IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Civil Action No. 20-cv-3668-RM

CITIZENS FOR CONSTITUTIONAL INTEGRITY; and
SOUTHWEST ADVOCATES, INC.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA;
THE OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT;
DAVID BERNHARDT, Department of the Interior Secretary, in his official capacity;
LANNY ERDOS, Acting Director of the Office of Surface Mining Reclamation and Enforcement, in his official capacity; and
CASEY HAMMOND, Acting Assistant Secretary for Land and Minerals Management, in his official capacity;

Defendants.

PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

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INTRODUCTION

Fifty-one does not equal sixty. By the Senate setting two voting thresholds for passing bills, it violated equal protection, substantive due process, and the separation of powers. With only fifty-four votes, Congress rescinded the statutory delegation for the Stream Protection Rule, 81 Fed. Reg. 93,066 (Dec. 20, 2016), and thereby stripped protection from community members who sought to stop the King II Mine's coal pollution from infiltrating aquifers from which they draw well water. The Mine uses so much water from the La Plata River that the river now runs dry every year.

Generally, the Supreme Court approves of Congress delegating legislative authority to agencies, which agencies exercise by issuing legislative rules. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015). Those statutory delegations completely define the agency's authority. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). After delegating legislative authority, Congress's participation in agency rulemaking ends unless or until it enacts a new statute to amend that authority. *Bowsher v. Synar*, 478 U.S. 714, 733-734 (1986).

In the 1996 Congressional Review Act (the Review Act), Congress created a new process for rescinding its delegations. 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). The Review Act allows Congress, with a short phrase that targets a recent legislative rule, to carve out and to withdraw whatever authority it had delegated to allow the agency to issue the target rule. 5 U.S.C. §§ 801(b)(1), 802(a). Congress set a fifty-one-vote threshold in the Senate for rescinding those statutory authorities, which allowed Congress to avoid the Senate's Cloture Rule, commonly known as the filibuster. The Cloture Rule sets a sixty-vote threshold for passing other bills—including bills to delegate new authorities. Rule 22.2, Standing Rules, Orders, Laws, and

Resolutions Affecting the Business of the U.S. Senate (113th Cong., 1st Sess.). By setting two, unequal thresholds for passing bills in the Senate, however, Congress violated equal protection, substantive due process, and the separation of powers.

In 2017, under that unconstitutional system, Congress passed one law that allows more pollution to flow out of the King II Mine, a coal mine in southwestern Colorado, and into the aquifers from which community members draw well water. Act of Feb. 16, 2017, Pub. L. No. 115-5, 131 Stat. 10. There, in the striking, dry, high-desert of southwestern Colorado, the King II Mine (the Mine), takes water from the La Plata River, one of the few local, perennial streams, to control the dust as miners delve deeper into poorly understood geologic formations.

In 2018, the Department of the Interior approved of GCC Energy, LLC, expanding the Mine to 950.55 more acres of coal underneath Ute Mountain Ute land. Mine Approval for the Mining Plan Modification at the King II Mine (the Mine Approval), ECF No. 1-3. The Mine's owner, GCC Energy, does not know what happens to fluids that flow out of the Mine, and it does not know how digging the coal will impact underground water flows in the complex geology. The Mine extracts coal above-grade and upstream of the wells of Southwest Advocates, Inc.'s, members' land and wells. GCC is failing to monitor the groundwater sufficiently to ensure pollutants are not mixing with the underground water, which supplies these wells.

Citizens rely on their government agencies to protect them from coal mining pollution and to protect them from coal mines otherwise damaging their ecosystems. Here, the Stream Protection Rule required OSMRE to complete a more thorough analysis of the groundwater before approving the Modification, and it required GCC to monitor more often and for more pollutants after approving the Mine. It also required more analysis of the hydrologic impacts from diverting La Plata River water to the Mine and away from irrigated cropland.

Despite the clear danger to this fragile ecosystem, where one drop of pollution spreads farther and lasts longer than in wetter environments, the Department of the Interior issued the Mine Approval without OSMRE complying with the Stream Protection Rule. The Department approved a second expansion, called the Dunn Ranch lease, on January 15, 2021.

