

THE CONGRESSIONAL REVIEW ACT AND JUDICIAL REVIEW
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The opportunity to seek relief in court from illegal governmental action has always been deemed a virtue of our form of government. In the *Federalist Papers*, Alexander Hamilton described the federal judiciary as “the citadel of public justice and public security.”¹ In its best known and most important opinion—*Marbury v. Madison*—the Supreme Court of the United States declared that it is “emphatically the province and duty of the judicial department to say what the law is.”² Nearly two centuries later, the Court made clear in *Plaut v. Spendthrift Farms, Inc.* that “the Framers crafted” Article III to give “the Federal Judiciary the power, not merely to rule on cases”—that was clear from *Marbury*—“but to *decide* them, subject to review only by superior courts in the Article III hierarchy.”³ Over the last few years, the Court has emphasized that point, ruling that while Congress may leave some legal issues to the political branches to resolve, there is a “strong presumption” that judicial review will always be available to scrutinize allegedly illegal actions taken by executive officials.⁴ That is particularly true when an official acts in an unconstitutional manner because, as Hamilton explained, an unconstitutional law or action is “void.”⁵

The Supreme Court of the United States recently lost an opportunity to reaffirm the centrality of judicial review to our governmental system in the context of the review of an action taken by the regulatory state. The Court recently denied a petition for a writ of certiorari in a case entitled *Kansas Natural Resources Coalition v. U.S. Department of Interior (KNRC)*.⁶ *KNRC* raised the issue of whether an agency’s refusal to comply with the requirements imposed on agency rulemaking set forth in a federal statute known as the Congressional Review Act (CRA)⁷ is subject to judicial review.⁸ By a 2-1 vote, the Tenth Circuit ruled that the CRA

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¹ THE FEDERALIST PAPERS, No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

² 5 U.S. (1 Cranch) 137, 177 (1803).

³ 514 U.S. 211, 218-19 (1995) (emphasis in original).

⁴ *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) (quoting *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496, 498 (1991)); *see also, e.g., Dep’t of Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020); *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018); *infra* notes 48-49.

⁵ THE FEDERALIST PAPERS, *supra* note 1, at 466.

⁶ *Kansas Nat. Res. Coal. v. Dep’t of Interior*, 971 F.3d 1222 (10th Cir. 2020), *petition for cert. filed*, No. 20-1195 (filed Feb. 25, 2021), *cert. denied*, 2021 WL 2301976 (U.S. Sup. Ct. June 7, 2021) [hereinafter *KNRC*].

⁷ Congress enacted the Congressional Review Act as Title II, Subtitle E, of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 871 (codified at 5 U.S.C. §§ 801-808 (2018)).

⁸ There also was an Article III standing issue posed by the case. The court of appeals disagreed over the issue of whether the plaintiff’s complaint had adequately alleged an injury to satisfy Article III requirements. *KNRC*, 971 F.3d at 1231-34, 1238 (concluding that the plaintiff’s allegations were insufficient to satisfy Article III); *id.* at 1238-45 (Lucero, J., dissenting) (concluding that the plaintiff’s allegations were sufficient). The majority did not rely entirely on the plaintiff’s pleading shortcoming because the plaintiff argued that any

forecloses judicial review of an agency’s failure—or refusal—to comply with the requirements of that statute.

That technical, humdrum description of the *KNRC* case, however, belies the fact that the issue it decided is of considerable legal, practical, and policy importance—and that the circuit court majority got it wrong. A ruling that judicial review is available would enable the federal courts to order federal agencies to comply with CRA in the thousands of cases where agencies use rules that are not “law” to govern private conduct and threaten enforcement actions. That consequence alone would be significant because, to date, agency compliance with the CRA has been spotty at best. The issue also has considerable policy importance because it would allow the Supreme Court to spotlight a particularly corrosive form of legal gamesmanship that the Executive Branch uses to coerce private parties to knuckle under to an agency’s unlawful demands.

Unfortunately, the Supreme Court denied certiorari in *KNRC*, which enabled the Department of the Interior to avoid offering a legitimate justification for its willful noncompliance with the CRA. It also allowed the department to avoid a public rebuke for hiding behind an ambiguous clause in a statute whose *raison d’être* is to prevent the government from injuring the public unless and until Congress has had the opportunity to review an agency’s newly issued “law.”⁹ That result will only further encourage federal agencies to willfully ignore the CRA, a statute that Congress enacted to ensure that agencies can be held accountable for the rules they adopt as, in Justice Scalia’s tart description, “a sort of junior-varsity Congress.”¹⁰

I. THE CONGRESSIONAL REVIEW ACT

The Supreme Court has held that a properly promulgated agency rule can have the force and effect of law.¹¹ Because quantity has a quality all its own,¹² that principle is important because federal agencies promulgate far more rules each year than Congress passes statutes.¹³ As Justice Gorsuch noted two years ago, the

deficiency could be remedied on remand. “In the interest of judicial economy,” the majority also addressed the CRA issue *Id.* at 1238. It is likely that the presence of the standing issue persuaded the Court not to review the Tenth Circuit’s decision.

