NO. 20-1195

In the
Supreme Court of the United States

KANSAS NATURAL RESOURCE COALITION,
Petitioner,

v.

U.S. DEPARTMENT OF THE INTERIOR; SCOTT DE LA VEGA, in his official capacity as Acting Secretary of the Interior; 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,
Respondents.

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

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Christine Carletta
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500
ccarletta@kslaw.com

Ilya Shapiro
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave. NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Amicus Curiae

March 31, 2021

QUESTIONS PRESENTED

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 Congressional Review Act's rule-submission requirement are subject to judicial review.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Regulations

Other Authorities

STATEMENT OF INTEREST[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests Cato because it concerns the separation of powers and respect for Congress's desire to reassert democratic accountability over the administrative state.

---

[1] No counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward its preparation or submission. Counsel of record for all parties have received timely notice and have consented to this filing in letters on file with the Clerk's office.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

Federal agencies promulgate far more rules than Congress passes statutes. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2446–47 (2019) (Gorsuch, J., concurring in the judgment) (noting that agency regulations "touch[] almost every aspect of daily life" and "dwarf the statutes enacted by Congress"). In 1949, Winston Churchill remarked, "If you make 10,000 regulations you destroy all respect for the law." Winston Churchill, In the Balance: Speeches 1949 and 1950 21 (1952); *see* The Federalist Papers No. 62 (James Madison). The administrative state passed that threshold long ago and shows no signs of stopping. *See Kisor*, 139 S. Ct. at 2446–47) (Gorsuch, J., concurring in the judgment) (noting that "agencies add thousands more pages of regulations every year"); *see also* Clyde Wayne Crews, Jr., Competitive Enter. Inst., Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State (2019). Every day, federal agencies issue myriad rules that touch virtually every aspect of American economic, social, and political life. That is important because agency rules can have the same effect as statutes. U.S. Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947).

For too long, agencies have issued rules virtually unchecked, and without any accountability to the American people. For years, Congress used the "legislative veto" to oversee the administrative state. Once this Court held the legislative veto unconstitutional in *INS v. Chadha*, 462 U.S. 919, 959

(1983), however, Congress found a new way to exercise its oversight function and protect the public interest. The vehicle it chose was the Congressional Review Act ("CRA"). *See* 5 U.S.C. §§ 801–08. That statute restores the "delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws" by creating a fast-track procedure for Congress to set aside a new rule before it takes effect. 142 Cong. Rec. S3683 (daily ed. Apr. 18, 1996) (joint statement of Sens. Nickles, Reid, and Stevens); *see also* 142 Cong. Rec. 6926 (1996) (statement submitted by House sponsors).

The Tenth Circuit's decision below undermines Congress's efforts to provide essential oversight. *See* App.21–24. The court found that the Kansas Natural Resource Coalition ("KNRC") cannot maintain an action challenging the Department of Interior's failure to submit a final regulation—its Policy for Evaluation of Conservation Efforts When Making Listing Decisions ("PECE Rule")—to Congress in accordance with the CRA. *Id.*; *see* 68 Fed. Reg. 15,100 (Mar. 28, 2003). That expansive interpretation of the statute's judicial review bar effectively forecloses review of any claim of illegal conduct, including final agency actions that impact private rights.

The Tenth Circuit's decision cannot be squared with the CRA's text, structure, or purpose. Properly interpreted, the CRA forecloses judicial review of *Congress's* actions. It does not preclude review of the *rule-issuing agency's* actions to enforce compliance with the CRA in the first instance. Any other reading renders core provisions of the statute meaningless. *See King v. Burwell*, 576 U.S. 473, 486 (2015) ("Our

duty, after all, is to construe statutes, not isolated provisions."). Moreover, by stripping the judiciary of its power to enforce the CRA's requirements against recalcitrant agencies, the Tenth Circuit has granted agencies a blank check to enforce their *ultra vires* rules against the citizens of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

The government has a large check to cash. By effectively eliminating judicial review, the Tenth Circuit's holding will allow agencies to continue disregarding the CRA's requirements. The GAO concluded that agencies failed to submit more than 1,000 rules to Congress between 1999 and 2009, and more recent estimates are even worse. *See* Curtis Copeland, Cong. Research Serv., Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress 17–18 (2014) (estimating that twelve percent of rules published in the Federal Register from 1997 through 2011 were not submitted to Congress).

