No. 21-1317

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CITIZENS FOR CONSTITUTIONAL INTEGRITY, and

SOUTHWEST ADVOCATES, INC.,

Plaintiffs-Appellants,

v.

THE UNITED STATES OF AMERICA, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado
No. 1:20-cv-3668-RM-STV
The Honorable Judge Raymond P. Moore

PLAINTIFFS-APPELLANTS' REPLY BRIEF

ORAL ARGUMENT REQUESTED

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10th Cir. R. 28.2(C)(3), directs Citizens for Constitutional Integrity and Southwest Advocates, Inc., to identify this new, related appeal: *Citizens for Constitutional Integrity v. Office of Surface Mining Reclamation and Enforcement*, No. 22-1056, *appeal docketed* (10th Cir. Feb. 28, 2022).

GLOSSARY

2017 Statute	Act of Feb. 16, 2017, Pub. L. No. 115-5, 131 Stat. 10
2021 Statute	Act of June 30, 2021, Pub. L. No. 117-23, 135 Stat. 595
APA	The Administrative Procedure Act, 5 U.S.C. §§ 701-706
Cloture Rule	Standing Rule of the U.S. Senate XXII.2
Citizens	Citizens for Constitutional Integrity and Southwest Advocates, Inc.
GCC	GCC Energy, LLC
Mine	The King II Mine and its expansions
Modification Approval	Mining plan modification to mine within Federal Coal Lease COC-62920 at the King II Mine, I-App-13
OSHA	Office of Safety and Health Administration
The one-way ratchet	5 U.S.C. §§ 802(d)(1) (majority), 801(b)(2), and Senate Rule XXII.2 (supermajority)
OSMRE	The Office of Surface Mining Reclamation and Enforcement, the Department of the Interior, Secretary of the Interior Deb Haaland, Acting OSMRE Director Glenda Owens, and Acting Assistant Secretary for Land and Minerals Management Laura Daniel-Davis
Review Act	Contract with America Advancement Act of 1996 § 251, Pub. L. No. 104-121, 110 Stat. 847, 868 (codified at 5 U.S.C. §§ 801-808) (Mar. 29, 1996)
SMCRA	Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328)

INTRODUCTION

OSMRE (collectively, the United States, the Office of Surface Mining Reclamation and Enforcement, the Department of the Interior, Secretary of the Interior Deb Haaland, Acting OSMRE Director Glenda Owens, and Acting Assistant Secretary for Land and Minerals Management Laura Daniel-Davis) argued itself into a double-bind. OSMRE's justifications to satisfy equal protection and due process violate the separation of powers; without them, it has no defense to equal protection and due process violations. Every explanation violates the Constitution one way or another.

When Congress adopts lawmaking rules that "ignore constitutional restraints," courts strike them down. *United States v. Ballin*, 144 U.S. 1, 5 (1892); *Clinton v. City of New York*, 524 U.S. 417, 448 (1998); *INS v. Chadha*, 462 U.S. 919, 941 (1983). The King II Mine Modification approval, I-App-13, relies on unconstitutional statutes. The Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328), and the Stream Protection Rule, 81 Fed. Reg. 93,066 (Dec. 20, 2016), which remain in effect, require the Court to vacate the Modification approval.

ARGUMENT

The Senate created two voting thresholds for different bills:

1. A simple majority for rescinding statutory authority for agency rules, Review Act, (the Contract with America Advancement Act of 1996 § 251, Pub. L. No. 104-121, 110 Stat. 847, 868 (codified at 5 U.S.C. §§ 801-808, 801(d)(1)) (Mar. 29, 1996)), and

2. A sixty-vote threshold, Cloture Rule, Standing Rule of the U.S. Senate XXII.2 (three-fifths of all enrolled Senators).

OSMRE asserts Congress simply created, in the Review Act, an additional, "expedited procedure" and a "more efficient method to oversee agency rulemaking." Br. for Defs.-Appellees 10, 12 (OSMRE Br.). Although the U.S. Constitution's Article I, Section 5, gives each house of Congress broad powers to define its own rules, Section 7 limits Congress to exercising its Legislative Power using "a *single*, finely wrought and exhaustively considered, procedure." *Chadha*, 462 U.S. at 951 (emphasis added).

That procedure directs simple majorities. *Ballin*, 144 U.S. at 6-7 ("when a quorum is present, the act of a majority of the quorum is the act of the body. . . . No [other] limitation is found in the Federal Constitution, and therefore the general law of such bodies obtains."). If Congress wants to create "a new procedure" for passing laws, the Constitution requires it to do so "not by legislation but through the

amendment procedures set forth in Article V of the Constitution." *Clinton*, 524 U.S. at 449; *Chadha*, 462 U.S. at 958 n.22. By admitting Congress created two procedures under Section 7, OSMRE effectively concedes the two thresholds violate the separation of powers.

