No. 20-1195

IN THE

Supreme Court of the United States

KANSAS NATURAL RESOURCE COALITION,
Petitioner,

v.

U.S. DEPARTMENT OF THE INTERIOR, *ET AL.*
Respondents.

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

BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICI CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs and lawsuits related to these goals.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs to advance its purpose and has appeared as an *amicus curiae* in this Court on many occasions.

Amici, as issue-oriented educational 501(c)(3) non-profit organizations, have a deep and vested interest in fair and equal access to the courts. *Amici* also have an interest in the proper application of judicial review and the doctrine of separation of powers. Judicial Watch has a particular interest in access to the courts because it litigates frequently as part of its public interest mission. The Tenth Circuit's erroneous application of this Court's principles of statutory interpretation and the presumption of

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[1] Judicial Watch states that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Judicial Watch obtained the consent of all parties to the filing of this *amicus* brief.

judicial review threaten to create a sphere of unchecked authority for federal agencies, thereby upending separation of powers.

SUMMARY OF ARGUMENT

The Tenth Circuit's decision to uphold the district court and reject Petitioner's lawsuit for lack of subject matter jurisdiction adds to the universe of confusion over the applicability of judicial review under the Congressional Review Act ('the Act"). 5 U.S.C. § 801, *et seq*. The Tenth Circuit's interpretation of the Act missed the mark and overlooked this Court's precedent by analyzing one section of the Act in a vacuum rather than analyzing the Act as a whole. The result of this disordered approach is a deepening circuit split and the inconsistent application of federal law.

The Tenth Circuit's decision to deny judicial review under the Act has also caused substantial adverse consequences for the Petitioners in this case as well as for the multitude of similarly situated persons and entities held captive by the failure of an agency to submit covered rules to Congress for review. If left in place, the Tenth Circuit's decision will affect six states, the approximately 18.5 million residents of those states, and the land, animals, resources, and other property within the approximately 550,600 square miles of those states. In addition to the other circuits who interpret the Act to deny judicial review, these residents are left with no avenue for legal relief of the adverse consequences they have suffered and

will continue to suffer absent this Court's intervention.

The Tenth Circuit's decision contradicts the Act's plain meaning, purpose, and legislative record and disregards this Court's presumption of judicial review.

This Court's intervention is needed.

ARGUMENT

A. The Tenth Circuit's Decision Further Entrenches the Circuit Split.

The question of whether the Act completely precludes judicial review pursuant to 5 U.S.C. § 805 is the source of deep confusion among lower courts and a split of judicial circuits. In addition to the Tenth Circuit, courts within the D.C. Circuit, Fifth Circuit, Sixth Circuit, and Eighth Circuit have adhered to the theory that a plain meaning of the Act completely precludes any judicial review of the Act.[2]

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[2] *See Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225 (D.C. Cir. 2009); *Texas Sav. & Cmty. Bankers Ass'n v. Fed. House Fin. Bd.*, 1998 U.S. Dist. LEXIS 13470 (W.D. Tex. June 25, 1998); *aff'd*, 201 F.3d 551 (5th Cir. 2000); *United States v. Am. Elec. Power Serv. Corp.,* 218 F. Supp. 2d 931 (S.D. Ohio 2002); *United States v. Carlson*, 2013 U.S. Dist. LEXIS 130893 (D. Minn. July 25, 2013), *aff'd* 810 F.3d 544 (8th Cir. 2016); *United States v. Ameren Mo.,* 2012 U.S. Dist. LEXIS 95065 (E.D. Mo. July 10, 2012). While neither the Fifth nor Eighth Circuit opinions addressed § 805 specifically, both affirmed the lower court opinions concretizing the inapplicability of judicial review to the Act.

Despite these cases, federal courts within the Fifth, Seventh, and Ninth Circuits have found that the Act is subject to judicial review.[3] Both the Second and Federal Circuits have applied judicial review in cases involving the Act without an explicit review of § 805.[4] And the Ninth Circuit has, on at least two occasions, split the difference, finding judicial review available for certain types of agency action while denying judicial review for others.[5]

Whether judicial review is available under the Act is a question of law that demands one answer so that the Act may be applied uniformly as federal law must be. As it stands presently, roughly half of the citizens of the United States are without legal remedy when federal agencies fail to submit covered rules to Congress under the Act. This causes a disparity in the application of federal law and grants residents of certain states legal relief but denies it to others. This inconsistency presents a quintessential case for intervention by this Court.