Judicial review of an agency's noncompliance with the CRA is critical to protecting private parties against abusive government practices. The government regularly enforces its programs through demand letters sent to regulated parties, threatening litigation for the alleged violation of an agency rule. The threat of litigation forces out-of-court settlements and effectively insulates the rule from meaningful review, even if the rule is not properly promulgated or "in effect" in accordance with the CRA's strictures.

Unless the decision below is reversed, agencies will have even greater reason to adopt rules that are not submitted to Congress, and those rules will remain

under the radar until they are wielded against an unsuspecting private party.

The mission of the federal judiciary is to protect private parties against unlawful government action. For that to occur in this setting, the courts must enforce the CRA's requirements against agencies. The Supreme Court has told parties that they "need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of serious criminal and civil penalties." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (cleaned up). KNRC, and the citizens under the Tenth Circuit's jurisdiction, are entitled to know whether and to which rules they are subject. The CRA does not strip the courts of its role in protecting against illegal agency action. This Court should grant the petition for certiorari to correct the Tenth Circuit's error.

REASONS TO GRANT THE PETITION

I. The Tenth Circuit's Decision Barring Judicial Review of Agency Action Frustrates the Text and Purpose of the Congressional Review Act.

The Tenth Circuit's decision—that Section 805 of the CRA forecloses judicial review of an agency's failure to comply with its requirements—cannot be squared with the purpose or the text of the statute. App.21–24. Section 805 provides that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review." 5 U.S.C. § 805. Reading Section 805 as expansively as possible, the Tenth Circuit held that because Interior's failure to submit the PECE Rule to Congress qualified as an

"omission" arising "under" the CRA's requirements, it is "covered by the plain language of § 805, and [the court] lack[ed] subject matter jurisdiction to review [Interior's] omission." App.22.

As a matter of pure textual interpretation, the decision below is flawed. First, an agency does not promulgate a rule "under" the CRA; it relies on the substantive lawmaking authority that Congress granted it in the relevant implementing statute. *United States v. S. Ind. Gas & Elec. Co.*, No. IP99-1692CMS, 2002 WL 31427523, at *5 (S.D. Ind. Oct. 24, 2002) ("Agencies do not make findings and determinations under this chapter; Congress, on the other hand, is required to make a number of findings and determinations under the CRA.").

Second, because agencies make findings and promulgate rules under the Administrative Procedure Act, there is a presumption that a private party can also obtain judicial review of an agency's actions. Notably, the CRA contains no provision expressly rebutting that presumption. *See Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2155 (2016) (Alito, J., concurring) (noting that judicial review was necessary to preclude agency "shenanigans" that would exceed its statutory bounds, and "Congress cannot have intended that." (cleaned up)). And this Court has "recognized a 'strong presumption' that Congress means to allow judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 480 (2015); *see also SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1359 (2018) ("[W]e begin with the strong presumption in favor of judicial review." (cleaned up)).

Even beyond those obvious interpretive errors, the Tenth Circuit's reading of the CRA's text torpedoes its evident purpose by nullifying its usefulness in the circumstances where it is needed the most: when an agency refuses to submit a rule to Congress, but continues to use the rule to muscle private parties into compliance. *See, e.g.*, *United States v. Reece*, 956 F. Supp. 2d 736, 743–44 (W.D. La. 2013) (ruling that Section 805 does not bar review of a CRA noncompliance claim); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 268 F. Supp. 2d 1197, 1234–35 (E.D. Cal. 2003) (rejecting a CRA noncompliance claim on the merits). Such a result is counter to the circumstances that prompted Congress to act and to the language of the statute itself. *See Smith v. United States*, 508 U.S. 223, 241 (1993) (Scalia, J., dissenting) (noting that while the definition of a word might permit a broader reading of statute provision at issue, the word should instead be read in context, rather than for any possible meaning).

