No. 20-1195

In The
Supreme Court of the United States

KANSAS NATURAL RESOURCE COALITION,
Petitioner,

v.

UNITED STATES
DEPARTMENT OF INTERIOR; et al.,
Respondents.

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

PETITIONER'S REPLY BRIEF

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Table of Contents

Table of Authorities ii

I. KNRC has standing and the Tenth Circuit's contrary judgment merits review and reversal 2

II. The Tenth Circuit's relegation of the presumption favoring judicial review created a circuit split 6

III. The Tenth Circuit's CRA holding conflicts with the statute's text, structure, legislative history, and purpose 8

Conclusion 12

Table of Authorities

Page(s)

Cases

Akins v. F.E.C.,
101 F.3d 731 (D.C. Cir. 1996) 1, 3

Black v. Cutter Laboratories,
351 U.S. 292 (1956) 6, 7

Block v. Cmty. Nutrition Inst.,
467 U.S. 340. (1984) 8

Bond v. U.S.,
564 U.S. 211 (2011) 4

Bruesewitz v. Wyeth, LLC,
562 U.S. 223 (2011) 11

California v. Rooney,
483 U.S. 307 (1987) (per curiam).....................6, 7

Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.,
789 F.3d 1075 (9th Cir. 2015) 3

El Paso Nat. Gas. Co. v. U.S.,
632 F.3d 1272 (D.C. Cir. 2011)........................1, 6

Hyatt v. Office of Management & Budget,
908 F.3d 1165 (9th Cir. 2018) 6

King v. Burwell,
576 U.S. 473 (2015) 2, 9

Kucana v. Holder,
558 U.S. 233 (2010) 12

Lexmark Intern., Inc. v. Static Control Components, Inc.,
572 U.S. 118 (2014) 9

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 1, 3, 5

Mach Mining, LLC, v. E.E.O.C.,
575 U.S. 480 (2015) 10, 12

Make The Road New York v. Wolf,
962 F.3d 612 (D.C. Cir. 2020) 6

Nat. Res. Defense Council, Inc. v. S.E.C.,
606 F.2d 1031 (D.C. Cir. 1979) 3

Natural Resources Defense Council v. Abraham,
355 F.3d 179 (2d Cir. 2004) 8

Nulankeyutmonen Nkihtaqmikon v. Impson,
503 F.3d 18 (1st Cir. 2007) 3, 4

Sackett v. E.P.A.,
566 U.S. 120 (2012) 9

Sierra Club v. Marita,
46 F.3d 606 (7th Cir. 1995) 3

Summers v. Earth Island Institute,
555 U.S. 488 (2009) 5

Tugaw Ranches, LLC v. U.S. Dep't of Interior,
362 F. Supp. 3d 879 (D. Idaho 2019) 9

U.S. v. L. A. Tucker Truck Lines, Inc.,
344 U.S. 33 (1952) 8

U.S. v. Woods,
571 U.S. 31 (2013) 11

United States v. Dohou,
948 F.3d 621 (3d Cir. 2020)..................................6

WildEarth Guardians v. Jewell,
738 F.3d 298 (D.C. Cir. 2013) 4

Statutes

5 U.S.C. § 551...10

5 U.S.C. § 804(3) 10

5 U.S.C. § 805..6, 8, 9, 11

Other Authorities

68 Fed. Reg. 15,112..5

H. Comm. on the Judiciary, Subcomm. on
Commercial & Admin. Law, 109th Cong.,
Interim Report on the Administrative
Law, Process and Procedure Project for
the 21st Century 86 n.253 (Comm. Print
2006)...12

Wallach & Nicolas W. Zeppos, Brookings
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REPLY BRIEF

The Tenth Circuit has created a conflict among the circuits over both procedural-injury standing and the presumption favoring judicial review of agency action. It has deepened another conflict over the Congressional Review Act's enforceability. Respondents offer nothing to lessen the need for this Court's review.

