No. 20-1195

In the Supreme Court of the United States

KANSAS NATURAL RESOURCE COALITION, PETITIONER

v.

DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
JEAN E. WILLIAMS
Acting Assistant Attorney General
ANDREW C. MERGEN
ROBERT J. LUNDMAN
BRIDGET K. MCNEIL
BRIAN C. TOTH
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

The Congressional Review Act (CRA), 5 U.S.C. 801 *et seq.*, requires agencies to report certain rules to Congress before they take effect and prescribes procedures under which Congress may prevent the rule from taking effect. Petitioner alleges that the United States Fish and Wildlife Service violated the CRA by failing to report to Congress a rule concerning the listing of endangered species. Petitioner supports that rule but alleges that the failure to report it creates uncertainty about its validity, undermining petitioner's ability to rely on it. The questions presented are:

1. Whether petitioner has Article III standing to challenge the agency's failure to report the rule.

2. Whether the CRA—which provides that "[n]o * * * omission under this chapter shall be subject to judicial review," 5 U.S.C. 805—precludes judicial review of petitioner's challenge.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A69) is reported at 971 F.3d 1222. The opinion and order of the district court (Pet. App. B1-B14) is reported at 382 F. Supp. 3d 1179.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2020. A petition for rehearing was denied on October 19, 2020 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on February 25, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Congressional Review Act (CRA), 5 U.S.C. 801 *et seq.*, provides that, before a "rule" can take effect, the federal agency promulgating it generally must report it to both Houses of Congress. 5 U.S.C. 801(a)(1)(A).

The CRA contains exceptions to its submission requirements, including for any rule of particular applicability, any rule relating to agency management or personnel, and any "rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties." 5 U.S.C. 804(3)(C). The CRA establishes an expedited procedure whereby Congress can consider whether to enact a law disapproving the rule. See 5 U.S.C. 802. If Congress enacts such a law, the rule "shall not take effect" and "may not be reissued in substantially the same form." 5 U.S.C. 801(b)(1)-(2). But if Congress fails to enact such a law within 60 days after the rule has been reported, the rule generally may take effect. See 5 U.S.C. 801(a)(3)-(4), 808. The CRA provides that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review." 5 U.S.C. 805.

2. The Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, protects "endangered" and "threatened" species. 16 U.S.C. 1531(b). A species is "'endangered'" if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. 1532(6). A species is "'threatened'" if it is "likely" to become endangered "within the foreseeable future." 16 U.S.C. 1532(20).

In 2003, the United States Fish and Wildlife Service (Service) adopted the *Policy for Evaluation of Conservation Efforts When Making Listing Decisions* (Policy), 68 Fed. Reg. 15,100 (Mar. 28, 2003). The Policy sets forth a framework under which the Service decides whether conservation efforts make it unnecessary to list a species as endangered or threatened. *Ibid.* The Policy provides for the Service to consider two primary factors in making such a decision: "[t]he certainty that the

conservation efforts will be implemented" and "the certainty that the efforts will be effective." *Id.* at 15,101. Petitioner alleges that the Service never submitted the Policy to Congress in accordance with the CRA. Pet. App. A9.

In 2014, the Service published a final rule listing the lesser prairie-chicken—a "prairie grouse endemic to the southern high plains"—as a threatened species. *Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Lesser Prairie-Chicken*, 79 Fed. Reg. 19,974, 19,998, 20,070-20,071 (Apr. 10, 2014), withdrawn, *Endangered and Threatened Wildlife and Plants; Lesser Prairie-Chicken Removed From the List of Endangered and Threatened Wildlife*, 81 Fed. Reg. 47,047, 47,047-47,048 (July 20, 2016). A district court vacated the rule as arbitrary and capricious, holding that the Service had failed to properly consider whether conservation efforts made listing unnecessary, as required by the Policy. See *Permian Basin Petroleum Ass'n* v. *Department of the Interior*, 127 F. Supp. 3d 700, 707 (W.D. Tex. 2015). The Service then withdrew the listing. 81 Fed. Reg. at 47,047-47,048.