Before the CRA, Congress routinely relied on the legislative veto to check rogue agency action. But after *INS v. Chadha*, 462 U.S. at 944–59, Congress passed the CRA to create a process "that would approximate a legislative veto as closely as *Chadha* would allow" in a manner that satisfied Article I bicameralism and presentment requirements. *See* Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 Harv. J.L. & Pub. Pol'y 187, 197 & n.21 (2018) (citing 142 Cong. Rec. 8196 (1996) (joint statement of Sens. Nickles, Reid, and Stevens); *id.* at 6922, 6929 (joint explanatory statement of House and Senate Sponsors); *id.* at 6907 (statement of Rep. McIntosh); Morton Rosenberg, Cong. Research Serv., RL30116,

Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After a Decade 37 (2008)).

The CRA was enacted to constrain agency authority, increase democratic accountability, and secure the separation of powers by providing Congress with a way to review and potentially nullify administrative rules before they go into effect. "[B]efore a rule can take effect," the CRA requires (much like a legislative veto) that an agency submit the rule for congressional review. 5 U.S.C. § 801(a)(1)(A). Submission of a rule to Congress is "a critical event for CRA purposes." Larkin, 41 Harv. J.L. & Pub. Pol'y at 201. After an agency submits a rule to Congress, Congress generally has 60 days to decide whether to nullify the rule, and that clock does not begin to run until both houses have received the agency's report. 5 U.S.C. § 801(d); *see* Rosenberg, RL30116, Congressional Review of Agency Rulemaking, *supra*, at 3 n.5.

The CRA is careful to not let an agency skirt these submission requirements. It provides detailed procedures and timelines to allow Congress time to review a rule when fewer than 60 legislative days remain and does not provide a statute of limitations on its opportunity to review a rule. *See* Larkin, 41 Harv. J.L. & Pub. Pol'y at 241–43, 247. If both chambers of Congress pass a joint resolution to invalidate the rule, and the president signs that resolution (or Congress overrides his veto), the rule is not only invalidated, but the reporting agency is also barred from promulgating a new rule that is

"substantially the same" as the previous rule. *See* 5 U.S.C. § 801(b)(2).

It would make no sense for Congress to create this detailed oversight regime without a way to enforce its strictures. Judicial review of agency action is that enforcement mechanism; Congress gave no indication that it had any intent to eliminate the historic role courts have played in halting illegal agency actions. Larkin, 41 Harv. J.L. & Pub. Pol'y at 222; *see also McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 498 (1991) (holding that a statutory preclusion provision did not deprive courts of constitutional challenges to agency conduct); *Abbott Labs. v. Gardner*, 387 U.S. 136, 152–53 (1967) (permitting pre-enforcement review of agency action). Perhaps the clearest indication that Congress intended to permit judicial review over certain actions arising in connection with the CRA is the CRA's savings clause. *See* 5 U.S.C. § 806. A complete bar to judicial review would relegate a savings provision to mere surplusage; no situation could arise where a court would find a section of the text or application of the CRA "invalid." *Id.*; Larkin, 41 Harv. J.L. & Pub. Pol'y at 229.

As a practical matter, a requirement without an enforcement mechanism is not a requirement at all. Allowing the Tenth Circuit's decision to stand will allow agencies to—as Interior has here—circumvent both the statute and Congressional oversight by simply ignoring the CRA, withholding a rule, sitting on it for 60 days, and waiting for the congressional review period to expire. Accordingly, the only way the CRA provisions have force is if courts enforce them

against wayward agencies. *See* 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).

Critically, Congress itself cannot enforce these provisions; it cannot compel an agency to submit a rule to it, and it cannot stop an agency from operating as though the rule in in effect. Larkin, 41 Harv. J.L. & Pub. Pol'y at 230. Nor can Congress protect the rights of private parties. As commentators have noted, judicial review is necessary because although the political branches can "engage in political wheeling and dealing[,]" private parties "do not sit at the table in that game. They need the courts to protect them[.]" *Id*.