In other statements, OSMRE makes equally dooming admissions. To defend against the separation of powers violation, OSMRE proposes the "Senate could amend or repeal the cloture rule." OSMRE Br. 15 (emphasis added). To solve the equal protection violation, it asserts the Senate could alter its voting thresholds using the simple-majority "nuclear option," as it did for judicial appointees. *Id.* at 4-5, 21. By arguing that new rules would cure the existing violations, OSMRE concedes violations of the Constitution right now.

The Senate's two voting thresholds create a one-way ratchet whose every use erodes Executive Power and protects it from future Senate majorities. For centuries, the Supreme Court denied past legislatures' ability to impede future legislatures. *See Fletcher v. Peck*, 10 U.S. 87, 136 (1810); *Lockhart v. United States*, 546 U.S. 142, 147 (2005) (Scalia, J., dissenting). Scholars call that tactic "legislative entrenchment" and most reject it:

- Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 247 (1997);
- Bruce Ackerman & Akhil Amar *et al.*, *An Open Letter to Congressman Gingrich*, 104 YALE L. J. 1539 (1995);
- Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 382 n.5 (1987) (explaining the term);
- Paul W. Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L.Q. 185 (1986);
- Charles L. Black Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972).

The Supreme Court overturned entrenchment in the form of legislative district malapportionment. *Reynolds v. Simms*, 377 U.S. 533, 567 (1964). The Constitution also prohibits this one-way ratchet.

I. The Senate's two voting thresholds violates Article I, Section 7.

OSMRE points to other parts of Section 7 to argue that the Review Act satisfies the Constitution because it requires bicameralism (passage by both houses of Congress) and presentment (signature by the President). OSMRE Br. 10-12. Citizens for Constitutional Integrity and Southwest Advocates, Inc. (Citizens), assert no violations of those procedures. The Review Act, however, does not satisfy Article I, Section 7, because it allows no pocket-veto of Review-Act statutes. 5 U.S.C. § 801(a)(3); *The Pocket Veto Case*, 279 U.S. 655, 677-78 (1929) ("The

power thus conferred upon the President cannot be narrowed or cut down by Congress . . . ."); *Chadha*, 462 U.S. at 958 n.23.

Section 7 prohibits exercising Legislative Power with different voting thresholds. Houses of Congress can change internal procedures with their Section 5 power to "determine the Rules of its Proceedings." But when Congress affects people outside the Capitol walls without following Section 7, Courts overturn it. *Chadha*, 462 U.S. at 955-57 ("an exercise of legislative power" is "subject to the standards prescribed in Art. I."); *United States v. Smith*, 286 U.S. 6, 29, 33 (1932).

Article I, Section 7 sets each house's voting threshold at a simple majority. Citizens' Br. 59-64. Changing voting thresholds violates it. *Id.*; *Ballin*, 144 U.S. at 6-7.

Despite Section 7's limits, the Review Act's one-way ratchet relies on two voting thresholds. *Compare* 5 U.S.C. § 802(d) (rescind statutory authority with a majority) *with id.* § 801(b)(2) (restore only with the sixty-vote Cloture Rule), *and* Senate Rule XXII.2 (supermajority) (collectively, the one-way ratchet). That two-voting-threshold system violates Section 7. *See Chadha*, 462 U.S. at 954 ("Amendment and repeal of statutes, no less than enactment, must conform with Art. I.").

OSMRE persists that the Court can ignore the Review Act and the Cloture Rule because they do not change the Senate's simple-majority voting threshold for final passage. OSMRE Br. 18. The Supreme Court already rejected that argument. The Constitution applies even to preliminary votes when they "may determine the final result." *Nixon v. Herndon*, 273 U.S. 536, 540 (1927). Votes on whether to close debate in the Senate, like the Cloture Rule, determine final results. *See King v. Burwell*, 576 U.S. 473, 492 (2015); VALERIE HEITSHUSEN & RICHARD S. BETH, CONG. RESEARCH SERV., FILIBUSTERS AND CLOTURE IN THE SENATE 18 (Apr. 7, 2017). The Senate's two-voting-threshold system violates the Constitution.

OSMRE asks this Court to dismiss this case because it presents issues of first impression. OSMRE Br. 12. Courts do not dismiss cases for that reason. "[T]he Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid." *Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) (quotations omitted).

II. Article III recognizes Citizens' standing to assert that Congress's two voting thresholds violate the Constitution.

OSMRE argues Citizens lack Article III standing to challenge the Cloture Rule alone. OSMRE Br. 11-12. That argument ignores the

reality that Congress created a system with the Review Act setting one lower voting threshold and the Cloture Rule setting a higher threshold. 5 U.S.C. § 802(d), 801(b)(2). Before the Review Act, the Cloture Rule had required sixty votes to set a thirty-hour time limit until the Senate votes on most bills. Citizens' Br. 15-16. The Review Act creates a workaround for rescinding statutory delegations to agencies.

The Review Act lets a simple majority vote set a ten-hour debate limit on those statutes—regardless of amendments, motions to postpone, or other parliamentarian devices. 5 U.S.C. § 802(d)(1), (2). After ten hours elapses, the Review Act requires the Senate to vote. *Id.* § 802(d)(3). Congress provided this meticulous detail to ensure a simple-majority-threshold alternative to the Cloture Rule.