⁹ What is doubly unfortunate is that no Justice wrote a separate opinion accompanying a denial of certiorari explaining that this issue is an important one that the Court will eventually need to address in a proper case. Justices occasionally use that practice to inform the bar, the academy, and the public that a certain issue is, to use the lingo, “certworthy” even if the particular case raising that issue does not provide a good “vehicle” to consider it because of some feature peculiar to that case. *See, e.g.*, *Biden v. Knight First Amend. Inst.* at Columbia Univ., 141 S. Ct. 1220, 1220 (2021) (Thomas, J., concurring); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Statement of Kavanaugh, J., respecting the denial of certiorari); *Whitman v. United States*, 574 U.S. 1003, 1003 (2014) (Statement of Scalia, J., joined by Thomas, J., respecting the denial of certiorari).

¹⁰ *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

¹¹ *See Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979); *see also, e.g.*, *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 95 (2015).

¹² Particularly when the costs imposed by those rules are astronomical. *See, e.g.*, James Gattuso & Diane Katz, *20,642 New Regulations Added in the Obama Presidency*, DAILY SIGNAL (May 23, 2016), <http://dailysignal.com/2016/05/23/20642-new-regulations-added-in-the-obama-presidency/> [<https://perma.cc/FJ5M-8WM8>] (“More than \$22 billion per year in new regulatory costs were imposed on Americans last year, pushing the total burden for the Obama years to exceed \$100 billion annually. That’s a dollar for every star in the galaxy, or one for every second in 32 years.”).

¹³ *See, e.g.*, Paul J. Larkin, Jr. & GianCarlo Canaparo, *Gunfight at the New Deal Corral*, 19 GEO. J. L. & PUB. POL’Y (forthcoming 2021) (manuscript at 12-13) (footnotes omitted):

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number of agency rules adopted yearly “dwarf[s]” the number of statutes Congress enacts during the same period.¹⁴ Agency rulemaking has effectively replaced congressional lawmaking as the primary mode of American governance.¹⁵

The principal statute regulating agency rulemaking is the Administrative Procedure Act (APA). Congress enacted the APA in 1946 after a more than a decade of debate over the proper role of the regulatory state.¹⁶ The act makes virtually all “final” agency actions subject to judicial review¹⁷ and requires the federal courts to set aside any such action that is “arbitrary and capricious” or lacking “substantial” supporting evidence.¹⁸ The APA contemplates that the federal courts will play an important role in protecting the public against an agency that exceeds its statutory authority or that engages in arbitrary or unjustified regulatory actions.

Since the New Deal, Congress has wanted to be able to review agency actions itself rather than await litigation. To do so, for decades Congress used a device known as the “legislative veto.”¹⁹ It permitted either chamber to nullify an agency rule by

For a visual image of how many rules exist, consider this description: Near the close of the New Deal in 1938, the *Code of Federal Regulations*, the compendium of agency rules, contained 18,000 pages. In 1975, it consisted of 71,224 pages spread over 133 volumes. Today, it is more than 175,000 pages long in 236 volumes, approximately double what it was 40 years ago. If those regulations were laid end to end, they would constitute a 30-mile stretch of federal law. It would take someone who read them as he walked (and did nothing else) more than three years to finish (unless he mercifully committed seppuku somewhere along the way). In 1949, Winston Churchill remarked, “If you make 10,000 regulations you destroy all respect for the law.” The administrative state passed that threshold long ago and shows no signs of stopping. Add in the fact that any one new rule can impose multiple restrictions, and you can understand why many people believe that the Leviathan’s orders and restraints are as numerous as the grains of sand on the beach.

¹⁴ *Kisor v. Wilkie*, 139 S. Ct. 2400, 2446–47 (2019) (Gorsuch, J., concurring in judgment); *see also, e.g.*, CLYDE WAYNE CREWS, JR., *TEN THOUSAND COMMANDMENTS 2020: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE*, COMPETITIVE ENTER. INST. (2020). The phenomenon is a bipartisan one. *See* Christopher DeMuth, *The Regulatory State*, NAT’L AFFS., Summer 2012, at 70, 70 (“[T]he apparent partisan divide over regulation is illusory During the half-century before President Obama’s election, the greatest growth in regulation came under Presidents Richard Nixon and George W. Bush.”).

¹⁵ *See, e.g.*, CORNELIUS M. KERWIN & SCOTT R. FURLONG, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 2* (4th ed. 2011) (“Increasingly, rulemaking defines the substance of public programs. It determines, to a very large extent, the specific legal obligations we bear as a society. Rulemaking gives precise form to the benefits we enjoy under a wide range of statutes. In the process, it fixes the actual costs we incur in meeting the ambitious objectives of many public programs.”).

¹⁶ *See, e.g.*, DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014).

¹⁷ Some actions, such as decisions not to initiate an enforcement action, are not subject to judicial review by a private party. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821 (1985) (ruling that government nonenforcement decisions are not subject to review under the APA); *cf. Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (ruling that “in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.”).

¹⁸ *See, e.g.*, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021).

