRA's expedited procedures.).

D. The Tenth Circuit's Decision Will Worsen the Already Serious Problem of Agencies Skirting the CRA

In *Mach Mining*, this Court explained that the presumption favoring judicial review of agency action plays an essential role in enforcing the rule of law and separation of powers. Exceptions are few because Congress "rarely intends to prevent courts from enforcing its directives to federal agencies" as this would leave the "agency to police its own conduct[.]" 575 U.S. at 486. After all, this Court "know[s]—and know[s] that Congress knows—that legal lapses and violations occur, and especially so when they have no consequence." *Id*. at 488-89.

Mach Mining's observation "appears to have been borne out with respect to the CRA—agencies have failed to submit hundreds of rules for approval, despite the statute's clear mandate." App. at A-62. According to the Congressional Research Service, the Government Accountability Office sent at least five letters to the Office of Information and Regulatory

Affairs between 1999 and 2009 documenting agencies' failure to submit more than 1,000 rules to Congress and urging the Executive Branch to take its CRA responsibilities more seriously. *See* Copeland, *supra*. These urgings fell on deaf ears. Only two of the 101 unsubmitted rules identified in GAO's May 2009 letter had been submitted five months later. *Id*. After some additional hectoring by GAO and OIRA, agencies submitted a dozen or so additional rules but, as of November 2009, many of the identified rules had still not been submitted. *Id.*

A more recent study by the Brookings Institution found that, as of 2017, agencies had failed to submit 348 significant rules. *See* Phillip A. Wallach & Nicholas W. Zeppos, Brookings Inst. Report, *How powerful is the Congressional Review Act?* (Apr. 4, 2017).[16] The study also found that the rate at which agencies had failed to submit significant rules was climbing. *Id.* (reporting that agencies failed to submit significant rules to Congress during the Obama administration at a rate 36% greater than during the Bush administration). *See also* GAO, *OMB Should Work with Agencies to Improve Congressional Review Act Compliance During and at the End of Presidents' Terms* (Mar. 2018) (finding a similar trend).[17] Other studies have found an even higher number of unsubmitted significant rules. *See, e.g.*, Cause of Action Institute, *Hundreds of Important Rules Vulnerable To Repeal Under the Congressional Review*

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[16] https://www.brookings.edu/research/how-powerful-is-the-congressional-review-act/.

[17] http://www.gao.gov/assets/700/690624.pdf.

Act (Mar. 29, 2017)[18] (finding 654 significant rules had not been submitted).

Because these recent studies consider only "significant" rules—those exceeding $100 million per year in costs or benefits or having similarly large noneconomic impacts, *see* E.O. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993)—they necessarily underestimate the extent of agencies' disregard for the CRA. *See* Wallach & Zeppos, *supra*. *See also* E.O. 12,866, § 3(f), 58 Fed. Reg. 51,735. But rules can have significant effects, in the ordinary sense, without meeting this high threshold. At least six of the 17 rules that Congress has disapproved under the CRA were deemed less than significant by the agency issuing them.[19]

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[18] https://causeofaction.org/hundreds-important-rules-vulnerable-repeal-under-congressional-review-act/.

[19] *See, e.g.*, Pub. L. No. 115-172, 132 Stat. 1290 (May 21, 2018) (disapproving CFPB Bulletin 2013-02 (Mar. 21, 2013)); Pub. L. No. 115-23, 131 Stat. 89 (Apr. 13, 2017) (disapproving Dep't of Health and Human Serv., Rule Relating to Compliance with Title X Requirements, 81 Fed. Reg. 91,852 (Dec. 19, 2016)); Pub. L. No. 115-21, 131 Stat. 87 (Apr. 3, 2017) (disapproving Dep't of Labor, Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness Rule, 81 Fed. Reg. 91,792 (Dec. 19, 2016)); Pub. L. No. 115-20, 131 Stat. 86 (Apr. 3, 2017) (disapproving Dep't of Interior, Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska Rule, 81 Fed. Reg. 52,247 (Aug. 5, 2016)); Pub. L. No. 115-17, 131 Stat. 81 (Mar. 31, 2017) (disapproving Dep't of Labor, Rule Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants, 81 Fed. Reg. 50,298 (Aug. 1, 2016)); Pub. L. No. 115-12, 131 Stat. 76 (Mar. 27, 2017) (disapproving Bureau of Land Management,

Moreover, agencies have entirely withheld certain categories of rules, such as interpretive rules and guidance documents. In 2019, the Acting Director of the Office of Management and Budget issued a memorandum reminding agencies that the CRA applies to these rules and they too must be submitted to Congress for review. *See* Memorandum from Russell T. Vought, Acting Director, Office of Management and Budget, to the Heads of Executive Departments and Agencies (Apr. 11, 2019).[20] *See also* Pub. L. No. 115-172 (disapproving a guidance document under the CRA).