After Congress rescinds a statutory delegation, the Review Act prohibits agencies from issuing or reissuing "substantially the same" rules unless or until "specifically authorized" by a later statute. *Id.* § 801(b)(2). Because that section created no special ten-hour debate limit, no statute can "specifically authorize[]" a new rule without sixty senators invoking the Cloture Rule. This inequality creates the one-way

ratchet. Congress considered the two voting thresholds together, and Citizens' claims arise from considering them together.

The two thresholds, together, caused Citizens' injuries. Article III standing requires plaintiffs to meet the "triad of injury in fact, causation, and redressability . . . ." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 103 (1998). To analyze standing, courts assume plaintiffs succeed on the merits of their claims and test the consequences of that success. *Initiative Referendum Institute v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006) (en banc); *see Warth v. Seldin*, 422 U.S. 490, 500 (1975). Plaintiffs satisfy standing for procedural injuries if success creates "some possibility" the agency will "reconsider the decision" that harmed them. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

Southwest Advocates' members live downgrade of the King II Mine, draw well water from aquifers, and can see the La Plata River, the Mine's water source, from their homes. II-App-172 to -182. OSMRE admits that, as a result of earlier mining, "[a]djacent landowners are reporting coal dust and methane smell in well water." I-App-41. If OSMRE had implemented the Stream Protection Rule, it would have completed a more thorough baseline assessment of water resources and

could have better protected community water supplies. These water risks arise from Congress unconstitutionally rescinding the statutory delegation for the Stream Protection Rule. Act of Feb. 16, 2017, Pub. L. No. 115-5, 131 Stat. 10 (2017 Statute).

If the Senate had used equal, 60-vote thresholds, its 54 votes could not have invoked cloture, and the 2017 Statute would not have passed. *See* 163 Cong. Rec. S632 (Feb. 2, 2017). If Congress had not violated the separation of powers, equal protection, and due process, OSMRE would be applying the Stream Protection Rule. *See* Congressional Nullification, 82 Fed. Reg. 54,924 (Nov. 17, 2017). Citizens demonstrated standing.

OSMRE contradicts Supreme Court precedent when it asks this Court to consider separately Citizens' standing to challenge the Cloture Rule. OSMRE Br. 12. When claims arise from relationships between two statutes, the Supreme Court considers the "two statutes . . . together as parts of one and the same law . . . ." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 414 (1920); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993).

OSMRE's argument that Citizens lack standing because the 2017 Statute was "not subject to" the Cloture Rule is absurd. OSMRE Br. 12. If OSMRE is correct, the Supreme Court wrongly decided *Brown v. Board of Education*, 347 U.S. 483 (1954). Those black-student plaintiffs were "not subject to" the laws that applied to white students. Courts routinely recognize standing to challenge a system of laws when the claims challenge that system.

III. The Review Act and the Cloture Rule's one-way ratchet violates the separation of powers.

A. OSMRE admits Congress created a second procedure for exercising legislative power.

In their opening brief, Citizens demonstrated the separation of powers prohibits Congress from creating a one-way ratchet legislative structure that inexorably reduces Article II Executive Power. Citizens' Br. 35-40. In response, OSMRE argues that Congress can define agency power however it likes. OSMRE Br. 14. OSMRE misapprehends the "structural protections against abuse of power," which are "critical to preserving liberty." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986); *see also Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2219 (2020) (Thomas, J.,

concurring in part) ("We simply cannot compromise when it comes to our Government's structure").

No one disputes that, in our republic, the legislative branch wields broad power to define agency power and to bind agencies. *Contra* OSMRE Br. 14, 16. But Article II limits Article I. The Framers never "intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously to weaken it." *Myers v. United States*, 272 U.S. 52, 127 (1926). This case does not ask whether Congress can control agencies through legislation; it asks whether Congress can create a legislative structure that inevitably decreases, undermines, and erodes Executive Power every time Congress uses it. The separation of powers prohibits that result. *See Stern v. Marshall*, 564 U.S. 462, 502-03 (2011); *Mistretta v. United States*, 488 U.S. 361, 382 (1989); *Chadha*, 462 U.S. at 958.

Because of Congress's extensive power, the Supreme Court is "sensitive to its responsibility to enforce" the separation of powers when Congress manages agencies because "representatives of the majority in a democratic society, if unconstrained, may" threaten liberty. *Metro.*

Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 273 (1991). James Madison warned against Congress passing complicated and indirect measures to evade the separation of powers, and this one-way ratchet qualifies. *See* THE FEDERALIST No. 48 at 317 (Random House ed., 2000).