Consistent with this Court's decision in *Lujan v. Defenders of Wildlife*,[1] the First, Seventh, Ninth, and D.C. Circuits hold that a procedural-injury plaintiff need only show that procedural compliance "could" protect its interests, regardless of the uncertain outcome of future agency action. In this case, the Tenth Circuit went the other way, holding that because the procedure that was violated "does not foreordain any particular outcome" in an impending agency action KNRC "cannot show a certainly impending injury[.]" App. A19–A20. As the D.C. Circuit has explained, this reasoning represents "a breathtaking attack on the legitimacy of virtually all judicial review of agency action" because 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).

The Tenth Circuit also created a conflict over the presumption favoring judicial review of agency action. The Third, Ninth, and D.C. Circuits hold that the presumption "dictates that" statutory provisions purporting to limit review "must be read narrowly." *El Paso Nat. Gas. Co. v. U.S.*, 632 F.3d 1272, 1276 (D.C.

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[1] 504 U.S. 555, 571–73 & nn.7–8 (1992).

Cir. 2011). The Tenth Circuit, however, held that such provisions should be interpreted without regard to the presumption, which instead applies "only to resolve any 'lingering doubt'" about the provision's meaning. App. A28. Because of this holding, the Tenth Circuit concluded that the CRA precludes judicial enforcement, in conflict with the Second and Federal Circuits.

The decision below is also manifestly wrong. The duty of courts is "to construe statutes, not isolated provisions[.]" *King v. Burwell*, 576 U.S. 473, 486 (2015). Yet the Tenth Circuit interpreted one provision of the CRA to "render[] . . . toothless" several others. App. A55. As Judge Lucero's dissent explains, that interpretation is contrary to the CRA's text, structure, purpose, and legislative history. App. A51–A67. "Congress enacted the CRA to restore democratic accountability to agency rulemaking" but the majority's holding "does not give effect to Congress' intent; it undermines it." App. A30. A decision with such consequence merits review.

I. KNRC has standing and the Tenth Circuit's contrary judgment merits review and reversal

KNRC has standing based on its interests in the lesser prairie chicken and its habitat within member counties, development and implementation of a conservation plan for this species, and the proper consideration of that plan in a listing decision that could have significant adverse consequences on member counties. App. A40–A42. *See* Pet. 12–15. Respondents—like the majority below—do not address these interests. Instead, their "analysis of the

concreteness of KNRC's alleged injury is unmoored from the interest allegedly harmed." App. A35–A36. Respondents' CRA violation indisputably "could impair" these interests by thwarting the PECE Rule's conservation incentives and leading to an adverse result in the listing decision. App. A40–A42. *See Lujan*, 504 U.S. at 572–73 (adopting this "could impair" standard). Therefore, KNRC has standing. Pet. 13–17.

Respondents contend that the Tenth Circuit applied the proper standard and that KNRC "simply disagrees with how the court of appeals applied that standard" in this case. Oppo. 10. Not so. The Tenth Circuit committed manifest errors of law that merit reversal.

Most importantly, the court held that KNRC lacks standing because the PECE Rule's submission "does not foreordain any particular outcome" in the listing decision. App. A19–A20. This holding conflicts with the law in the First, Seventh, Ninth, and D.C. Circuits, which hold that uncertainty over future agency action is no obstacle to procedural-injury standing. *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*, *Inc. v. S.E.C.*, 606 F.2d 1031, 1036 (D.C. Cir. 1979). The Tenth Circuit's contrary rule would preclude "virtually all judicial review of agency action." *Akins*, 101 F.3d at 738.

Respondents attempt to distinguish these cases as concerning redressability rather than injury-in-

fact. But it is Respondents that confuse these requirements. Respondents dispute neither KNRC's interests in the lesser prairie chicken, its conservation plan, or consideration of that plan in the listing decision nor that these interests are related to the PECE Rule. *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013) (A procedural violation "must be tethered to" some concrete interest.). Instead, they challenge the likelihood that procedural compliance with the CRA will materially affect whether these interests will be benefitted or harmed. Oppo. 6–10. This is the same redressability argument, only mislabeled by Respondents, that the First Circuit considered and rejected in *Nulankeyutmonen Nkihtaqmikon*, 503 F.3d at 28. *See* Pet. 15–17.