¹⁹ *See* Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2164 (2009) (“The problem of congressional control of the administrative state is not new. As early as the 1930s, members of Congress worried that wide delegations of administrative authority would leave the unelected bureaucracy politically unaccountable. Yet they also realized that Congress could not pass enough specific legislation to regulate the increasingly complex world. The legislative veto was seen as a partial solution to this dilemma. Congress would grant broad rulemaking authority to administrative agencies, but would reserve the ability to disapprove regulations that Congress disfavored. No single statute created an across-the-board legislative veto. Instead, over the course of sixty years, Congress enacted more than 200 federal statutes with individual legislative vetoes.”). *See generally* Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative*

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a simple majority vote.²⁰ In 1982, however, the Supreme Court in *INS v. Chadha*²¹ held the legislative veto unconstitutional on the grounds that it nullifies the President's role in the lawmaking process guaranteed by the Article I bicameralism and presentment provisions.²² Congress therefore needed a new way to review agency lawmaking. The CRA was its answer.

Enacted in 1996, the CRA provides that, before an agency “rule”²³ can go “into effect,” the issuing agency must submit the rule to the House of Representatives and Senate so that each chamber can review its effect and vote on a bill to nullify a particular action.²⁴ The text of the CRA is clear about that condition because it provides as follows: “*Before a rule can take effect*, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—(i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule.”²⁵ As one scholar has noted:

The very first sentence of the Congressional Review Act . . . states that, “Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the

Regulation: A Study of Legislative Vetoes, 90 HARV. L. REV. 1369 (1977) (historical discussion of legislative vetoes).

²⁰ “Borrowing from the presidential veto, a legislative veto would allow both chambers—and, sometimes, just one—to nullify a specific agency action that a majority found unauthorized or unwise. The rationale for the legislative veto was in part a version of ‘the greater includes the lesser’ argument. The argument was that Congress should be free to reserve a legislative veto because Congress need not create a particular agency or empower one to adopt rules. Part of the justification was practical. Delegation is risky because of the difficulty of ensuring that agency officials adhere to Congress’s mandates—what economists call a ‘principal-agent problem’—so Congress felt a need to nullify unwise agency actions before they became effective. The Supreme Court had also refused to limit the type or amount of authority that Congress could delegate. The legislative veto seemed perfect for the job.” Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J. L. & PUB. POL’Y 187, 194-95 (2018) (footnotes omitted).

²¹ 462 U.S. 919 (1982); *see also* *Process Gas Grp. v. Consumer Energy Council*, 463 U.S. 1216 (1983) (relying on *Chadha* to affirm lower court holdings that a two-House veto and a one-House veto are unconstitutional).

²² U.S. CONST. art. I, § 7, cls. 2 & 3.

²³ The CRA incorporates the definition of a “rule” from the APA, which defines that term as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” 5 U.S.C. § 551(4) (2018). The term includes virtually every document in which an agency sets forth its interpretation of the law. *See, e.g.*, Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1320 (1992) (“[R]ules” include “legislative rules, interpretive rules, opinion letters, policy statements, policies, program policy letters, Dear Colleague letters, regulatory guidance letters, rule interpretations, guidances, guidelines, staff instructions, manuals, questions-and-answers, bulletins, advisory circulars, models, enforcement policies, action levels, press releases, testimony before Congress, and many others”); Larkin, *supra* note 20, at 207 n.55 (collecting cases broadly construing the term “rule”).

²⁴ “The CRA falls between the quick-acting legislative veto and the deliberative process that Congress ordinarily uses to enact legislation. Like a legislative veto, the Act enables Congress to expeditiously nullify administrative rules that it finds unauthorized, unnecessary, or unwise before they can go into effect. Unlike a legislative veto, the CRA requires both houses of Congress to pass the identical joint resolution and the President to sign it (or Congress to override his veto) for a rule to be nullified. The CRA therefore satisfies the requirements of Article I described in *Chadha* while trying to preserve at least some of the expedition that the legislative veto afforded.” *Id.* at 197-98 (footnote omitted).

²⁵ 5 U.S.C. § 801(a)(1)(A) (2018) (emphasis added).

Comptroller General” several items. . . . There is nothing particularly mysterious or complicated about this mandate.²⁶

If a member of Congress introduces a bill to disapprove a new agency rule, the bill will come up for a vote. The vote comes up pursuant to a “fast-track” procedure that forces a quick decision on a disapproval resolution by avoiding parliamentary delays, including a Senate filibuster. If both chambers pass the disapproval resolution, it goes to the President for his signature or veto.²⁷

Of course, a President is unlikely to sign into law a resolution disapproving a rule that his or her administration issued, so the CRA is likely to have its greatest effect during the early days of a new administration when both the White House and Congress have changed political hands because of the prior November election. That was true at the beginning of the Trump Administration, which made use of the CRA to nullify the Obama Administration’s midnight rules.²⁸ Nonetheless, Congress can use a resolution as part of a negotiating process with an administration, even when one party holds power at both ends of Pennsylvania Avenue. Regardless, one would presume that the federal courts can prevent the government from acting unlawfully. The Tenth Circuit’s decision in *KNRC* raised that issue.