When Congress exercises its Legislative Power over agencies, the Supreme Court ensures that Congress does not breach the separation of powers by requiring Congress to "follow the '*single*, finely wrought and exhaustively considered, procedures' specified in Article I." *Metro. Wash. Airports*, 501 U.S. at 274 (quoting *Chadha*, 462 U.S. at 951, emphasis added). But OSMRE admits repeatedly that Congress created a *second* procedure. OSMRE Br. 10, 13 ("an expedited procedure"), 20, 21 ("a default, streamlined procedure"), 24. OSMRE thus admits that Congress violated the separation of powers by creating the Senate's two voting thresholds. *See Metro. Wash. Airports*, 501 U.S. at 274; *Chadha*, 462 U.S. at 958 n.22.

B. Both regulatory and deregulatory Review Act statutes erode Executive Power.

Citizens explained in their opening brief that every use of the Review Act erodes Executive Power. Citizens' Br. 5, 34. OSMRE disputes that

conclusion by pointing to a 2021 Review Act statute that rescinded statutory authority for EPA's 2020 deregulatory rule. OSMRE Br. 15 (citing Act of June 30, 2021, Pub. L. No. 117-23, 135 Stat. 595 (the 2021 Statute)). OSMRE misunderstands Executive Power, which encompasses power not only to *regulate*, but also to *de*regulate. *See Dep't of Homeland Security v. Regents of Univ.*, 140 S. Ct. 1891, 1905 (2020). Statutes that prohibit agencies from deregulating diminish Executive Power.

OSMRE's cited statute demonstrates this. In 2016, EPA regulated air pollutant emissions from oil and gas (a) production, (b) processing, (c) transmission, and (d) storage. Oil and Natural Gas Sector: Emission Stds. for New, Reconstructed, and Modified Sources Review, 85 Fed. Reg. 57018, 57,018-19 (Sept. 14, 2020). In 2020, it deregulated (c) transmission and (d) storage because it found those aspects unsupported and "redundant." *Id.* The 2021 Statute rescinded EPA's authority for that deregulation.

Now, the Review Act prohibits the EPA from deregulating via a "substantially the same" rule unless Congress passes a new statute by invoking the Cloture Rule with sixty Senate votes. *See* 5 U.S.C. §

801(b)(2). In other words, the EPA no longer can deregulate emissions from oil and gas (c) transmission and (d) storage. The 2021 Statute decreased Executive Power, as does every use of the Review Act.

The Framers intended the separation of powers structure to protect energy in the executive branch. They "deemed an energetic executive essential to the protection of the community against foreign attacks, the steady administration of the laws, the protection of property, and the security of liberty." *Seila Law*, 140 S. Ct. at 2203 (quotations omitted). But using the Review Act saps the agency's energy by hollowing out its authority. After Congress used the Review Act in 2000 to stop the Office of Safety and Health's (OSHA) Ergonomics Rule, OSHA never reissued a new rule. Eric Dude, *The Conflicting Mandate: Agency Paralysis through the* [*Review Act*] *Resubmit Provision*, 30 COLO. NAT. RES. ENERGY & ENVTL. L. REV. 115, 123-125 (2019).

Similarly, using the Review Act here leaves OSMRE paralyzed with a mission to implement SMCRA, 30 U.S.C. § 1265(b), and no clear path forward. Citizens showed in their opening brief that OSMRE worked thirteen years to implement SMCRA's complex direction to regulate coal mining using the best technology. Citizens' Br. 30-34. The 2017

Statute not only erased that effort, but also prohibited issuance of any substantially similar rule. *See* 5 U.S.C. § 801(b)(2). OSMRE never explains how it can implement both the 2017 Statute and 30 U.S.C. § 1265(b). OSMRE Br. 16.

Specifically, SMCRA assigned OSMRE the duty to use the "best technology currently available" to regulate coal mining and, "to the extent possible . . . minimize disturbances and adverse impacts." 30 U.S.C. § 1265(b)(10), (24). OSMRE identified that technology and those methods. Stream Protection Rule, 81 Fed. Reg. at 93,069, 93,115.

The 2017 Statute bars OSMRE from using those mechanisms, so it removes any definite and precise means for implementing 30 U.S.C. § 1265(b)(10) and (b)(24). The 2017 Statute uses the boilerplate the Review Act requires: "Congress disapproves the rule submitted by [OSMRE] relating to the [Stream Protection Rule], and such rule shall have no force or effect." *See* 5 U.S.C. § 802(a). But "a simple and unelaborated 'No!' withdraws from agencies a range of substantive authority that cannot be determined without subsequent litigation." Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 Admin. L. Rev. 95, 104 (1997). The Review Act,

however, also bars judicial review. 5 U.S.C. § 805. Thus, the 2017 Statute leaves undefined holes in 30 U.S.C. § 1265(b)(10), (24). The sheer uncertainty of OSMRE's remaining authority erodes Executive Power.