The Office of Surface Mining Reclamation and Enforcement (OSMRE) did not apply its 2016 Stream Protection Rule, because it believes Congress rescinded its statutory authority for that rule. *See* [OSMRE] Congressional Nullification of the Stream Protection Rule, 82 Fed. Reg. 54,924 (Nov. 17, 2017). In 2017, the Senate used the lower voting threshold by voting 54-43 to rescind the statutory authority for the Stream Protection Rule. 163 CONG. REC. S611, S632 (Feb. 2, 2017). The President signed that bill into law two weeks later. Act of Feb. 16, 2017.

But Congress violated the Constitution in passing that statute, so it is void. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803). Specifically, the Senate's two voting thresholds facially violate the Constitution in three ways.[1]

First, by simple mathematics, the Senate's two, unequal voting thresholds violate equal protection.[2] Every statute that impacts individual rights either protects citizens or removes protections. Congress never identified the two categories it created with its two voting thresholds: (a) individuals protected by statutory delegations to agencies and (b) individuals protected directly by statutes. Consequently, Congress did not relate the Senate's two voting thresholds to those two categories. No connection exists, and the categorization therefore violates equal protection—under all levels of scrutiny. A sixty-vote threshold in the Senate would have

[1] Facial challenges succeed when "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

[2] Although, on its face, the Fourteenth Amendment's applies only to states, the Supreme Court applies it to the United States through the Fifth Amendment Due Process Clause. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213-18 (1995).

protected Southwest Advocates' members from losing the Stream Protection Rule because Congress passed the repealing statute with only fifty-four votes.

Second, the Senate's two voting thresholds also violate substantive due process in the Fifth Amendment. The thresholds violate both the rational basis test and strict scrutiny. Those tests require every statute to advance a legitimate or compelling governmental objective, respectively. With the Senate's two thresholds, Congress intended to stop agencies from acting inefficiently and ineffectively, and from issuing burdensome rules. But because parties can so easily allege government misconduct, courts never assume agency misconduct; they insist on "clear evidence" to establish it. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004) (*NARA*).

In establishing the Senate's two voting thresholds, Congress provided no clear evidence of agency misconduct. Its assumptions thus fail the due process requirement of presenting a rational objective. Congress also failed to provide clear evidence that two Senate voting thresholds would somehow cure that unsubstantiated agency misconduct. Without evidence of the misconduct and without evidence that the Senate's two voting thresholds would cure the misconduct, the voting thresholds fail the rational basis test and strict scrutiny.

Third, the Senate's two voting thresholds violate the separation of powers. The Executive Branch obtains its authority from only two sources: the Constitution and the statutes that Congress passes. The Senate's two voting thresholds let Congress rescind delegations of authority more easily (with only fifty-one votes) than Congress can redelegate those same authorities (because that requires sixty votes). This one-way ratchet allows Congress to "chip away" at Executive Branch authority. *See Stern v. Marshall*, 564 U.S. 462, 502-03 (2011). The Supreme Court, however, does not hesitate in striking down even the "mildest and least repulsive" laws when they "undermine" or "erode[]" the authority of another branch. *Id.* at 503

(quotations omitted); *Mistretta v. United States*, 488 U.S. 361, 382 (1989); *INS v. Chadha*, 462 U.S. 919, 958 (1983). Therefore, this one-way ratchet violates the separation of powers.

Because Congress used an unconstitutional procedure to withdraw statutory authority for the Stream Protection Rule, the withdrawal statute is void. 131 Stat. 10. The Stream Protection Rule remains in force, and OSMRE violated the Constitution, SMCRA, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, by failing to apply it to the Mine Approval.

No doubt, this case presents difficult questions of thorny constitutional dimensions. Nevertheless, courts do not shy from reviewing congressional rules for compliance with the Constitution when, as here, those rules affect individual citizens. When "the construction [of Senate] rules affects persons other than members of the Senate, the question presented is of necessity a judicial one." *United States v. Smith*, 286 U.S. 6, 29, 33 (1932). The statute rescinds the Stream Protection Rule statutory authority, and it thereby impacts Citizens via environmental impacts on their property and appreciation of their environment.

This situation calls upon this Court to follow Chief Justice John Marshall's direction to answer the Constitutional issue despite any doubts, complexities, or difficulties that may arise:

> The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.