The Tenth Circuit's view of the CRA—that an agency can refuse to submit its rules to Congress and still enforce them against private parties—cannot stand. Such a result is fundamentally at odds with the law's purpose, renders multiple CRA provisions meaningless, and allows agencies to continue to amass a virtually unchecked concentration of power over policymaking. *See Mach Mining*, 575 U.S. at 488–89 (courts should presume judicial review is available to avoid that result).

II. Without Judicial Review, Agencies Will Continue to Disregard the Congressional Review Act.

The decision below has enormous consequences for the citizens of the states under its purview. Agencies routinely ignore the CRA's requirements.

While it is unclear precisely how many rules have bypassed the CRA, the GAO concluded that agencies failed to submit more than 1,000 rules to Congress between 1999 and 2009. *See* Copeland, Congressional Review Act, *supra*, at 17–18 (estimating that twelve percent of agency rules published in the Federal Register from 1997 through 2011 were not submitted to Congress). Other parties have offered a variety of numbers, which are even more grim. *See* Majority Staff Report, House Comm. on Oversight & Gov't Reform, Shining Light on Regulatory Dark Matter 10 (2018) ("The information obtained by the Committee shows, of the more than 13,000 guidance documents identified, agencies sent only 189 to Congress and GAO in accordance with the CRA."); Phillip A. Wallach & Nicholas W. Zeppos, Brookings Inst., *How Powerful is the Congressional Review Act?* (Apr. 4, 2017) (finding that, as of 2017, agencies had failed to submit 348 significant rules).

Judicial review of an agency's noncompliance with the CRA is critical to protecting private parties against these scores of unaccounted for rules and abusive government practices. The government routinely threatens litigation for an alleged violation of an agency rule unless the regulated party pays a (usually hefty) fine and changes its practices to comply with the agency's demands. Rather than defend and litigate against agency overreach, a company will often instead choose a comply-and-pay approach to mitigate costs. The agency, of course, does not pay private counsel for litigation—agency and Justice Department lawyers handle those cases—so the agency does not take a hit to its budget by going to court.

The result is that only private parties bear the cost of litigation, which enables the federal government to twist a private party's arm without a lawsuit ever being filed. Agencies thus use their *inputs* (e.g., appropriations, personnel) to generate *outputs* (e.g., an increase in new enforcement actions), rather than pursuing beneficial *outcomes* (e.g., overall improvement in public health) because it is too difficult to measure the success of such outcomes. *See, e.g.*, Paul J. Larkin, Jr., *Essay: A New Law Enforcement Agenda for a New Attorney General*, 17 Geo. J.L. & Pub. Pol'y 231, 242–45 (2019).

It is clear that the government does not intend to comply with the CRA's requirements. True enough, the Office of Management and Budget acknowledged the problem and issued a memorandum to all agencies reminding them of the CRA's scope and their obligations to submit rules. *See* Memorandum from Russell T. Vought, Acting Dir., OMB, M-19-14, to Heads of Executive Departments and Agencies 2–3 (Apr. 11, 2019).

But Interior's defense throughout this action is far more telling. Interior has not, in this or any other case, argued that it has remedied, or that it intends to remedy, its error. *See, e.g.*, U.S. Mot. to Dismiss at 4–5, *Tugaw Ranches, LLC v. U.S. Dep't of Interior*, No. 4:18-cv-00159-CWD (D. Idaho June 22, 2018), ECF No. 22. Far from it: by arguing that the courts are barred from reviewing agency action, Interior instead has made it known that the government has no intention of complying with the CRA. Indeed, it was only after the district court in *Tugaw Ranches* found that section 805 did not prohibit judicial review of

Interior's alleged CRA violations, that Interior finally cured them. *See* Answer ¶ 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.

Nor does the new administration show signs of changing course. President Biden has already issued multiple executive orders rolling back President Trump's deregulatory agenda. *See* Exec. Order 13992, *Revocation of Certain Executive Orders Concerning Federal Regulation*, 86 Fed. Reg. 7049, 7049 (Jan. 25, 2021); Exec. Order 14018, *Revocation of Certain Presidential Actions,* 86 Fed. Reg. 11,855 (Feb. 24, 2021). That includes the withdrawal of an executive order issued by his predecessor that would have required agencies to make publicly available on their websites the rules they might use to justify regulating private parties. Exec. Order 13992, 86 Fed. Reg. at 7049 (revoking Exec. Order 13892, *Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication*, 84 Fed. Reg. 55,235 (Oct. 9, 2019)).