Conservation groups submitted a new petition to the Service to list the lesser prairie-chicken. Pet. App. A10. The groups later sued the government, alleging that it had violated its obligation under 16 U.S.C. 1533(b)(3)(B) to make a finding on the petition within 12 months. Pet. App. A10. The parties settled the case in 2019, agreeing that the Service would make the required finding by May 26, 2021. *Ibid.*

3. Petitioner is "an organization of county governments in western Kansas." Pet. App. A10 (citation omitted). Petitioner has developed its own conservation

plan for the lesser prairie-chicken. *Id.* at A10-A11. Petitioner argues that, under the Policy, that plan makes it unnecessary for the Service to list the lesser prairie-chicken under the ESA. *Id.* at A11. Petitioner worries, however, that because the Service failed to report the Policy to Congress, it may not be able to rely on the Policy in opposing a listing decision. *Ibid.*

Petitioner filed this suit in the District of Kansas, seeking a declaration that the Service's failure to report the Policy to Congress was unlawful and an injunction directing the Service to make the report. See Pet. App. B5. The district court dismissed the claim. *Id.* at B1-B14. The court held that petitioner's suit was barred by 5 U.S.C. 805, which provides that "no * * * omission under this chapter shall be subject to judicial review." Pet. App. B9 (citation and emphasis omitted); see *id.* at B7-B14.

4. The court of appeals affirmed. Pet. App. A1-A22.

The court of appeals first held that petitioner lacked Article III standing to bring its challenge. Pet. App. A12-A20. The court rejected petitioner's contention that it had standing because uncertainty about whether the Policy was in effect undermined incentives for counties and property owners to participate in petitioner's plan. *Id.* at A15. The court observed that, "[b]ased on the complaint, it does not appear that any county or property owner has refused to participate in [the] conservation plan." *Ibid.* The court further observed that, according to the complaint, counties and property owners have not "even expressed concerns over the [Policy's] validity." *Ibid.*; see *ibid.* ("[Petitioner has] not allege[d] that anyone * * * has exhibited any lack of confidence in the [Policy]."). The court also rejected peti-

tioner's contention that it had standing because the Service might disregard the Policy in deciding whether to list the lesser prairie-chicken. *Id.* at A19. The court found petitioner's allegations about "the outcome of a future rulemaking" too "speculative" to support standing, noting that petitioner "is not injured by an analysis that has yet to take place." *Id.* at A20.

The court of appeals then held, in the alternative, that the CRA deprived the district court of jurisdiction over this case. Pet. App. A20-A21. The court noted that the CRA provides that "no * * * omission under this chapter shall be subject to judicial review." *Id.* at A21 (quoting 5 U.S.C. 805) (brackets omitted). The court explained that the Service's alleged failure to comply with the CRA by reporting the Policy to Congress constituted an "omission under this chapter." *Id.* at A22. The court rejected petitioner's reliance on the presumption in favor of judicial review, explaining that "the presumption is rebutted" because "§ 805 unambiguously applies to [petitioner's] claim." *Id.* at A28.

Judge Lucero dissented. Pet. App. A30-A69. He concluded that petitioner had adequately alleged standing because "counties and property owners are less likely to undertake the burdensome actions the Plan requires because the [Policy] may not actually be in effect." *Id.* at A32. He also concluded that the CRA's bar to judicial review applies only to omissions that occur "after an agency has submitted a proposed rule for review." *Id.* at A53.

ARGUMENT

Petitioner contends (Pet. 12-19) that it has Article III standing to challenge the Service's failure to report the Policy to Congress and that the CRA does not bar

its claim. Because the court of appeals rested its judgment on both the Article III ground and the CRA ground, see Pet. App. A29, petitioner must establish that the court erred on both grounds in order to obtain reversal, see *United States* v. *Title Insurance & Trust Co.*, 265 U.S. 472, 486 (1924). Petitioner has not done so. The court of appeals correctly rejected petitioner's contentions on each issue, and its decision does not conflict with any decision of this Court or any other court of appeals. The Court should deny the petition for a writ of certiorari.

1. A writ of certiorari is not warranted to review petitioner's contention that it has adequately alleged Article III standing.

a. To establish Article III standing, a plaintiff must show, among other things, that it has suffered an injury in fact—an actual or imminent invasion of a concrete and legally protected interest. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The deprivation of a procedural right can result in a cognizable injury in fact only if that procedural right protects "some concrete interest" that belongs to the plaintiff. *Summers* v. *Earth Island Institute*, 555 U.S. 488, 496 (2009). A plaintiff does not establish standing by alleging the deprivation of a "procedural right *in vacuo*," *ibid.*—that is, a "bare procedural violation, divorced from any concrete harm," *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1549 (2016).