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[3] *See United States v. Reece*, 956 F. Supp.2d 736 (W.D. La 2013); *United States v. S. Ind. Gas & Elec. Co.*, 2002 U.S. Dist. LEXIS 20936 (S.D. Ind. Oct. 24, 2002); *Tugaw Ranches, LLC v. U.S. Dep't of Interior*, 362 F. Supp. 3d 879 (D. Idaho 2019).

[4] *See Natural Res. Def. Council, Inc. v. Abraham*, 355 F.3d 179 (2d Cir. 2004); *Liesegang v. Sec'y of Veterans Affairs*, 312 F.3d 1368 (Fed. Cir. 2002).

[5] *See Center for Biological Diversity v. Zinke*, 313 F. Supp. 3d 976 (D. Alaska 2018); *Center for Biological Diversity v. Bernhardt,* 946 F.3d 553 (9th Cir. 2019).

B. The Petition Presents an Important Issue with Substantial Adverse Consequences.[6]

The Tenth Circuit's decision to deny judicial review under the Act has resulted in substantial adverse consequences for Petitioners as well as for those similarly situated persons and entities who are held captive by agency inaction. The primary adverse consequence suffered by Petitioners and all residents within the Tenth Circuit's jurisdiction is an unequal application of federal law. While Petitioners cannot challenge a federal agency's failure to submit covered rules to Congress in the Tenth Circuit, a similarly situated organization of county governments in the Second Circuit can find precedent to challenge and arguably obtain review. *See Natural Res. Def. Council, Inc.*, 355 F.3d at 201-02. A resident of the State of Minnesota cannot file suit under the Act, but a resident of Idaho could. *See e.g., Carlson*, 2013 U.S. Dist. LEXIS at *43-44; *Tugaw*, 362 F. Supp. 3d at 889.

Additionally, by denying judicial review, the Tenth Circuit joins other circuits in frustrating the very purpose of the Act and giving federal agencies carte blanche control over when, or even if, rules are submitted to Congress for review. This scheme is an affront to separation of powers. Federal agencies should not be free to create federal policies which have the force of law without Congressional oversight and input.

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[6] Petitioners present two issues in the petition, but *Amici* focus on the judicial reviewability of the Act.

In addition to undermining separation of powers, the Tenth Circuit's decision also renders the Act impotent. As Petitioner demonstrates, several research organizations and think tanks have studied the federal agencies' compliance with the Act. *Kansas Natural Res. Coalition v. U.S. Department of Interior*, S. Ct. No. 20-1195, Petition for a Writ of Certiorari ("Petition") at 31-34. According to a recent study cited in Petitioner's brief, as of 2017, federal agencies had failed to submit 348 *significant* rules to Congress.[7] *Id.* (emphasis added). Without an enforcement mechanism, these rules as well as many to come, which encompass issues dealing with serious economic, legal, and regulatory issues, will continue to evade congressional oversight.

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[7] "Significant rules" as defined by Executive Order 12866, Section 3(f) involves those rules which

> 1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Exec.Order No.12866, 58 Fed. Reg. 190 (Oct. 4, 1993).

C. The Tenth Circuit's Decision Was Erroneous and Ignored this Court's Principles of Statutory Interpretation.

In addition to settling the serious circuit split and preventing further harmful consequences, this Court's intervention would permit it to clarify its principles of statutory interpretation in relation to the Act, a statute it has not yet expounded upon. The Tenth Circuit's misapplication of the plain language rule contradicts the Act's plain meaning, purpose, and legislative record, and disregards this Court's presumption of judicial review.

The Tenth Circuit divorced § 805 from the Act and analyzed the words of the provision without any reference to or deference for the Act as a whole. This is not the proper application of the plain meaning rule. While it is true that a "plain and unambiguous meaning" ends the court's inquiry into statutory interpretation, the Tenth Circuit failed to apply this Court's direction in determining what is plain and unambiguous.[8] In *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997), this Court very clearly laid out how to analyze the "plainness or ambiguity of statutory language." The Court held that plainness or ambiguity "is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the

[8] The Tenth Circuit is not alone in this erroneous application. In each of the cases cited in footnote 2, the court failed to consider the *Robinson* factors in analyzing the statutory language. By clarifying this point, the Court can end this misapplication. *See supra* § A, n. 2.

statute as a whole." *Id*.; *see also Parker Drilling Mgmt. Servs. v. Newton,* 139 S. Ct. 1881, 1888 (2019). The Tenth Circuit considered only the language of § 805 itself and failed to properly consider the specific and broader context of the remainder of the Act. This error is fatal to the Tenth Circuit's holding. *See Roberts v. Sea-Land Servs*., 566 U.S. 93, 101-02 (2012).