Likewise, President Biden has issued numerous orders directing agencies to take significant action, none of which have instructed the agency to comply with the CRA. President Biden has stated that he intends to "empower[] agencies to use appropriate regulatory tools to achieve [the administration's] goals," an approach that harkens back to President Obama's "pen and phone" method of policymaking. *See* Exec. Order 13992, 86 Fed. Reg. at 7049; Tamara Keith, *Wielding a Pen and a Phone, Obama Goes It Alone*, NPR.com (Jan. 20, 2014), https://www.npr.org/

2014/01/20/263766043/wielding-a-pen-and-a-phone-obama-goes-it-alone.

No matter the administration, agency noncompliance is a significant problem that undermines Congress's efforts to manage agency action. By shielding agencies from judicial review, the Tenth Circuit's decision will embolden agencies to continue to disregard the CRA.

III. The Courts Are Best Situated to Curb This Type of Agency Abuse.

The judiciary is best suited to ensure that agencies comply with the CRA's scheme. The Tenth Circuit found that it could not consider KNRC's claim because it was "not injured by an analysis that has yet to take place." App.20. To the contrary, parties need not wait for enforcement proceedings before challenging final agency action where such proceedings carry the risk of "serious criminal and civil penalties." *Hawkes*, 136 S. Ct. at 1815 (quoting *Abbott Labs.*, 387 U.S. at 153); *Sackett v. EPA*, 566 U.S. 120, 127 (2012); Larkin, 41 Harv. J.L. & Pub. Pol'y at 231. The Administrative Procedure Act has long provided an injured party with a cause of action to sue an agency if that agency acts in an unlawful or arbitrary and capricious manner. *See Bowen v. Massachusetts*, 487 U.S. 879, 891–92 (1988) ("[I]t is undisputed" that the APA "was intended to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity . . . ."). Judicial review is available to an injured party, for "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *see Bennett v. Spear*, 520 U.S. 154, 178 (1997) (detailing

requirements for an agency's action to be considered final).

This Court's decisions in *Sackett* and *Hawkes* provide guidance concerning the scope of judicial review in these situations. *See* Larkin, 41 Harv. J.L. & Pub. Pol'y at 231. The Sacketts sought judicial review of an EPA compliance order that subjected them to the permitting requirements of the Clean Water Act. *Sackett*, 566 U.S. at 124; 33 U.S.C. §§ 1251–1387. The Court noted that while the Sacketts could defend against an enforcement action, the opportunity to raise that claim as a defense did not afford them with an "adequate remedy in a court." 566 U.S. at 127–28 (quoting 5 U.S.C. § 704). The Court reasoned that "the Sacketts cannot initiate that process, and each day they wait for the agency to drop the hammer, they accrue, by the Government's telling, an additional $75,000 in potential liability." *Id.* at 127.

Hawkes involved a similar challenge to the Clean Water Act's wetlands designation and permitting requirements. 136 S. Ct. at 1812–13. The Court again rejected the government's argument that the ability to raise a procedural violation as a defense in an enforcement action is an adequate remedy. The Court instead found that "parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of 'serious criminal and civil penalties.'" *Id.* at 1815 (quoting *Abbott Labs.*, 387 U.S. at 153).

The KNRC was well within its rights to raise the claim that Interior has not complied with the CRA. The KNRC' s conservation plan is subject to the PECE Rule and the Lesser Prairie-Chicken is again under

consideration for listing. *See* 81 Fed. Reg. 86,315, 86,317 (Nov. 30, 2016). Should KNRC's efforts fail, the Lesser Prairie-Chicken may join the Endangered Species Act's list, and KNRC's members will be subject to its burdensome regulations.

CONCLUSION

For these reasons, and those stated by petitioner, the Court should grant the petition for certiorari.

Respectfully submitted,

Christine Carletta
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500
ccarletta@kslaw.com

Ilya Shapiro
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave. NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Amicus Curiae

March 31, 2021