Second, the Tenth Circuit held that, assuming KNRC has a sufficient interest, it is not among those protected by the CRA. The CRA "seems designed[,]" said the majority, to protect only Congress' interest in "oversight of the executive branch[.]" App. A17. The zone-of-interests test does not apply here because KNRC does not rely on third-party standing. App. A36 n.4. Additionally, the zone-of-interests test would be satisfied because the CRA and the separation of powers principles it vindicates do protect individual interests. *See Bond v. U.S.*, 564 U.S. 211, 222 (2011) (While separation of powers principles "protect each branch of government from incursion by the others" they "protect the individual as well[.]"). *See also* Pet. 13–14. Besides, Respondents have waived any zone-of-interests argument by failing to raise it earlier. App. A36 n.4.

Respondents also assert that KNRC is not entitled to the reduced standing burden that applies to the "object of the action (or forgone action) at issue." Oppo. 8 (quoting *Lujan*, 504 U.S. at 561). According to Respondents, the PECE Rule does not regulate parties developing and implementing conservation plans but only "*the Service* by requiring it consider certain factors when making listing decisions[.]" Oppo. 8. This assertion is remarkable. The PECE Rule expressly acknowledges that "the criteria identified in this policy can be construed as requirements placed on the development" of conservation plans because "the entity [proffering such a plan] must satisfy these criteria in order to obtain and retain the benefit they are seeking, which is making the listing of a species as threatened or endangered unnecessary." 68 Fed. Reg. 15,112. It's true that, like every rule, this one relies on agency personnel to apply it. But this does not make agencies the object, much less the only object, of their own regulations. *Cf. Lujan*, 504 U.S. at 561 (contrasting a challenge to a rule governing a plaintiff's actions with a challenge to a rule governing another private party).

Finally, even if the Court's review of the Tenth Circuit's standing decision were mere error correction, the second question presented provides ample reason to grant review, overturn the Tenth Circuit on standing, and decide whether the CRA is judicially enforceable. The Tenth Circuit's errant standing decision presents no vehicle problem because the Court must consider standing when deciding any case on the merits. *See Summers v. Earth Island Institute*, 555 U.S. 488, 499 (2009).

II. The Tenth Circuit's relegation of the presumption favoring judicial review created a circuit split

The Tenth Circuit's holding that it need consider the presumption "only to resolve any 'lingering doubt'" after interpreting § 805 without regard to the presumption conflicts with the law in the Third, Ninth, and D.C. Circuits. *See, e.g.*, *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. Office of Management & Budget*, 908 F.3d 1165, 1171 (9th Cir. 2018). These circuits recognize that the presumption "is so embedded in the law that it applies even when determining the scope of statutory provisions specifically designed to limit judicial review." *Make The Road New York*, 962 F.3d at 624. Indeed, it requires them to "be read narrowly" where the statute's structure, purpose, and legislative history support that result. *El Paso Nat. Gas. Co.*, 632 F.3d at 1276. *See Hyatt*, 908 F.3d at 1172. *See also* Pet. 24–26.

Respondents suggest that the Tenth Circuit's unprecedented relegation of the presumption was not a part of the holding, referencing this Court's observation that it "reviews judgments, not statements in opinions." Oppo. 14 (citing *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956) and *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam)). This argument is specious. Neither *Cutter Laboratories* nor *Rooney* support Respondents. These cases held, respectively, that cert was improvidently granted (1) where a judgment of a state supreme court "rests on adequate state grounds" and any discussion of federal law was dicta and (2) where a party "won

below, and was therefore not in a position to appeal" just because it objected to how the court ruled in its favor. *Cutter Laboratories*, 351 U.S. at 297; *Rooney*, 483 U.S. at 311. Neither is remotely analogous to this case.