The court of appeals correctly held that petitioner failed to allege that the purported procedural violation of the CRA had caused it any concrete harm. Petitioner's theory of injury (Pet. 13) is that uncertainty about whether the Policy is in effect undermines coun-

ties' and property owners' incentives to comply with petitioner's conservation plan. As the court observed, however, the allegations in petitioner's complaint do not support that theory. In the court's view, "[b]ased on the complaint, it does not appear that any county or property owner has refused to participate in [petitioner's] conservation plan, due to uncertainty over the [Policy] or for any other reason." Pet. App. A15. Indeed, the court explained, petitioner "fails to allege that a county or property owner has even expressed concerns over the [Policy's] validity." *Ibid.*; see *ibid.* ("[T]o reiterate, [petitioner] does not allege that anyone * * * has exhibited any lack of confidence in the [Policy].); *id.* at A15-A16 ("[T]he complaint describes counties' and property owners' incentives' without alleging that any of them is having doubts about participating in [petitioner's] conservation plan.") (citation omitted). It follows that "the complaint does not allege any tangible harm [petitioner] is currently suffering" because of the Service's conduct. *Id.* at A15.

b. Petitioner's contrary arguments lack merit. Petitioner argues (Pet. 13) that the CRA's requirements are analogous to the Constitution's separation-of-powers provisions and that individuals can have standing to raise separation-of-powers claims. Even assuming that petitioner's analogy were sound, however, the court of appeals' decision would still be correct. This Court's precedents establish only that a private plaintiff *can* have standing to raise a separation-of-powers claim, not that a private plaintiff *always* has standing to do so. See, *e.g.*, *United States* v. *Richardson*, 418 U.S. 166, 170 (1974) (holding that a plaintiff lacked standing to raise a separation-of-powers claim because the plaintiff had failed to establish injury in fact). The decision below is

consistent with that principle. The court of appeals did not hold that a plaintiff can never have Article III standing to challenge an alleged violation of the CRA; rather, the court simply held that petitioner had not adequately alleged standing in its complaint. Pet. App. A15-A21.

Petitioner also errs in arguing (Pet. 12) that its burden to establish standing is lessened because it is the "object" of the challenged rule. Petitioner is correct that, under this Court's precedents, it may be easier to establish standing when "the plaintiff is himself an object of the action (or forgone action) at issue." *Lujan*, 504 U.S. at 561. Petitioner, however, is not the "object" of the Policy. The Policy regulates *the Service* by requiring it consider certain factors when making listing decisions; it does not regulate *petitioner* in any way.

Petitioner likewise errs in suggesting (Pet. 14-15) that the court of appeals contravened this Court's precedents on procedural injury. This Court has recognized that "'procedural rights' are special" in one respect: "[t]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability." *Lujan*, 504 U.S. at 572 n.7. For example, "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered." *Ibid.* That principle, however, relates to "redressability," not to injury in fact, and it comes into play only when the plaintiff "has been accorded a procedural right *to protect his concrete interests*." *Ibid.* (emphasis added). In this case, as the court of appeals correctly held, petitioner has failed to

allege any such concrete interest in the first place. Nor do the CRA's procedures serve to protect *petitioner's* interests. The CRA was instead "designed to facilitate Congress's oversight of the executive branch," Pet. App. A17, and at least "so long as Congress complies with the requirements of bicameralism and presentment," petitioner has no personal stake "in Congress's internal lawmaking procedures," *id.* at A19.