OSMRE's suggestion that a Review-Act statute "amends" the statutory text does not somehow make the 2017 Statute workable. OSMRE Br. 15. OSMRE relies on *Center for Biological Diversity v. Bernhar*dt, 946 F.3d 553, 562 (9th Cir. 2019). That court relied on *Alliance for the Wild Rockies v. Salazar*, 672 F.3d 1170 (9th Cir. 2012), for the principle that later statutory directions amend earlier statutes, and it ultimately concluded that a separate Review-Act statute somehow "amended" three "substantive environmental law[s]." *Id.* In *Alliance*, a lower court had struck down a rule that delisted Wyoming gray wolves from the Endangered Species Act. *Id.* at 1171-72. Congress, not using the Review Act, passed a new, discrete statute that directed the agency to reissue the delisting rule, regardless of the Endangered Species Act. *Id.* Thus, in *Alliance*, Congress gave the agency directions to take a specific, defined action, and that made sense conceptually as amending the Endangered Species Act. The 2017 Statute, however, only

tells OSMRE what *not* to do. *See The Conflicting Mandate*, 30 COLO. NAT. RES. ENERGY & ENVTL. L. REV. at 125 ("The [Review Act] is most dangerous when applied to rules that outline broad agency processes."). It creates the same paralysis that OSHA has already faced for twenty years.

When Congress strips statutory authorities away in this way, it causes rational administrators to shrink from their duties to "take Care that the Laws be faithfully executed . . . ." Art. II, Sec. 3. With the Senate's two voting thresholds, Congress assigns tasks to agencies with a threat of punishment for accomplishing them.

OSMRE contends Citizens lacks evidence that administrators may shrink from implementing the full scope of their statutory duties. OSMRE Br. 13. OSHA's paralysis after the Ergonomics Rule proves the point. And the Supreme Court already rejected OSMRE's argument. The separation of powers requires no evidence of harm because it is a "*structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) (emphasis in original). The separation of powers serves as a "prophylactic device" with "high

walls and clear distinctions . . . .” *Id.*; *Seila Law*, 140 S. Ct. at 2202; *Bowsher*, 478 U.S. at 730.

OSMRE argues that the President can veto statutes under the Review Act and thereby preserve Executive Power. OSMRE Br. 15. The Supreme Court already rejected that argument, too. “[T]he separation of powers does not depend on the views of individual Presidents, nor on whether the encroached-upon branch approves the encroachment.” *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010) (quotations and citations omitted)).

The same case highlighted the problem that “the lack of historical precedent” for Congress’s action “most tellingly” suggests a “severe constitutional problem.” *Id.* at 505 (quotations omitted). Here, two historical precedents for expedited vetoes each failed. The Supreme Court struck down the one-house legislative veto. *Chadha*, 462 U.S. at 954. And it struck down the line-item veto passed alongside the Review Act. *Clinton*, 524 U.S. 417; *see* Contract with America Advancement Act, 110 Stat. at 847 (“To provide for enactment of . . . the Line Item Veto Act . . . .”). Those precedents confirm the constitutional violation here.

C. By the one-way ratchet, past Congresses bind future Congresses.

In their opening brief, Citizens argued that, by (a) passing a statute with a simple majority in the Senate, and then (b) requiring sixty votes in the Senate to rescind that statute, the one-way ratchet violates Congress's perfectly equal power to alter any past statute (and thereby to restore Executive Power). Citizens' Br. 38-40. In legislative entrenchment, "[t]he legislatures that promulgate entrenching efforts, no less than the courts that scrutinize them, have simply not recognized what was at issue." Eule, *Temporal Limits on Legislative Mandate*, 1987 Am. B. Found. Res. J. at 407. Professor Eule cites the Cloture Rule as the paradigmatic example of unconstitutional legislative entrenchment. *Id.* at 407-15.

OSMRE defends the one-way ratchet's unconstitutional legislative entrenchment by asserting that the "Senate could amend or repeal the cloture rule." OSMRE Br. 15-16. With that statement, OSMRE effectively admits the current rules violate the Constitution. The Constitution requires this Court to rule on the laws in place now—not some contingent, possible, future law. *See Henderson v. United States*, 568 U.S. 266, 271 (2013).

OSMRE also argues that the voting thresholds are irrelevant because the Senate could always invoke the Cloture Rule to restore any statutory delegation revoked via the Review Act. OSMRE Br. 15. But these powers are not "perfectly" equal because fifty-one does not equal sixty. *Newton v. Comm'rs*, 100 U.S. 548, 559 (1879) (requiring "perfect equality."). OSMRE's response violates the Constitution's requirement that "each subsequent legislature has *equal* power to legislate upon the same subject." *Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 621 (1899) (emphasis added). The one-way ratchet violates the separation of powers because its every use erodes Executive Power.

IV. Equal protection compels equal voting thresholds.

A. Congress aimed to create a special class to protect from hurtful rules.

In their initial brief, Citizens explained that equal protection applied to the Senate's two voting thresholds because the Review Act created a special class and carved it out for preferential treatment. Citizens' Br. 40-54. The Senate changed its voting threshold to fifty-one to relieve burdens on this special class, while leaving a sixty-vote threshold for everyone else.