The dispute in *KNRC* hinged on the meaning of a provision in the CRA addressing judicial review. Section 805 of Title 5 provides as follows: “No determination, finding, action, or omission under this chapter shall be subject to judicial review.”²⁹ On its face, Section 805 appears to preclude all APA review of an agency’s non-compliance with the CRA’s submission requirements. But the text of Section 805 is just one feature of the CRA, which itself is but one component of Congress’s program for judicial review of agency actions set forth in the APA.

When the CRA is read as a whole, along with the text and purpose of the APA, it is clear that an agency rule not submitted to Congress as required by the CRA can be challenged in a pre-enforcement lawsuit brought under the APA. The government cannot enforce a rule that the CRA declares is not “law,” and the APA empowers a private party to bring a suit to prevent an agency’s unlawful conduct before it happens.³⁰

²⁶ Sean D. Croston, *Congress and the Courts Close Their Eyes: The Continuing Abdication of the Duty to Review Agencies’ Noncompliance with the Congressional Review Act*, 62 ADMIN. L. REV. 907, 908 (2010). The CRA was not the subject of pre-enactment congressional hearings, a committee report, or extensive floor debate. The only CRA “legislative history” consists of a post-enactment joint statement by its sponsors. See 142 Cong. Rec. 8196 (1996) (Joint Statement of Senators Nickles, Reid, and Stevens); *id.* at 6922, 6929 (Joint Explanatory Statement of House and Senate Sponsors); *id.* at 6907 (Statement of Rep. David McIntosh). The Government Accountability Office, however, agreed with the conclusion stated above in the text. See Letter from Susan A. Poling, GAO General Counsel, to Senator Pat Toomey, Pub. B-329272, Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation—Applicability of the Congressional Review Act to Interagency Guidance on Leveraged Lending 2 (Oct. 19, 2017), <https://www.gao.gov/assets/690/687879.pdf> [<https://perma.cc/ZG86-4Q9U>].

²⁷ Larkin, *supra* note 20, at 198-203.

²⁸ See Paul J. Larkin, Jr., *The Trump Administration and the Congressional Review Act*, 15 GEO. J.L. & PUB. POL’Y 505, 509-12 (2018).

²⁹ 5 U.S.C. § 805 (2018).

³⁰ See 5 U.S.C. § 706 (2018) (“The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . .”).

II. THE *KNRC* CASE

The *KNRC* case stemmed from a controversy over whether a bird known as the lesser prairie chicken, a member of the pheasant and grouse family, should be listed as threatened or endangered under the Endangered Species Act (ESA).³¹ In 2012, the Department of the Interior (DOI) proposed listing the bird as a threatened species.³² After four years of administrative proceedings and litigation, the government entered into a consent decree in which it agreed to rely on criteria set forth in a 2003 department rule when deciding how to classify the lesser prairie chicken.³³ Importantly, the DOI never submitted that 2003 rule to Congress.³⁴

In 2018, the Kansas Natural Resource Coalition, an organization of western Kansas county governments, sued the department over the listing issue, claiming that it was invalid as a matter of law because the government had never submitted it to Congress, as the CRA requires.³⁵ The U.S. District Court for the District of Kansas dismissed the complaint on the ground that the government's failure to comply with the CRA is not subject to judicial review.³⁶ On appeal, the U.S. Court of Appeals for the Tenth Circuit affirmed by a divided vote, disagreeing whether the text of the CRA forecloses any judicial challenge to an agency's noncompliance.³⁷ The *KNRC* plaintiffs sought review in the Supreme Court, which recently turned down their request.

III. THE IMPORTANCE OF JUDICIAL REVIEW TO ENFORCEMENT OF THE CRA

Like the Tenth Circuit majority in *KNRC*, most courts have read Section 805 as a complete bar on judicial review, including—quite paradoxically—any review over an agency's failure to comply with the CRA.³⁸ Yet, that *McGuffey's Readers* approach to statutory interpretation is mistaken.³⁹

Start with this hypothetical. Suppose the government brings a civil or administrative action (or a criminal prosecution; it's a fielder's choice to you) against a private party, seeking damages or a fine (or imprisonment, if you chose a criminal prosecution) in reliance on a rule that an agency did not submit to Congress. Then, ask yourself this question: May the defendant raise as a defense the fact that the government has not submitted the rule to Congress? That is, may the defendant argue that, given the government's failure to comply with the CRA, the rule has never gone "into effect," and that therefore the government's case fails as a matter of law because the rule is not a "law"? The natural conclusion should be, "Of course

³¹ 16 U.S.C. § 1533 (2018).

³² *Kansas Nat. Res. Coal. v. Dep't of Interior*, 971 F.3d 1222 (10th Cir. 2020).

³³ *Policy for Evaluation of Conservation Efforts When Making Listing Decisions*, 68 Fed. Reg. 15,100 (Mar. 28, 2003).

³⁴ *KNRC*, 971 F.3d at 1238 (Lucero, J., dissenting) ("This much is undisputed: the Department of the Interior ('DOI') has violated the Congressional Review Act . . . and has indicated no intent to remedy its violation.").

³⁵ *KNRC*, 971 F.3d at 1230.

³⁶ *Kansas Natural Resource Coalition v. U.S. Dep't of Interior*, 382 F. Supp. 3d 1179 (D. Kan. 2019).