KNRC challenges "precisely the ground on which the judgment rests." *Cutter Laboratories*, 351 U.S. at 298. The court's holding that it need consider the presumption "only to resolve any 'lingering doubt'" was critical to the judgment. App. A28. Respondents overread the majority's statement that it would have reached the same result had it begun with this holding rather than concluding with it. Oppo. 14 (citing App. A28). The problem is not the opinion's "paragraph sequence." Oppo. 14. It is that the court issued a holding misstating the presumption's role and conflicting with decisions of three other circuits, regardless of that holding's placement in the opinion. *See* Pet. 21–26. Because of this holding, the court "fail[ed] to apply" the presumption nor even to "acknowledge" (much less hold the government to) the government's heavy burden to overcome the presumption. App. A50. For the reasons explained in Judge Lucero's dissent, the judgment could not be sustained under a faithful application of the presumption. App. A44–A63.

III. The Tenth Circuit's CRA holding conflicts with the statute's text, structure, legislative history, and purpose

"Whether 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." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345. (1984). These factors favor review here. Indeed, as Judge Lucero noted, Respondents have "largely fail[ed] to make an affirmative case that Congress intended to strip courts of jurisdiction" under *Block*. App. A65.

Respondents dispute whether the judgment below conflicts with *Natural Resources Defense Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004), analogizing the Second Circuit's resolution of a CRA claim to a *sub silentio* exercise of jurisdiction. Oppo. 13–14 (citing *U.S. v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952)). But *Abraham* is not a case where jurisdiction "was not questioned" and, therefore, not passed on by the Court. *See L. A. Tucker Truck Lines*, 344 U.S. at 38. Instead, as the petition explains and Respondents do not dispute, jurisdiction under § 805 was challenged in *Abraham*. Pet. 27. Rejecting the argument, the Second Circuit considered and resolved the merits of the CRA argument in that case. *Abraham*, 355 F.3d at 201–02. *See* Pet. 27. Therefore, the Second Circuit's and the Tenth Circuit's judgments conflict. Moreover, because "a federal court's obligation to hear and decide cases

within its jurisdiction is virtually unflagging,"[2] this Court has granted cases concerning the presumption of judicial review for agency action without a circuit split. *See*, *e.g.*, *Sackett v. E.P.A.*, 566 U.S. 120, 131 (2012) (reversing, unanimously, all five circuits that had considered whether the Clean Water Act precluded judicial review of administrative compliance orders).

Moving to the merits, Respondents contend that the decision below was correct, regardless of its rationale. They argue that § 805 forecloses judicial review and, therefore, the presumption has been rebutted. But Respondents interpret § 805 in isolation without regard to the surrounding text, an approach this Court has explicitly rejected. *See Burwell*, 576 U.S. at 485. As Judge Lucero explained, Respondents' interpretation "renders . . . toothless" the CRA's enforcement provisions which is "pertinent to the plain meaning of § 805 because it relates to the overall statutory scheme." App. A55 (citing *Burwell*, 576 U.S. at 485). *See* Pet. 18–21. Yet Respondents offer no explanation how their interpretation of § 805's ambiguous text can be reconciled with the CRA's other provisions or its structure. App. A54–A55. *See Tugaw Ranches, LLC v. U.S. Dep't of Interior*, 362 F. Supp. 3d 879, 883 (D. Idaho 2019).

Instead, Respondents suggest that the presumption need not be applied here because Congress and the public have other means of "ensuring that an agency fulfills its legal obligations." Oppo. 11–12 (citing the powers of the people to deny

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[2] *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (internal quotations omitted).

the President reelection, of the Senate to decline to confirm officers, and of Congress to enact legislation or withhold funds). But this is always true. "Were the agency able to meet its heavy burden to rebut the presumption of judicial review merely by pointing to general powers of Congress available in every circumstance, the presumption would be meaningless." App. A62–A63. It is not.