Cohens v. Virginia, 19 U.S. 264, 404 (1821); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) ("a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." (quotations omitted)). In other words, the Constitution assigned this Court a duty to determine compliance with the Constitution's

constraints. That duty attaches when, like here, Congress's internal rules affect individual citizens. *See Smith*, 286 U.S. at 29.

Because Congress and the President used an unconstitutional statute to rescind the Stream Protection Rule, that statute is void. OSMRE is violating the Constitution by failing to implement the still-applicable rule. Therefore, the Constitution requires the Court to strike down the Review Act, and SMCRA requires the Court to direct OSMRE to implement the Stream Protection Rule, and to enjoin Mine activities until OSMRE completes a new analysis.

LEGAL BACKGROUND

I. The Mineral Leasing Act and the Surface Mining Control Act

The act commonly known as the Mineral Leasing Act of 1920 (the Mineral Act), Pub. L. No. 66-146, 41 Stat. 437 (Feb. 25, 1920), authorizes the Secretary of the Interior to lease coal deposits that the United States owns.[3] Although the Bureau of Land Management (BLM), an Interior component, generally leases federal coal rights, the Mineral Act assigns the Secretary responsibility to ensure, through "terms and conditions," that the mining plan lies in the "public interest" before approving it.[4]

Without a mining plan, no one can mine any federal coal they lease. 30 C.F.R. § 746.11(a). The mining plan, in turn, "bind[s]" the miners. *Id.* § 746.17(b). The Secretary's responsibility to approve mining plans extends to Indian lands, even if the United States does not own the underlying coal rights. 30 U.S.C. § 1300; 30 C.F.R. § 750.6(a).

Congress enacted SMCRA in 1977 because it found "many surface mining operations" will "destroy[] or diminish[] the utility of land," cause "erosion and landslides," pollute water,

[3] *See* 30 U.S.C. §§ 181, 189, 201; *S. Utah Wilderness All. v. OSMRE*, 620 F.3d 1227, 1230 (10th Cir. 2010).
[4] 30 U.S.C. §§ 201(a)(1), 207(a), 207(c); 43 C.F.R. §§ 23.3(c), 23.5, 24.4(d); *see also* 43 C.F.R. §§ 3425.1-8(a) and 3475.1.

destroy fish and wildlife habitats, impair natural beauty, and degrade "the quality of life in local communities." 30 U.S.C. § 1201(c). Congress sought to "minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public." *Id.* § 1201(d). Therefore, it created "a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." *Id.* § 1202(a). It also created OSMRE and delegated authority to implement the new mining law. 30 U.S.C. § 1211(c)(2).

SMCRA regulates coal mining with "a permit system and a series of performance standards." *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 699 (D.C. Cir. 1988) (citations omitted). Before a state or OSMRE can issue a coal mining permit, SMCRA requires mining companies to "submit detailed information concerning the environmental consequences of the proposed mining operations and include a plan for reclaiming affected lands . . . ." *Id.*; 30 U.S.C. §§ 1256(a), 1266(b). During mining, SMCRA requires mining companies to "adhere to the statutory environmental performance standards . . . ." *Nat'l Wildlife Fed'n*, 839 F.2d at 699.

As one of the most important parts of the permitting process, SMCRA requires mining companies to assess "the probable cumulative impact of all anticipated mining in the area on the hydrologic balance" and "to prevent material damage" to that balance—not only inside but also outside the permit area. 30 U.S.C. § 1260(b)(3). Specifically, it requires mining companies to "protect offsite areas from damages which may result from [underground] mining operations" 30 U.S.C. § 1266(b)(7). When OSMRE exercises jurisdiction to approve a mining plan, it sends "a decision document recommending to the Secretary approval, disapproval or conditional approval of mining plans and of modifications thereto." 30 C.F.R. § 740.4(b)(1).