³⁷ *Compare KNRC*, 971 F.3d. at 1234-38 (CRA compliance issues are not subject to judicial review), *with id.* at 1238-57 (Lucero, J., dissenting) (such issues are subject to judicial review).

³⁸ See Larkin, *supra* note 20, at 218-19 (discussing lower court case law).

³⁹ *McGuffey Readers* were a "series of elementary school reading books that were widely used in American schools beginning in the 1830s." BRITANNICA, <https://www.britannica.com/topic/McGuffey-Readers> (last accessed July 1, 2021).

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a defendant can assert that defense. If the CRA provides that a rule cannot go ‘into effect’ unless and until the issuing agency submits the rule to Congress and waits for Congress to do nothing or fails to pass a disapproval resolution, then the rule is not yet ‘law’.”

That conclusion should be determinative. It has been true since Magna Carta in 1215⁴⁰ that the government may not deprive someone of “life, liberty, or property” without first affording him or her, in the words of the Fifth Amendment, “due process of law.”⁴¹ Most discussions of the Due Process Clause involve the issue whether the administrative or adjudicatory process afforded a party is fundamentally fair or whether the government can undertake some deprivations at all, regardless of the fairness of the available procedures.⁴² But that does not exhaust the limitations that the Due Process Clause imposes on the government. The government also cannot punish someone unless he has broken the “law,”⁴³ and Article I of the Constitution defines the process by which Congress can turn a “bill” into a “law.”⁴⁴ Neither a bill passed by only one house of Congress, a bill vetoed by the President (and not overridden by Congress), nor a bill introduced into Congress but never brought up for a vote are “laws” for Article I purposes. *Chadha* makes that clear. The CRA creates a parallel requirement for an agency “rule” to become “law”: the rule first must be submitted to Congress for its review. Noncompliance with that requirement means that an unsubmitted agency rule has not become “law,” and, in turn, that means noncompliance with the CRA is fatal to the government’s claim that someone has violated an agency rule. And if that is true, the *KNRC* plaintiffs were entitled to bring this pre-enforcement action to seek invalidation of the rule. Why?—Because a private party need not wait until for the “hammer” to fall before asking a federal court to protect it against unlawful government activity, as the Supreme Court unanimously held in *Sackett v. EPA*.⁴⁵

In *KNRC*, the Tenth Circuit misread the CRA because it failed to recognize that an unsubmitted rule is not a “law” that the government can enforce. Properly viewed, the CRA works together with the APA to protect private parties against actual, threatened, or potential lawless agency action—the very type of conduct that

⁴⁰ See Paul J. Larkin, Jr., *The Private Delegation Doctrine*, 73 FLA. L. REV. 31, 71 (2021) (“The most relevant (and well-known) provision in Magna Carta is Chapter 39, which is ‘a plain, popular statement of the most elementary rights’ of Englishmen. In essence, the provision states that ‘no free man is to be imprisoned, dispossessed, outlawed, exiled or damaged without lawful judgement of his peers or by the law of the land.’ Chapter 39 prohibited the king from acting in a wanton, lawless manner—to speak colloquially, from taking the law into his own hands. It accomplished that result by guaranteeing that the Crown would be subject to the ‘rule of law’.”).

⁴¹ U.S. CONST. amend. V.

⁴² See Paul J. Larkin Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 297-303 (2017).

⁴³ See, e.g., *Chapman v. United States*, 500 U.S. 453, 465 (1991) (ruling that the government cannot punish someone “unless and until it proves his guilt beyond a reasonable doubt” of the charged crime); Larkin, *supra* note 20, at 223-30 (explaining why the Due Process Clause requires the government to justify its conduct under the “law”); see also, e.g., JOHN PHILLIP REID, *THE RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 93 (2004) (“Rule-of-law belonged to the seventeenth and eighteenth centuries. It was . . . the cornerstone of the jurisprudence of liberty in the years when liberty was struggling to survive.”).

⁴⁴ See *supra* notes 21-21 and accompanying text.

⁴⁵ 566 U.S. 120, 127 (2012).

gave rise to the need for Magna Carta and the Due Process Clause.⁴⁶ That conclusion is important because it raises the bar that the government must overcome to deny the *KNRC* plaintiffs their day in court. The Supreme Court has been reluctant to construe a federal statute as precluding judicial review of a claim that the government has acted unconstitutionally. Yet that is precisely what the government would be doing were it to invoke an unsubmitted agency rule as a basis for seeking to hold a private party liable in an administrative, civil, or criminal proceeding. The Tenth Circuit failed to realize that a government action rendered “unlawful” by the CRA because the agency rule has not gone “into effect” raises a claim that the agency has acted not merely without statutory authority but also *unconstitutionally*.⁴⁷ At a minimum, that provides a powerful reason for not construing Section 805 of the CRA as barring judicial review of a claim that an agency has violated that statute.⁴⁸

For that reason, only the interpretation of the CRA offered here advances the purpose of both the CRA and the *parent* statute—the APA—of which the CRA is but one component. It has been settled law since the Supreme Court’s 1803 decision in *Marbury v. Madison* that it is Article III courts have the final say on the meaning of a law.⁴⁹ The APA enforces that rule by virtue of a “strong presumption” that the

⁴⁶ See Larkin, *supra* note 20, at 224-27.