OSMRE repeats a long-defunct, circular argument that everyone lives equally under the Senate's two voting thresholds, so they do not violate equal protection. OSMRE Br. 17-18. This concept fell with the end of separate-but-equal laws. "A [government] cannot deflect an equal protection challenge by observing that in light of the statutory classification all those within the burdened class are similarly situated." *Williams v. Vermont*, 472 U.S. 14, 27 (1985). Equal protection requires courts to compare the law's effects on different classes. *Id.*

OSMRE next denies that the Review Act and the Cloture Rule create classes. OSMRE Br. 17-18; *see also* Order, II-App-209 to -10. It ignores the Review Act's text, which identifies the special class Congress intended to benefit: small businesses.

The Review Act is Subtitle E of Title II of the Contract with America Advancement Act. 110 Stat. at 857, 868. Congress named Title II the "Small Business Regulatory Enforcement Fairness Act of 1996." *Id.* § 201, 110 Stat. 857. It found:

- "small businesses bear a disproportionate share of regulatory costs and burdens," and
- "fundamental changes . . . are needed in the regulatory and enforcement culture of Federal agencies to make agencies more responsive to small business . . . ."

Id. § 202.

To remedy these perceived ills, Congress aimed "to make Federal regulators more accountable for their enforcement actions by providing small entities with a meaningful opportunity for redress of excessive enforcement activities." *Id.* § 203(7). Congress sought to benefit small businesses by eliminating agency rules with a lower, simple-majority vote in the Senate. *See id.* § 251, 5 U.S.C. § 802(d)(1).

Equal protection applies "when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction," like small businesses. *N.Y. Transit Auth. v. Beazer*, 440 U.S. 568, 587-88 (1979). Because Congress explicitly intended to benefit a class, equal protection requires courts to analyze its preferential treatment.

Congress made its intent clear, but the Review Act's text protects an even broader class than small businesses: anyone harmed by a new rule. It also disadvantaged anyone helped by a new rule. Discrimination always advantages one class at the expense of another. *See Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 882 (1985) (recognizing that equal

protection does not "depend[] primarily on how a [government] framed its purpose—as benefiting one group or as harming another.").

OSMRE argues that equal protection does not apply because the Senate's two voting thresholds do not "subject one caste of persons to a code not applicable to another." Cong. Globe, 39th Cong., 1st Sess. 2766 (May 22, 1866) (Sen. Howard) (quoted by *Jones v. Helms*, 452 U.S. 412, 423-24 (1981)); OSMRE Br. 17. Of course, equal protection applies to legislatively created castes. It also applies to non-suspect classes with any "distinguishing characteristics." *See Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985).

Equal protection applies to groups delineated on all sorts of distinctions:

- Prior versus new residents, *Zobel v. Williams*, 457 U.S. 55, 64 (1982).
- Out-of-state versus in-state insurance companies, *Metro. Life*, 470 U.S. 882,
- Unrelated versus related, co-habitating, food-stamp recipients, *USDA v. Moreno*, 413 U.S. 528, 529, 538 (1973),
- Voters who own more than versus less than $250 of household furnishings or $3,000 of land, *Hill v. Stone*, 421 U.S. 289, 292 (1975),
- Voters who live in one part of a state versus another. *Reynolds*, 377 U.S. at 567.

- Residents who bought their cars in-state versus elsewhere. *Williams*, 472 U.S. at 27.

With the Senate's two voting thresholds, Congress created a new distinction: hurt or helped by a new regulation. OSMRE contends that all citizens belong to both classes "at some point," so equal protection does not apply. OSMRE Br. 18. To the contrary, courts measure inequality not across all time, but "at the time" of unequal treatment—even if the citizen later switches classes. *Williams*, 472 U.S. at 15, 18-19, 18 n.3, 21 n.6, 22, 23.

OSMRE misreads *Jones* as applying a statute equally to all parents. OSMRE Br. 17. It did not. *Jones* routinely applied the rational basis test. There, Georgia made failing to pay child support (1) a *misdemeanor* for parents who *stay* in Georgia and (2) a *felony* for parents who *leave* Georgia. 452 U.S. at 423-24. The Supreme Court found a legitimate objective: a "parental support obligation is more difficult to enforce if the parent charged with child abandonment leaves the state." *Id.* at 423 (quotations omitted). Because Georgia created two groups and treated them differently based on their different characteristics, the Supreme Court upheld the categorization. *Id.* at 422.

OSMRE also misinterprets *James v. Valtierra*, 402 U.S. 137 (1971). There, California voters by referendum required a popular, favorable vote before local governments could approve new, low-income housing. *Id.* at 141-142. Some fundamental differences in procedures, like referenda, may disadvantage a group without violating equal protection. *Id.* Here, however, mathematics demonstrates the equal protection violation because fifty-one does not equal sixty for virtually the same procedure. *See Louisville Gas Co. v. Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting) (recognizing courts competently enforce "mathematical or logical" lines) (quoted *approvingly by Buckley v. Valeo*, 424 U.S. 1, 83 n.111 (1976)). Congress created a special class and treated it specially. Equal protection applies.