II. The Administrative Procedure Act

The Supreme Court recognized Congress's broad authority to delegate legislative rulemaking authority to the agencies. The Constitution requires only an "intelligible principle" to guide the

agency. *Mistretta*, 488 U.S. at 372 (quotations omitted). After Congress delegates legislative authority by statute, the Constitution prohibits Congress from micro-managing the agency. Congress can further direct an agency only by passing additional statutes. *Bowsher*, 478 U.S. at 733-734; *Chadha*, 462 U.S. at 954. When agencies issue "legislative rules," like the Stream Protection Rule, through the APA's notice-and-comment procedures, those rules have the "force and effect of law." *Perez*, 575 U.S. at 96 (quotations omitted); *see* 5 U.S.C. § 553.

III. The Congressional Review Act

Congress passed the Congressional Review Act as a new, easier method for overturning legislative rules. *See* 141 CONG. REC. H5099 (May 17, 1995) (statement of Rep. Gekas); 142 CONG. REC. S2312 (Mar. 19, 1996) (statement of Sen. Glenn); *Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 556 (9th Cir. 2019) (*Biological Diversity*). Passed in 1996, Congress intended the Review Act as a legislative veto to replace the one the Supreme Court struck down in 1983. *See* 142 CONG. REC. 3122 (statement of Sen. Levin); *Chadha*, 462 U.S. 919.

Starting in the New Deal, as Congress delegated more authority to agencies to respond to the complexities of a growing nation, it also sought veto power over the rules it authorized. From 1930 to 1983, Congress inserted almost 200 "one-house veto" provisions in various delegating statutes. *Chadha*, 462 U.S. at 967 (White, J., dissenting). One-house veto provisions allowed one house of Congress, by resolution, to invalidate an Executive-Branch decision or rule. *Id.* at 923 (majority opinion). In 1983, the Supreme Court overturned one-house vetoes as unconstitutional because they allowed one house to legislate without complying with Article I. *Id.* at 956-959.

The Review Act also unconstitutionally streamlines bills to veto agency rules subject to timing constraints. It both (a) describes the effect of future statutes passed under it and (b)

designs a process for passing those future statutes.[5] If Congress and the President pass a statute that invokes specific words for a rule, the Review Act directs courts to interpret that statute to repeal whatever statutory authority the agency could have relied on to issue that rule. *See* 5 U.S.C. §§ 801(b)(1); *Biological Diversity*, 946 F.3d at 562. The Review Act specifies these words: "That Congress disapproves the rule submitted by the _____ relating to _____ and such rule shall have no force or effect." 5 U.S.C. § 802(a). When Congress revokes statutory authority for an agency rule this way, the Review Act prohibits the agency from issuing any future rule that is "substantially the same." *Id.* § 801(b)(2).

The Review Act's procedures allow Congress to pass statutes to repeal agency rules with simple majorities in both houses, which bypasses the Senate's sixty-vote Cloture Rule to end a filibuster. *See* 142 CONG. REC. S2161 (Mar. 15, 1996) (statement of Sen. Don Nickles).

To close debate on most bills and thereby to allow the Senate to vote, the Senate's Cloture Rule requires sixty votes on a cloture motion. Since the Senate changed its cloture rules in 1975, filibusters have not worked like the talking filibuster in MR. SMITH GOES TO WASHINGTON (Columbia Pictures 1939). VALERIE HEITSHUSEN & RICHARD S. BETH, CONG. RESEARCH SERV., FILIBUSTERS AND CLOTURE IN THE SENATE ii (Apr. 7, 2017). The term "filibuster" in the Senate refers broadly to various "dilatory or obstructive tactics to block a measure by preventing it from coming to a vote." *Id.* at ii. Under the pre-1975 rule, while a senator held the floor, the Senate rules required a vote of two-thirds of the Senators to stop the senator from holding the floor to

[5] Although the Review Act refers to "joint resolutions," 5 U.S.C. § 802, the Constitution ignores formalistic distinctions among bills, orders, resolutions, and votes; courts focus solely on the document's function to determine whether it exercises legislative power. Art. I, § 7; *Chadha*, 462 U.S. at 946-49, 952. The Review Act process repeats the Constitutional process for passing bills, so labels are irrelevant. *See Biological Diversity*, 946 F.3d at 562.

stop a vote. *Id.* at 9. Since 1975, the Cloture Rule requires three-fifths of the senators (usually 60) to close debate—regardless of whether any Senator is speaking.