It is difficult to determine the full extent of agency violations of the CRA. Agencies do not publish lists of unsubmitted rules (obviously). So the violation must be deduced from the absence of a rule in a GAO database[21] and the House and Senate's Executive Communications databases.[22] *See* Wallach & Zeppos, *supra* (describing the methodology used for the Brookings Institution study). But by any measure, agency noncompliance is a significant problem that undermines the CRA's operation and frustrates its goal of restoring democratic accountability over the administrative state. By assuring agencies they will pay no price for violating the CRA, the Tenth Circuit's

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Resource Management Planning Rule, 81 Fed. Reg. 89,580 (Dec. 12, 2016)).

[20] https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf.

[21] https://www.gao.gov/legal/other-legal-work/congressional-review-act#database (last visited Feb. 5, 2021).

[22] https://www.senate.gov/reference/common/faq/how_to_executivecommunications.htm (last visited Feb. 5, 2021).

decision is likely to worsen this already significant problem.

E. Withholding Judicial Review Causes Significant Harm to Regulated Parties and Undermines the Policies Underlying Unsubmitted Rules

Finally, the decision below has significant practical consequences for unsubmitted rules and those affected by them. None of these rules are lawfully in effect yet an agency may sometimes treat them as if they are. This puts those who are regulated by such rules or otherwise depend on them in an unfair catch-22: they must follow these rules but cannot be certain that they bind the agency.

The PECE Rule, for instance, is intended to encourage groups like KNRC to develop voluntary conservation plans for at-risk species. 68 Fed. Reg. at 15,114-15. However, the success of these plans depends on the ability of landowners, industry, and conservationists to rely on the rule's incentives. *Id.* at 15,104. That the rule is not lawfully in effect undermines these incentives by providing no assurances to participating landowners and by creating uncertainty whether the rule binds the agency. Indeed, Interior has previously failed to follow the PECE Rule in a decision involving the lesser prairie chicken, the very species KNRC is trying to conserve. *Permian Basin Petroleum Ass'n*, 127 F. Supp. 3d at 707-08.

Although these concerns are weighty enough in the context of the lesser prairie chicken and the more than 17 million acres of land it occupies, the PECE Rule has been critical to conservation efforts for many

more species and is likely to continue having broad importance.[23] However, because application of the PECE Rule results in a species not being listed under the Endangered Species Act, applications of the PECE Rule have frequently been litigated.[24] In light of this history of consistent litigation, there is no good reason for Interior, having learned that the PECE Rule has not been submitted and is not lawfully in effect, to continue withholding the rule from Congress and leave those developing conservation plans in limbo.

The Tenth Circuit's interpretation would permit any rule to "go into effect without oversight or approval and there [would be] no legal remedy available for an affected third party." *Tugaw Ranches*, 362 F. Supp. 3d at 883. That unfair result has significant consequences for the policies underlying countless unsubmitted rules and the individuals, industries, and organizations subject to or depending on those rules.

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[23] *See, e.g.*, 12-Month Finding for the Monarch Butterfly, 85 Fed. Reg. 81,813, 81,815 (Dec. 17, 2020) (describing ongoing conservation efforts for the monarch butterfly and concluding that a listing is precluded based in part on these efforts); Withdrawal of the Proposed Rule to List Dunes Sagebrush Lizard, 77 Fed. Reg. 36,872 (June 19, 2012) (declining to list a species based on conservation efforts spurred by the PECE Rule).

[24] *See, e.g.*, *Defenders of Wildlife v. Jewell*, 815 F.3d 1 (D.C. Cir. 2016); *Desert Survivors v. U.S. Dep't of Interior*, 321 F. Supp. 3d 1011 (N.D. Cal. 2018); *Rocky Mountain Wild v. Walsh*, 216 F. Supp. 3d 1234 (D. Colo. 2016); *Permian Basin Petroleum Ass'n*, 127 F. Supp. 3d 700; *Western Watersheds Project v. Fish & Wildlife Serv.*, 535 F. Supp. 2d 1173 (D. Idaho 2007); *Western Watersheds Project v. Foss*, No. 04-cv-168, 2005 WL 2002473 (D. Idaho Aug. 19, 2005).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted and the Tenth Circuit's decision reversed.

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JONATHAN WOOD
Counsel of Record
TODD GAZIANO
Pacific Legal Foundation
3100 Clarendon Blvd.,
Suite 610
Arlington, VA 22201-5330
Telephone: (202) 888-6881
JWood@pacificlegal.org
TGaziano@pacificlegal.org

JEFFREY W. MCCOY
CALEB R. TROTTER
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
JMccoy@pacificlegal.org
CTrotter@pacificlegal.org

KENNETH W. ESTES
Calihan Law Firm
P.O. Box 1016
Garden City, KS 67846
Telephone: (620) 276-2381
kestes@calihanlawfirm.com

Counsel for Petitioner