Next, Respondents argue that even if their theory renders the CRA unenforceable, this Court should not be troubled by that result because "agencies have submitted more than 78,000 rules to Congress in accordance with the statute." Oppo. 11. That agencies sometimes follow the law is no reason for this Court to ignore when they don't. *See* App. A45 ("We need not doubt an agency's fidelity to law" to apply the presumption.).

In *Mach Mining, LLC, v. E.E.O.C.*, this Court observed that the presumption exists because the Court "know[s]—and know[s] that Congress knows—that legal lapses and violations occur, and especially so when they have no consequence." 575 U.S. 480, 488–89 (2015). As Judge Lucero's dissent explained, "*Mach Mining*'s observation 'appears to have been borne out with respect to the CRA—agencies have failed to submit hundreds of rules[3] for approval,

[3] This figure considers only "significant" regulations, generally those having greater than $100 million in annual economic impacts. *See* Pet. 32–33. The CRA is not limited to such rules. Instead, it requires submission of a huge body of regulations, guidance documents, and virtually any other agency statement of general applicability. 5 U.S.C. § 804(3) (adopting 5 U.S.C. § 551's definition of "rule" subject to three exceedingly narrow exceptions).

despite the statute's clear mandate." App. A31. Indeed, the problem got substantially worse after the D.C. Circuit held that agencies' CRA violations are unreviewable (the first circuit to do so). Philip A. Wallach & Nicolas W. Zeppos, Brookings Inst. Report, *How powerful is the Congressional Review Act?* (Apr. 4, 2017)[4] (rate that agencies failed to submit significant rules to Congress increased 36% after 2009, compared to 2001–2008).

Respondents also contend that the CRA's bipartisan sponsors' thorough explanation of Congress' intent behind § 805, and explicit confirmation that it does not preclude judicial review here, must be given no weight. Oppo. 12–13 (citing *Bruesewitz v. Wyeth, LLC*, 562 U.S. 223, 242 (2011)). But as this Court has explained since *Bruesewitz*, post-enactment evidence of legislative intent should be considered "to the extent it is persuasive." *U.S. v. Woods*, 571 U.S. 31, 48 (2013). As Judge Lucero explained, the sponsors' statement "is powerful evidence" that Congress did not intend to withhold judicial review of an agency's failure to submit a rule to Congress. App. A59. The statement was recorded "a mere twenty days after the CRA was enacted, during the same session[,]" the brief delay was due to the CRA being enacted as a late amendment to an omnibus bill, the sponsors expressed their intent to record the statement prior to enactment, and no member expressed any disagreement with the statement's content. App. A60. Respondents offer no reason to think that the sponsors' "memories fade[d]" or that their "perception of [their] earlier intention"

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

changed. App. A59 (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980)). Indeed, the bipartisan sponsors' statement has been acknowledged by both the legislative and the executive branches as illuminating the CRA's meaning.[5]

Finally, Respondents take issue with Judge Lucero's observation that the judgment below "'place[s] in executive hands authority to remove cases from the Judiciary's domain.'" App. A55 (quoting *Kucana v. Holder*, 558 U.S. 233, 237 (2010)). They respond that Congress has broad power to determine federal courts' jurisdiction. Oppo. 12. That's true, as it was in *Kucana*. But it is irrelevant because the question is whether Congress has precluded jurisdiction, not whether it has the power to do so. The judgment below would allow executive agencies to prevent both legislative and judicial scrutiny by unlawfully withholding rules from Congress. Pet. 28–31. Avoiding this result is precisely why the presumption of judicial review exists. *See Kucana*, 558 U.S. at 237. *See also Mach Mining*, 575 U.S. at 488–89.

Conclusion

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

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[5] *See* H. Comm. on the Judiciary, Subcomm. on Commercial & Admin. Law, 109th Cong., Interim Report on the Administrative Law, Process and Procedure Project for the 21st Century 86 n.253 (Comm. Print 2006); Memorandum from Russell T. Vought, Acting Director, Office of Management and Budget, to the Heads of Executive Departments and Agencies (Apr. 11, 2019).

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