⁴⁷ *Id.* at 227 (footnotes omitted):

The upshot of that history is this: an agency has no authority to act except what it receives from Congress; the government must be authorized by law to infringe on someone’s life, liberty, or property; and a statute that has the intent and effect of permitting an agency to evade those limitations—that is, a law that exempts the government from complying with the rule of law—is not a law but a license to act lawlessly. Due process demands that there be some already-existing law for the government to infringe on someone’s life, liberty, or property; the government cannot make it up as it goes along. Otherwise, the government’s actions would not be authorized by, and would be at odds with, the “due process of law” (or, as it would have been said in 1215, “the law of the land”).

⁴⁸ *Id.* at 227-28 (footnotes omitted):

That conclusion considerably raises the stakes as far as the preclusion of judicial review is concerned. Since 1953, when Harvard Law School Professor Henry Hart first discussed in depth Congress’s power over the jurisdiction of the federal courts, constitutional law scholars have vigorously debated whether Congress can preclude judicial review of a private party’s claim that a government official has violated the Constitution. Congress can channel the resolution of all legal claims into a particular scheme when it offers an opportunity for review by an Article III court at the end of the process. It is an entirely different matter, however, to interpret a statute as foreclosing *any* judicial review of a constitutional claim, particularly when the defendant has had no prior opportunity to raise that claim in an Article III court and it is offered as a defense in a government enforcement action. The Supreme Court has been exceedingly reluctant to construe an act of Congress to deny a party any opportunity to assert a constitutional claim. Reading a law in that manner would pose extraordinarily difficult constitutional issues because it would amount to an attempt by Congress to legislate around the nation’s fundamental law by zoning out federal constitutional claims.

⁴⁹ 5 U.S. (1 Cranch) 137, 177 (1803). The Justice Department’s opinion as to what a law means is just that, an opinion, not a controlling decision; that job is for the courts. See, e.g., *Abramski v. United States*, 573 U.S. 169, 191 (2014) (“We may put aside that ATF has for almost two decades now taken the opposite position, after reflecting on both appellate case law and changes in the statute. . . . The critical point is that criminal laws are for courts, not for the Government, to construe. See, e.g., *United States v. Apel*, 571 U.S. 359, 369 ([W]e have never held that the Government’s reading of a criminal statute is entitled to any deference”). We think ATF’s old position no more relevant than its current one—which is to say, not relevant at all.”); Paul J. Larkin, Jr., *Agency Deference after Kisor v. Wilkie*, 18 *GEO. J.L. & PUB. POL’Y* 105, 131-40 (2020). Even

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potentially adverse actions of a government official are subject to judicial review in a pre-enforcement action brought by a private party under the APA.⁵⁰ Yes, Congress can foreclose judicial review of a statutory issue, and sometimes it has done so. But there ordinarily is a sensible reason for preclusion, such as the belief that agency officials possess subject matter expertise that judges lack or because Congress chose to limit judicial review to challenges by particular parties.⁵¹ Rationales like those, however, do not apply here. The Tenth Circuit never explained why a statute designed to curb agency excesses should be left in the hands of the very officials that the act was meant to control, and no reason jumps to mind. Atop that, the Supreme Court's *Chevron* doctrine does not permit an agency to force a mistaken reading of a statute on the courts.⁵² Furthermore, no litigant can offer a binding interpretation of a law, not even when that litigant is the Justice Department.⁵³ Accordingly, CRA compliance is a classic case where judicial review is necessary.

To be sure, the evident purpose of CRA's Section 805 is to keep the courts from second-guessing decisions made by Congress and the President.⁵⁴ But the

the Supreme Court's *Chevron* doctrine does not permit an agency to force a mistaken reading of a statute on the courts. *See Chevron U.S.A. Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 842-43 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *id.* at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

⁵⁰ *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 489 (2015); *see also, e.g., Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020); *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018); *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1359 (2018); *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 480 (2015); *Sackett v. EPA*, 566 U.S. 120, 128 (2012); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967); *supra* note 4.

⁵¹ *See, e.g., Dep't of the Navy v. Egan*, 484 U.S. 518 (1988) (ruling that judicial review is unavailable to challenge the revocation of a security clearance); *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984) (ruling that judicial review of milk marketing orders is available for handlers and producers, but not consumers).

⁵² *See Chevron U.S.A. Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 842-43 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *id.* at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

⁵³ *See supra* note 49.