c. Contrary to petitioner's assertion (Pet. 15-17), the decision below does not conflict with the decision of any other court of appeals. The cases that petitioner cites all stand for the proposition that, when a plaintiff alleges a deprivation of a procedural right *that protects his concrete interests*, the plaintiff may be able to establish standing even if it is uncertain whether the observance of the procedure would have led to a different outcome. See *Nulankeyutmonen Nkihtaqmikon* v. *Impson*, 503 F.3d 18, 27 (1st Cir. 2007) (emphasizing that the procedure served to "protect the plaintiff's concrete interest") (citation omitted); *Sierra Club* v. *Marita*, 46 F.3d 606, 612 (7th Cir. 1995) (finding "a concrete injury underlying the procedural default"); *Cottonwood Environmental Law Center* v. *United States Forest Service*, 789 F.3d 1075, 1079 (9th Cir. 2015) (concluding that the procedural injury worked a "concrete harm"), cert. denied, 137 S. Ct. 293 (2016); *Natural Resources Defense Council, Inc.* v. *SEC*, 606 F.2d 1031, 1042 (D.C. Cir. 1979) (stating that the procedural injury "arguably impaired" an "interest" that was "judicially cognizable" and "personal" to the plaintiffs). In this case, by contrast, the court of appeals held that the alleged failure to observe the procedures required by the CRA did not affect any concrete interests belonging to petitioner. See Pet. App. A17-A18 n.5 (distinguishing

cases involving "injuries based on procedural errors" on the ground that those cases, unlike this one, involved a "concrete" harm rather than a bare procedural violation).

The court of appeals thus applied the legal standard that this Court's precedents have articulated, that other courts of appeals have followed, and that petitioner itself endorses (Pet. 14): the deprivation of a procedural right that protects a concrete interest can result in a cognizable injury, but "a procedural violation *in vacuo*" does not. Petitioner simply disagrees with how the court of appeals applied that standard to the allegations in this case. That fact-bound contention does not warrant further review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

2. A writ of certiorari also is not warranted to review petitioner's contention that the CRA does not bar judicial review of its claim.

a. The CRA provides that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review." 5 U.S.C. 805. An agency's failure to comply with the CRA's requirement to submit rules to Congress is an "omission under this chapter." *Ibid.* Such a failure accordingly is not "subject to judicial review." *Ibid.*

Petitioner attempts to overcome the plain language of the statute by invoking (Pet. 23) this Court's presumption in favor of judicial review. That presumption,

however, is not absolute; it "may be overcome," for example, by "'specific language'" indicating that "Congress intended to bar review." *Cuozzo Speed Technologies, LLC* v. *Lee*, 136 S. Ct. 2131, 2140 (2016) (citation omitted). Section 805 contains just such language: it unambiguously provides that "[n]o * * * omission under this chapter shall be subject to judicial review." 5 U.S.C. 805.

Petitioner also asserts (Pet. 22, 28-30) that applying Section 805 according to its terms would undermine the CRA's purposes by rendering its provisions ineffectual. Experience has proven otherwise: even though Section 805's jurisdictional bar has been in effect ever since the CRA's enactment, agencies have submitted more than 78,000 rules to Congress in accordance with the statute. See Valerie C. Brannon & Maeve P. Carey, Cong. Research Serv., R45248, *The Congressional Review Act: Determining Which "Rules" Must Be Submitted to Congress* 20 n.182 (2019). Petitioner asserts (Pet. 32) that agencies have sometimes failed to submit rules to Congress, but the CRA expressly exempts various classes of rules from the submission requirements, including "any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties." 5 U.S.C. 804(3)(C). And if an agency fails to submit a rule that falls outside those exceptions, Congress can still enact a joint resolution disapproving of the rule if it wishes to do so. On at least one occasion, Congress has invoked the CRA to disapprove the rule that an agency failed to submit, but that the Government Accountability Office concluded should have been submitted. See J. Res., Pub. L. No. 115-172, 132 Stat. 1290 (disapproving rule issued by the Consumer Financial Protection Bureau in 2013).

The Constitution, moreover, provides a wide variety of mechanisms beyond judicial review for ensuring that an agency fulfills its legal obligations. For example, the President has an independent duty to take care that the laws are faithfully executed, and the voters may hold him accountable for his failure to do so, see U.S. Const. Art. II, § 3; the Senate may decline to confirm officers whom it does not trust to comply with the law, see Art. II, § 2, Cl. 2; and Congress may decline to fund agencies that have failed to implement its policies, see Art. I, § 9, Cl. 7.