As the district court in *United States v. S. Ind. Gas & Elec. Co.* skillfully explained, denying judicial review does not fit into the context of the Act. 2002 U.S. Dist. LEXIS 20936, *11-18. First, reading § 805's prohibition of judicial review as applying to an agency's failure to submit covered rules to Congress instead of (or in addition to) "determinations, findings, actions, or omissions" *by Congress*, sets the Act up against its very purpose "which was to provide a check on the administrative agencies' power to set policies and essentially legislate without Congressional oversight." *Id.* at 13-14; *see also Kansas Natural Res. Coalition v. U.S. Dep't of the Interior*, 971 F.3d 1222, 1254-1255 (10th Cir. 2020) (Lucero, J., *dissenting*) (explaining the Act's purpose and referencing the congressional record).[9] The court reasoned it was more likely, based on the context of the Act, that § 805 applied to Congressional acts and omissions and not the agency submission requirement. *Id*. Second, § 805 prohibits judicial

[9] The purpose of the Act – agency oversight by Congress – simply cannot be achieved without judicial review as the agencies would be left to self-regulate. This completely frustrates the intent. *See Mach Mining, LLC v. EEOC*, 575 U.S. 480, 488-89 (2015).

review of a "'determination, finding, action, or omission under this chapter ….' Agencies do not make findings and determinations under this chapter [§ 801]. Congress, on the other hand, is required to make a number of findings and determinations under this chapter." *Id.* at 14. Applying § 805 to congressional actions better conforms with the Act itself.

Looking at the context of § 805 reveals that the language is not so "plain or unambiguous" that the legal analysis ends here. When courts are presented with more than one plausible statutory meaning, their inquiry continues, and they employ additional statutory interpretation techniques. *See e.g., United States v. Public Utilities Comm'n.*, 345 U.S. 295, 315 (1953). For example, if there is a record of what Congress intended by the ambiguous language, courts are encouraged to consider it. *See e.g., Immigration and Naturalization Serv. v. Cardoza-Fonseca,* 480 U.S. 421, 432-33 (1987). In this case, the legislative record is very clear, though perhaps slightly unorthodox. As noted in the dissent below as well as both *S. Indiana Gas* and *Tugaw Ranches,* the bipartisan sponsors of the Act entered a joint statement into the Congressional Record ten days after the Act went into effect. *See Kansas Natural Resource Coalition,* 91 F.3d at 1252-53 (Lucero, J., *dissenting*); *S. Indiana Gas*, 2002 U.S. Dist. LEXIS at *14-16; *Tugaw Ranches*, 362 F. Supp. 3d at 886-87. And while courts generally refrain from using "post-enactment legislative history" as a tool of statutory interpretation, the joint statement in this case was clearly meant to explain both the timing of the

statement and the application of judicial review. *Kansas Natural Resources Coalition*, 971 F.3d at 1252-54 (Lucero, J., *dissenting)*; *see also Marmon Coal Co. v. Eckman*, 726 F.3d 387, 392-93 (3d Cir. 2013) (explaining why the post-enactment statement of one of the amendment's sponsors was significant to the legislative history).

In the statement, Senator Nickles, one of the sponsors, stated that "no legislative history document was prepared to explain the legislation or the reasons for changes in the final language negotiated between the House and Senate. This joint statement of the authors in the congressional review subtitle is intended to cure this deficiency." 142 CONG. REC. S3683 (daily ed. April 18, 1996) (statement of Sen. Nickles). Later in the record, Senator Nickles explains the limitations on judicial review under the Act. He plainly states that a court may not "review whether ***Congress*** complied with the congressional review procedures in this chapter." 142 CONG. REC. S3686 (daily ed. April 18, 1996) (statement of Sen. Nickles) (emphasis added). This statement clearly supports the statutory interpretation that § 805 was intended to foreclose judicial review of Congress' actions, not the agencies' actions or inactions.

Lastly, the Tenth Circuit erred by disregarding the presumption of judicial review in favor of its misreading of the Act's plain language. As demonstrated above, § 805 is not unambiguous and, at the very least, is open to multiple interpretations. In instances of ambiguity, the presumption of judicial review becomes an important factor, as this Court has

held that "Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining, LLC*, 575 U.S. at 486. Importantly, the applying presumption here does not contradict the text but simply adds context to the Act and the legislative record in interpreting § 805.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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