⁵⁴ Congress expressly exempted itself from judicial review under the APA in 1946. *See* 5 U.S.C. § 804 ("For purposes of this chapter—(1) The term 'Federal agency' means any agency as that term is defined in section 551(1)."); *id.* § 551 ("For the purpose of this subchapter—(1) 'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) the Congress . . ."); *Larkin, supra* note 20, at 221. That exception reflects the longstanding principle that the traditional remedy for any mistakes made by a legislature is to "throw the bums out" at the next election, rather than sue the assembly itself. *See Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) ("The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."). The APA does not expressly exempt the President, but in 1995, before the CRA became law, the Supreme Court construed the APA as not reaching the President. *See Franklin v. Massachusetts*, 505 U.S. 788 (1992); *see Larkin, supra* note 15, at 221-22. The CRA does not modify either rule, and the reading urged here also does not. *Larkin, supra* note 15, at 221-22. Only agencies must stand in the box, as the APA envisioned.

interpretation offered here would not have that intrusive effect. Section 805 would still foreclose judicial review of all actions taken under the CRA *by Congress or the President*—viz., by everyone *other than the responsible agency*. In fact, the interpretation offered here is the only one that actually serves the purpose of the CRA because it empowers the courts to bring agencies to heel for their noncompliance with that statute. Otherwise, agencies can willfully break the law and in the process, thumb their noses at Congress and the courts. It is impossible to believe that Congress ordered the courts to “see no evil” by an agency, or that it matters whether a private party raises that claim in an answer or a complaint. When read as a whole, the CRA and the APA permit the courts to call out an agency for breaking the law.

IV. AGENCY COMPLIANCE WITH THE CRA IS A RECURRING ISSUE

It should surprise no one that agencies can fail to submit new rules to Congress. People are imperfect, and people staff agencies, so some number of instances of accidental or negligent noncompliance would be expected to occur. We presume that agencies will comply with the law,⁵⁵ so we would normally anticipate that the number of agency defaults would be minimal. To use the vernacular, this issue should be no biggie.

But it is, because agencies have been repeat offenders. The number of unsubmitted rules is—at a minimum—in the thousands.⁵⁶ Could that number be in the tens of thousands? The available evidence suggests that it might.⁵⁷ Agencies have made no effort to identify (let alone remedy) them all because the government is not inclined to publicize the number of instances in which its personnel broke the law. If it did, candor could generate some testy exchanges with members of Congress at budget, appropriations, and nomination hearings. That is bad for the agency’s image (and the witness’s digestion) and creates problems for any administration. The upshot for the executive branch is that agencies have no incentive to disclose their shortcomings.

⁵⁵ See, e.g., *United States v. Chem. Fndn.*, 272 U.S. 1, 14-15 (1926).

⁵⁶ See, e.g., Curtis W. Copeland, Congressional Review Act: Rules Not Submitted to GAO and Congress, Cong. Res. Serv., R40997 (2009); Sean D. Croston, *Congress and the Courts Close Their Eyes: The Continuing Abdication of the Duty to Review Agencies’ Noncompliance with the Congressional Rev. Act*, 62 ADMIN. L. REV. 907 (2010); Susan E. Dudley, *New Implications of the Congressional Review Act*, GEO. WASH. U. REGULATORY STUD. CNTR. (Nov. 8, 2017), <https://regulatorystudies.columbian.gwu.edu/new-implications-congressional-review-act> [<https://perma.cc/LJR4-DMUR>]; Larkin, *supra* note 28, at 513 (“The exact number of unsubmitted rules is a matter of some conjecture, but the number is likely to be considerable. Different parties, including the Government Accountability Office (GAO), have analyzed or estimated the relevant number. For example, the GAO concluded that agencies had failed to submit more than 1,000 rules to Congress between 1999 and 2009. Others have estimated that there are hundreds or thousands of rules that still have not been filed with Congress and the Comptroller General. Whatever the exact number is, the likelihood is virtually nil that there is a null set of important regulations that agencies did not submit to Congress. That is particularly true when you remember that the reach of the CRA is quite broad, taking in whatever types of guidance documents an agency might develop.”) (footnotes omitted).

⁵⁷ See MAJORITY STAFF REPORT, HOUSE COMM. ON OVERSIGHT AND GOVERNMENT REFORM, 115TH CONG., SHINING LIGHT ON REGULATORY DARK MATTER 10 (Mar. 2018) (“The information obtained by the Committee shows, of the more than 13,000 guidance documents identified, agencies sent only 189 to Congress and <the> GAO in accordance with the CRA. To be sure, not all of the more than 13,000 guidance documents disclosed to the Committee necessarily qualify as a rule under the CRA. However, many of these guidance documents would likely qualify as rules under the CRA’s capacious definition.”) (footnote omitted).

In fact, the incentives work in the other direction. The reward structure under which government agencies operate compels them to generate an ever-increasing number of enforcement actions and fines because that is how agencies justify their budgets.⁵⁸ Every budget season, agencies march up to Capitol Hill with reports, charts, and written statements explaining how they used their past *inputs* (e.g., appropriations, personnel) to generate past *outputs* (e.g., an increased number of new enforcement actions taken), rather than present or future *outcomes* (e.g., overall decreases in crime or improvement in public health). Why?—Because that last item is, comparatively speaking, far too difficult for an agency to measure.⁵⁹ Accordingly, agencies have a powerful incentive to threaten litigation to achieve as many out-of-court settlements as possible simply to receive the last fiscal year’s appropriations, let alone any future increases.