Petitioner further asserts that the decision below raises constitutional concerns by "remov[ing] cases from the Judiciary's domain." Pet. 31 (citation omitted). This Court has long held, however, that Congress has broad power to determine the jurisdiction of the federal courts. See, *e.g.*, *Bowles* v. *Russell*, 551 U.S. 205, 212 (2007); *Brotherhood of R.R. Trainmen* v. *Toledo, Peoria & Western R.R.*, 321 U.S. 50, 63-64 (1944); *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812). The Court has suggested that "[a] 'serious constitutional question' * * * would arise if a federal statute were construed to deny any judicial forum for a colorable *constitutional* claim," *Webster* v. *Doe*, 486 U.S. 592, 603 (1988) (emphasis added; citation omitted), but that concern does not arise in this case, which involves only a statutory claim.

Finally, petitioner argues (Pet. 22) that, after the CRA's enactment, the statute's sponsors issued a statement that "§ 805 does not preclude judicial review when agencies violate the rule-submission requirement." See Pet. App. A6-A7. This Court has recognized, however, that "[p]ost-enactment legislative history (a contradic-

tion in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 242 (2011). The sponsors' post-enactment statements, even if interpreted as petitioner suggests, cannot overcome the plain language of the statute.

b. As the court of appeals noted, the decision below does not conflict with the decision of any other court of appeals. See Pet. App. A28-A29. The D.C. Circuit, the only other court of appeals to consider the precise question presented here, has held that Section 805 bars judicial review of an agency's alleged failure to submit a rule in accordance with the CRA. See *Montanans for Multiple Use* v. *Barbouletos*, 568 F.3d 225, 229 (2009) (Kavanaugh, J.), cert. denied, 560 U.S. 926 (2010). Relatedly, the Ninth Circuit has held that Section 805 bars judicial review of Congress's decision to invoke the CRA's procedures in considering legislation. See *Center for Biological Diversity* v. *Bernhardt*, 946 F.3d 553, 563 (2019).

Petitioner cites (Pet. 26-28) *Natural Resources Defense Council* v. *Abraham*, 355 F.3d 179 (2d Cir. 2004), and *Liesegang* v. *Secretary of Veterans Affairs*, 312 F.3d 1368 (Fed. Cir. 2002), but neither decision conflicts with the decision below. In both cases, challengers argued that a statute required a rule to take effect upon a particular date; the agency responded that the CRA required a different effective date; and the court rejected the agency's argument. See *Abraham*, 355 F.3d at 201-202; *Liesegang*, 312 F.3d at 1372-1376. Neither case involved a challenge to an agency's failure to submit a rule to Congress. Further, neither court even mentioned Section 805, let alone issued a holding about the provision's meaning. See *ibid.*; see also *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952)

(explaining that a *sub silentio* exercise of jurisdiction does not constitute binding precedent).

Unable to establish a circuit conflict on the specific question whether the CRA bars judicial review of a suit such as this one, petitioner asserts (Pet. 24-26) that courts of appeals disagree about the more abstract question of what role the presumption in favor of judicial review should play in statutory interpretation. That assertion is incorrect. The decisions that petitioner cites, all of which involved statutes other than the CRA, treat the presumption as a useful tool of statutory interpretation, but accept that the presumption can be rebutted by contrary textual evidence. See *Make The Road New York* v. *Wolf*, 962 F.3d 612, 624 (D.C. Cir. 2020); *United States* v. *Dohou*, 948 F.3d 621, 626 (3d Cir. 2020); *Hyatt* v. *OMB*, 908 F.3d 1165, 1171 (9th Cir. 2018). Consistent with those decisions, the court of appeals acknowledged the presumption in favor of judicial review, but held that, "[b]ecause § 805 unambiguously applies to [petitioner's] claim, the presumption is rebutted." Pet. App. A28. Petitioner faults (Pet. 20) the court of appeals for discussing the presumption at the end rather than the beginning of its analysis, but the court explained when Judge Lucero's dissent raised the same objection that it would have reached the same result "regardless of [the] paragraph sequence." Pet. App. A28 n.11. In any event, this Court "reviews judgments, not statements in opinions," *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956); "[t]he fact that the [lower court] reached its decision through analysis different than [petitioner would have preferred] does not make it appropriate for this Court to rewrite the [lower] court's decision," *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General
JEAN E. WILLIAMS
Acting Assistant Attorney General
ANDREW C. MERGEN
ROBERT J. LUNDMAN
BRIDGET K. MCNEIL
BRIAN C. TOTH
Attorneys

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