The Congressional Research Service recognizes that "[t]hreatened filibusters on motions to proceed once were rare but have become more common in recent years." *Id.* 10. As threatened filibusters increased, the number of cloture votes increased eightfold.[6]

Today, no legislation passes the Senate when forty-one senators do not consent. Congress's specialists and the Supreme Court acknowledge that, without sixty votes "invok[ing] cloture . . ., the measure . . . that is being filibustered will not receive chamber approval . . . ." FILIBUSTERS AND CLOTURE IN THE SENATE 18. That creates a sixty-vote threshold. *See King v. Burwell*, 576 U.S. 473, 492 (2015) (recognizing "the Senate's normal 60-vote filibuster requirement"). The Review Act replaces the Senate's sixty-vote threshold, with a simple-majority-vote threshold, for repealing authority for recently passed legislative rules. 5 U.S.C. § 802(d).

STATEMENT OF FACTS

See statement of undisputed facts.

STANDARD OF REVIEW

SMCRA's citizen-suit provision provides jurisdiction to enforce the Stream Protection Rule. 30 U.S.C. § 1270(c). When statutes set no different standards of review for judicial review of agency actions, courts use the APA's standards. 5 U.S.C. § 701; *United States v. Bean*, 537 U.S. 71, 77 (2002); *Robbins v. BLM*, 438 F.3d 1074 (10th Cir. 2006). Among them, the APA assigns courts duties to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. Upon that review, the APA directs courts to "hold unlawful and set aside agency

[6] U.S. Senate, Cloture Motions, senate.gov/legislative/cloture/clotureCounts.htm.

action, findings, and conclusions" that are "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B).

ARGUMENT

I. The Senate's two voting thresholds violate equal protection because the inequality does not relate to the mechanism of to voting thresholds in the Senate.

The Senate's two, unequal voting thresholds for passing laws violate equal protection because they protect citizens unequally. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("the equal protection of the laws is a pledge of the protection of equal laws"). Equal protection legal mechanics only confirm that unassailable conclusion.

Although the Constitution delegated to each House broad power to "determine the Rules of its Proceedings . . .," U.S. CONST. art. I, § 5, Congress's power to determine procedures does not stand "absolute and beyond the challenge of any other body or tribunal." *United States v. Ballin*, 144 U.S. 1, 5 (1892). Neither house of Congress may "ignore constitutional restraints or violate fundamental rights." *Id.* The Constitution also requires Congress to comply with equal protection. Equal protection prohibits the entire United States from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. 14, sec. 1. It "applies to the exercise of all the powers of the state which can affect the individual or his property . . . ." *See Louisville Gas Elec. Co. v. Coleman*, 277 U.S. 32, 37 (1928).

Therefore, when, as here, "Congress takes action that has the purpose and effect of altering the legal rights, duties, and relations of persons outside the Legislative Branch," the Constitution requires Congress to "take that action by the procedures authorized in the Constitution." *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 276 (1991) (quoting *Chadha*, 462 U.S. at 952-55 (quotations and alterations omitted)). For that reason, when Senate rules affect citizens, courts review them. *Smith*, 286 U.S. at 29, 33.

The Supreme Court applies three tiers of scrutiny for determining whether a statute creates classes that violate equal protection. The mechanics require courts to identify and to connect three elements:

(1) the harm the legislature intends to remediate,

(2) the classification the legislature created to remediate that harm, and

(3) the expectation that the classification could remediate that harm.

Cf. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) (plurality) (requiring, for First Amendment intermediate scrutiny, the government to "do more than simply posit the existence of the disease sought to be cured," by "demonstrat[ing] that the recited harms are real, not merely conjectural, and that the regulation will, in fact, alleviate these harms in a direct and material way." (quotations omitted)).

Each higher tier requires a more compelling purpose and a tighter means-ends fit. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1696 (2017). The "fit" reflects the precision by which a statute classifies citizens to meet its objective. *See Craig v. Boren*, 429 U.S. 190, 201-202, 202 n.12 (1976).