A common government enforcement practice begins with a demand letter sent to an alleged violator, threatening fines and enforcement actions unless the recipient agrees to settle for a lesser sum. Commercial businesses exist to make a profit, and not-for-profit businesses also don’t like to wind up in the red, so the cost of litigation bears heavily on a company’s decision whether to grit its teeth and choose a comply-and-pay response, rather than a defend-and-litigate option, even when the agency action is clearly abusive.⁶⁰ The agency, of course, does not pay private counsel for litigation—agency and Justice Department lawyers handle those cases—so the agency does not feel any pinch in 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. If the rule that is the basis for the government’s allegation was adopted without complying with the CRA, the federal government can take advantage of a private party’s litigation costs and force businesses to comply with a demand letter that should have no legal force or effect.

That practice will only increase over the next few years. In 2019, President Donald Trump issued an executive order requiring agencies to make their rules publicly

⁵⁸ 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).

⁵⁹ See, e.g., Paul J. Larkin, Jr., *Reflexive Federalism*, 44 HARV. J.L. & PUB. POL’Y 523, 578 (2021) (“Success is ordinarily measured by rates, and there is no one success rate for every enterprise in life. In baseball, a batter who hits safely once in every three at-bats will wind up in the Hall of Fame, whereas in football, a quarterback who completes only one pass out of three will wind up on the bench, and a surgeon who has only one-third of his patients survive the procedure won’t be practicing medicine for long.”) (footnote omitted); Paul J. Larkin, Jr. & GianCarlo Canaparo, *Are Criminals Bad or Mad? Premeditated Murder, Mental Illness, and Kahler v. Kansas*, 43 HARV. J.L. & PUB. POL’Y 85, 150 (2020) (“Think of the questions that must be answered to do that job properly. Are all justifications [for criminal punishment] of equal importance or do some—say, deterrence—carry more weight than others—say, retribution? How do you measure a punishment’s effectiveness? How effective must a punishment be? How do you trade off short-term versus long-term effectiveness? Are some successes—such as uncovering espionage plots or intercepting terrorist attacks—worth more than others are—such as apprehending mass murderers (or serial killers) or convicting senior members of an organized crime family? There are no easy answers to those questions, let alone objective ones.”) (footnote omitted).

⁶⁰ Cf. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559-60 & n.6 (2007) (in deciding the proper standard to review the sufficiency of a civil antitrust complaint, the Court noted the “potentially enormous expense of discovery” in such cases if the standard was set too low).

available on their websites.⁶¹ On his first day in office, however, President Joe Biden withdrew that requirement.⁶² The result will be a return to a practice inimical to any reasonable understanding of government regulatory enforcement. Agencies will adopt rules that they do not submit to Congress and that remain secret until they are trotted out in an agency demand letter threatening fines for conduct that no one knew was unlawful. How do we know that will occur?—Because the government has aggressively argued, in the Tenth Circuit and everywhere else, that an agency’s willful noncompliance with the CRA is *not* subject to judicial review. The Biden Administration has clearly signaled that it sees no problem with the practice of “secret” agency rules, and the Justice Department has made clear that it will not let the courts intervene to stop that practice, so there is nothing to stop agencies from giving in to the darker angels of their nature.

Judicial review of an agency’s noncompliance with the CRA is critical to protect private parties against the abusive government practices that will inevitably follow. Unless the courts can intervene, ignorance of the law will not be offered by a private party in defense of unlawful conduct, but it will be used by the government to extract fines from private parties lacking any knowledge that they had done anything wrong.⁶³ As long as the APA and CRA are on the books, that is not a way the government can lawfully run the railroad—at least not if the courts can intervene. If the courts cannot review the government’s lawbreaking, however, that game plan will play out without end. Hopefully, the Supreme Court will soon end that practice.

CONCLUSION

Congress enacted the CRA to prevent the executive branch from using new rules against private parties unless and until the issuing agency submitted the rule to Congress for its review and possible nullification. The Tenth Circuit’s decision in *KNRC* gives the executive branch a clear path to nullify the CRA: don’t submit a rule to Congress because nothing good can come of it. If the agency submits the rule to Congress, Congress might pass a resolution of disapproval, or at least embarrass the agency during the floor debates over the rule. By contrast, if the agency sits on the rule, no court can order the agency to comply with the CRA or stop the agency from using it against private parties. That administrative law version of “heads I win, tails you lose” benefits no one except agency officials bent on disregarding the law. Properly read, the CRA does not permit an agency official to ignore the law in that manner. The Supreme Court needs to make that clear.

⁶¹ Promoting the Rule of Law Through Agency Guidance Documents, Exec. Order No. 13891 (Oct. 15, 2019), <https://www.federalregister.gov/documents/2019/10/15/2019-22623/promoting-the-rule-of-law-through-improved-agency-guidance-documents>.

⁶² Revocation of Certain Executive Orders Concerning Federal Regulation, Exec. Order No. 13992 (signed Jan. 20, 2021; published Jan. 25, 2021), <https://www.federalregister.gov/documents/2021/01/25/2021-01767/revocation-of-certain-executive-orders-concerning-federal-regulation>.

⁶³ The Miscellaneous Receipts Act, 31 U.S.C. § 3302(a) (2018), directs federal officers and employees to pay into the treasury any money, including fines, that they receive in the course of their official duties. See Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1364–70 (1988).