B. The Senate's two voting thresholds fail intermediate scrutiny.

Citizens' opening brief demonstrated that intermediate scrutiny requires striking down the Senate's two voting thresholds. Citizens' Br. 47-48. The rational basis test does not apply because the one-way ratchet makes fixing any legislative errors harder. *Id.*

OSMRE interprets this argument as "assum[ing]" the Review Act statutes are "'errors.'" OSMRE Br. 21. Some might not be "errors," but

that does not matter. The Supreme Court defers to Congress under the rational basis test only because it assumes that *if* Congress errs, the democratic process can fix the error. *Vance v. Bradley*, 440 U.S. 93, 97 (1979). When Congress makes fixing errors harder, though, the premise no longer holds, and courts apply heightened scrutiny. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (plurality); *The Filibuster*, 49 Stan. L. Rev. at 248.

OSMRE references this Court's precedents that allow intermediate scrutiny only for suspect or quasi-suspect classes. OSMRE Br. 20-21. Although OSMRE cites the paradigmatic situations, it is "too quick to generalize and in doing so [it runs] afoul of the logical fallacy of accident." *McClendon v. City of Albuquerque*, 630 F.3d 1288, 1292 (10th Cir. 2011). Usually, heightened scrutiny applies only for suspect or quasi-suspect classes, but the Senate's two voting thresholds present a rare exception. *See Carolene Prods.*, 304 U.S. at 153 n.4.

Ignoring the Review Act's detailed structure, OSMRE asks this Court to consider the Cloture Rule separately. First, OSMRE focuses on the Cloture Rule and denies it qualifies as "legislation." OSMRE Br. 21. Labels do not matter. When "the construction [of Senate] rules affects

persons other than members of the Senate, the question presented is of necessity a judicial one." *Smith*, 286 U.S. at 29, 33. Second, OSMRE focuses solely on the Review Act to argue that it, alone, "does not restrict any political process." OSMRE Br. 21. It missed the point. Citizens demonstrated that the Senate's two voting thresholds, together, restrict a political process. *See Royster Guano*, 253 U.S. at 414. OSMRE never disputes that the Senate's two voting thresholds "restrict[] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *Carolene Prods.*, 304 U.S. at 153 n.4.

OSMRE suggests ignoring the Cloture Rule's sixty-vote threshold because the Senate could always use the "nuclear option" to eliminate it with a simple majority. OSMRE Br. 4-5, 21. But "[t]he fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000). By arguing that new rules would cure an equal protection violation, OSMRE effectively concedes the current violation.

Intermediate scrutiny requires Congress affirmatively to defend its categorizations. *United States v. Virginia*, 518 U.S. 515, 534 (1996). Congress provided no "exceedingly persuasive justification" for the Senate's two voting thresholds, so they fail intermediate scrutiny and violate equal protection. *See id.*

C. The Senate's two voting thresholds fail the rational basis test.

Citizens explained in their original brief that Congress lacked a rational basis for connecting (a) a fifty-one-vote-threshold to citizens with problems too complex for Congress to solve directly and (b) a sixty-vote-threshold to citizens with problems Congress could solve directly. Citizens' Br. 50. Complexity of problems have no relationship to voting thresholds. Without a rational connection to a legitimate government objective, the Senate's two thresholds fail even the rational basis test. *See Reed v. Reed*, 404 U.S. 71, 75-76 (1971) ("legislat[ing] that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute" violates equal protection).

OSMRE misinterprets this argument as "plaintiffs' theory that equal-protection principles apply to categories of laws rather than

people . . . .” OSMRE Br. 19. Citizens do not advance that theory. But “most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.” *Romer v. Evans*, 517 U.S. 620, 631 (1996). A Fourteenth Amendment Framer described the relevant principle: “the law which operates upon one man shall operate equally upon all. . . . Whatever means of redress is afforded to one shall be afforded to all.” Cong. Globe, 39th Cong., 1st Sess. 2459 (May 8, 1866) (Rep. Stevens). Here, the mining company received redress with 54 votes, and Citizens now need 60. The Senate’s two voting thresholds afford an unequal means of redress and violate equal protection. *See Romer*, 517 U.S. at 633 (overturning a state statute that made procedures for protecting some groups more difficult).

OSMRE offers no “legitimate” objective to connect (a) a simple majority vote in the Senate to citizens whose problems Congress can solve directly and (b) a sixty-vote threshold to citizens with more complex problems. *See Cleburne*, 473 U.S. at 440. OSMRE suggests the Senate merely created an “expedited procedure to review and disapprove federal regulations” that “more efficiently streamlines procedures for review and disapproval of” agency rules. OSMRE Br. 20

(quotations omitted). That objective does not qualify as legitimate because it violates Article I, Section 7, by creating a second voting threshold. *Chadha*, 462 U.S. at 951. Without a legitimate objective, the Senate's two voting thresholds violate even the rational basis test.

V. The Senate's two voting thresholds violate substantive due process because they advance no legitimate objective.

In their opening brief, Citizens demonstrated that the Senate's two voting thresholds violate substantive due process's rational basis test (a) because they rely on irrational factual assumptions, and (b) because changing voting thresholds in violation of Article I, Section 7, never qualifies as a legitimate objective. Citizens' Br. 54-59.