Courts apply strict scrutiny to statutes that classify individuals based on race, national origin, or citizenship. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). Under strict scrutiny, a statute violates equal protection unless the legislature "suitably tailored [it] to serve a compelling [governmental] interest." *Id.*

Courts apply intermediate scrutiny to statutes that classify based on gender or birth to unwed parents. *Id.* at 440-41. In those situations, the Supreme Court requires an "exceedingly persuasive justification" for a "substantial[] relat[ionship]" to an "important governmental

objective[].” *Sessions*, 137 S. Ct. at 1700, 1700 n.25 (illegitimacy) (quoting *United States v. Virginia*, 518 U.S. 515, 531 (1996) (gender)).

Finally, courts usually apply the rational basis test when a statute categorizes citizens on any basis to which the other tiers do not apply. *See Romer v. Evans*, 517 U.S. 620, 630 (1996). Under the rational basis test, courts require a statute’s classifications to “bear a rational relationship to a legitimate governmental interest.” *Id.* at 632.

A. The Senate’s two voting thresholds do not qualify for rational basis scrutiny.

Courts often leap directly to the rational basis test in cases that involve no suspect class, like race, but this situation prohibits the Court from doing so. The Senate’s two laws about making laws do not qualify for the traditional, deferential rational basis review because they change the democratic process for rectifying errors, which, at bottom, justifies rational-basis-test deference.

Under the rational basis test, statutes carry “a strong presumption of validity,” and challengers bear the burden of negating “every conceivable basis which might support it”—whether that basis “actually motivated the legislature” or not. *FCC v. Beach Commc’s, Inc.*, 508 U.S. 307, 313 (1993) (quotations omitted). Courts defer to legislatures, however, only because they expect the democratic process to rectify any errors that legislatures make. *See id.*; *Cleburne*, 473 U.S. at 440 (“the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.”); *Vance v. Bradley*, 440 U.S. 93, 97 (1979). The Congressional Review Act and the Cloture Rule do not deserve that deference because they rig the democratic system instead of implementing social or economic policy. *See Beach Commc’ns*, 508 U.S. at 313; *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152, 152 n.4 (1938).

Contrary to the policy of deferring to Congress to rectify its own errors via the rational basis test, the two voting thresholds impede efforts to rectify errors. Here, with only a simple majority of votes in the Senate, Congress rescinded the statutory delegation for the Stream Protection

Rule. Suppose that Congress later decided it erred. Then, only a supermajority of sixty votes in the Senate could redelegate that authority. Because the Senate's two voting thresholds make rectifying errors through democracy harder, the Supreme Court's justifications for deferential rational basis review do not apply.

B. No rationale links the two categories of citizens that Congress created with the Senate's two, unequal voting thresholds, and these two voting thresholds consequently fail every level of scrutiny.

In any event, the Review Act and the Cloture Rule categorize citizens into categories with no relation to the Senate's two, unequal voting thresholds. This scheme fails under every level of scrutiny because it carves out groups like Citizens, who would have benefitted from a sixty-vote threshold to rescind the Stream Protection Rule delegation. The Review Act and the Cloture Rule divide citizens into two groups:

(1) Citizens protected by statutes that delegate authorities to agencies and

(2) Citizens protected by statutes directly.

See Romer, 517 U.S. at 631 ("most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.").

The Supreme Court has applied equal protection to other uncommon classifications that governments have created. "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Louisville*, 277 U.S. at 37-38 (quoted by *Romer*, 517 U.S. at 633). The Supreme Court recognizes the principle that "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities." *See Shelley v. Kramer*, 334 U.S. 1, 22 (1948) (quoted approvingly by *Romer*, 517 U.S. at 633). In one case, Fort Worth, Texas, had classified: (a) voters who signed an affidavit stating they listed more than $250 of household furnishings or $3,000 of land with the tax assessor and (b) voters who did not sign that affidavit. *Hill v. Stone*, 421 U.S. 289, 292

(1975). Later, Alaska distributed different amounts from its mineral royalties to different categories of Alaska citizens based on how long they lived there. *Zobel v. Williams*, 457 U.S. 55, 59-60 (1982). The Supreme Court struck down both unusual categorizations.

By requiring fifty-one votes in the Senate to rescind statutory protections for citizens protected by delegations to agencies, and sixty votes for citizens protected by statutes directly, Congress created two unusual categories.