In response, OSMRE contends that the Senate can create a second, "more efficient procedure for congressional oversight of agency rules . . . ." OSMRE Br. 22. No one disputes that the Senate can set debate time limits under Article I, Section 5. But Section 7 sets the voting thresholds, and it prohibits Congress from setting new voting thresholds. *Chadha*, 462 U.S. at 956-57; *Ballin*, 144 U.S. at 6-7.

OSMRE's objective of "congressional oversight of agency rules," OSMRE Br. 22, fails the rational basis test. Congress could already oversee agencies using the Cloture Rule. Citizens' Br. 55-56. OSMRE

argues that courts do not speculate whether Congress could have achieved its objective in a better way. OSMRE Br. 22. It fails to provide any rationale for the Senate's lower voting threshold. Even for the rational basis test, courts insist on knowing Congress's objective. *Romer*, 517 U.S. at 630.

Rational people do not install a second door out of a room when they already have one door—without an additional reason for the additional door (like a fire escape or to reach a different room). OSMRE argues that this Court need not investigate Congress's reason for the second door because its broad intent to "leave the room" lets Congress build as many doors as it wants. The rational basis test is not so "toothless." *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). It requires courts to investigate the basis for each incremental change. *Romer*, 517 U.S. at 630.

With Congress's "expedited procedure," OSMRE Br. 24, Congress could only have sought not merely to overturn agency rules, but to overturn more agency rules than it could by the Cloture Rule. Citizens' Br. 56-57. That justification just begs the question why Congress wanted to overturn so many more agency rules. The only answer is that

Congress assumed pervasive agency misconduct. *See Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (explaining that, after eliminating "all legitimate reasons" for an action, the actor likely "based his decision on an impermissible consideration").

OSMRE argues that this objective to pass more bills to "police 'pervasive agency misconduct'" qualifies as legitimate. OSMRE Br. 23. This argument fails the rational basis test because the underlying factual assumption is irrational. *See Vance*, 440 U.S. at 111. An assumption that agencies are issuing more "ill-advised rules," OSMRE Br. 23, violates the presumption of regularity and could not "reasonably be conceived to be true." *See Nat'l Archives and Rs. Admin. v. Favish*, 541 U.S. 157, 174 (2004); *Vance*, 440 U.S. at 111. The Supreme Court rejects assumptions of agency misconduct; they are not even "debatable" in court. *Nat'l Archives*, 541 U.S. at 174; *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 18 (1988); *Carolene Prods.*, 304 U.S. at 154.

OSMRE asserts that courts reject "courtroom fact-finding" under the rational basis test, but OSMRE omits the limiting principle for this concept. OSMRE Br. 25 (quotations omitted). The case reads in full: "In other words, a legislative choice is not subject to courtroom factfinding,

and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). Congress's speculation of pervasive agency misconduct does not qualify as "rational." *Nat'l Archives*, 541 U.S. at 174.

OSMRE asserts the rational basis test does not require hearings. OSMRE Br. 24. Usually, it does not. But to overcome the presumption of regularity, the Supreme Court requires actual evidence. *Nat'l Archives*, 541 U.S. at 174. Congress provided none. Citizens' Br. 56-57. OSMRE failed to demonstrate any rational basis for the Senate's two voting thresholds.

Citizens' initial brief explained that setting different voting thresholds for different types of bills violates Section 7. Citizens' Br. 59-64. Changing the voting threshold via legislation qualifies as an illegitimate government objective, and the Senate's two voting thresholds violate the rational basis test. *Id.*; *Ballin*, 144 U.S. at 6-7.

OSMRE responds that the Review Act only requires simple majorities to pass bills in the Senate, so it does not violate Section 7. OSMRE Br. 24. But Congress passed the Review Act so it could reach that final vote with a simple majority, even when the Senate lacks sixty

votes to invoke the Cloture Rule. OSMRE asks this Court for willful blindness. *See Trump v. Mazars U.S., LLP*, 140 S. Ct. 2019, 2034 (2020) ("We would have to be blind not to see what all others can see and understand . . . ." (quotations and alterations omitted)). The Review Act and the Cloture Rule *system* violates Section 7 by setting different voting thresholds based on no rational assumption and to accomplish no legitimate government objective. The *system* violates the Constitution's requirement that only Article V amendments can change Section 7. *Clinton*, 524 U.S. at 449. The Senate's two-voting-threshold *system* violates substantive due process.

CONCLUSION

For the foregoing reasons, the Constitution and SMCRA entitle Citizens to an order (1) setting aside the 2017 Statute, (2) declaring the Senate's two-voting thresholds unconstitutional, (3) restoring the Stream Protection Rule, and (4) vacating the Modification Approval, I-App-13.

Dated: March 28, 2021,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Circuit Rule 32(a)(7)(B)(ii) because it contains 6,500 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(B). I counted the words using Microsoft Word.

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Dated: March 28, 2021,

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On this day, I served this brief on the following counsel via the Court's CM/ECF system:

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