The first category includes citizens facing problems for which Congress delegated statutory authorities to agencies. Congress delegates that authority when it faces "complex conditions involving a host of details with which [it] cannot deal directly." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935). If Congress lacked authority to delegate, the United States Government would not work. *Loving*, 517 U.S. at 758 ("To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government."); *Opp Cotton Mills, Inc. v. Adm'r of Wage and Hour Div.*, 312 U.S. 126, 145 (1941) ("In an increasingly complex society Congress obviously could not perform its functions" without delegating administrative details to agencies).

The second category includes citizens who face less-complex issues that Congress can solve directly by statute without delegating to an agency. Therefore, Congress created two categories that differ only by the complexity of the issues the citizens in each category face.

The Senate's two, unequal voting thresholds in no way relate to the complexity of the problems the two groups face. Just as categorizing citizens by where they live does not qualify as a "legitimate reason for overweighting or diluting the efficacy of [their] vote[s]," neither does the complexity of the issues the individuals confront qualify as a legitimate reason for setting unequal voting thresholds. *See Reynolds v. Simms*, 377 U.S. 533, 567 (1964). In other words,

Congress violated equal protection by failing to demonstrate any relationship between the two categories and the Senate's two voting thresholds.

Equal protection ensures every group equal access to the democratic process, so that citizens hurt by a statute have an equal opportunity to reverse it. *See Romer*, 517 U.S. at 633 ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."); *Yick Wo*, 118 U.S. at 369. But the Senate's two, unequal voting thresholds result in two categories of citizens with *un*equal access to the democratic process.

Here, a sixty-vote threshold would have protected Citizens because the bill carving out the statutory delegation for the Stream Protection Rule would not have passed. Only fifty-four senators voted for it. 163 CONG. REC. at S632. But "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer*, 517 U.S. at 633. The Review Act and the Cloture Rule, together, violate the Fifth Amendment's equal protection requirement. *See Romer*, 517 U.S. at 633.

C. The scheme of two voting thresholds in the Senate fail under every level of scrutiny.

Congress never explained why it created two categories of citizens, so its classification violates strict scrutiny. Strict scrutiny requires the government to carry the burden of explaining the "actual purpose" that motivated the legislature to create the classification and to produce "a strong basis in evidence" to justify it. *See Shaw v. Hunt*, 517 U.S. 899, 909 n.4 (1996). As referenced above, the Supreme Court overturned the classifications of voters based on reporting property for taxation for want of a compelling reason. *Hill*, 421 U.S. at 300-01.

Here, without even any evidence of Congress intending to classify citizens, the government could only produce post hoc rationalizations for those classifications. For the lack of any

contemporaneous, compelling rationale, the Senate's two voting thresholds fail strict scrutiny. *See Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017).

The two voting thresholds also fail intermediate scrutiny because Congress provided no contemporaneous rationale for the two voting thresholds to accomplish an important objective. Intermediate scrutiny requires the United States to show "that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Virginia*, 518 U.S. at 534 (quotations and alterations omitted). The United States bears the burden of demonstrating an "exceedingly persuasive justification" for changing this democratic process. *See id.* Courts require the United States to prove a "justification [that] must be genuine, not hypothesized or invented post hoc in response to litigation." *Id.* at 533. Again, Congress never acknowledged it was creating two categories of citizens, so its classification fails intermediate scrutiny. *See id.*

The classification even fails under equal protection's most deferential, rational basis test. Under it, courts do not conduct a "toothless" inquiry. *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). Courts always "insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 630.

The Supreme Court routinely overturns categories based on mathematical inequalities when it interprets the term "equal" in "equal protection" to require one person, one vote. This principle grew out of the "rural strangle hold" in some states. *Reynolds*, 377 U.S. at 543. As the population distribution moved dramatically to urban centers, many states declined to change their legislative district boundaries because rural representatives would not vote away their overrepresentation privilege. *See id.* at 556; *Evenwel v. Abbott*, 136 S. Ct. 1120, 1123 (2016). *Id.*; *Baker v. Carr*, 369 U.S. 186, 192 (1962). In Alabama, for example, one senate district had forty-one times as

many people as another. *Reynolds*, 377 U.S. at 545. The Supreme Court cured that malapportionment by applying equal protection mathematics.

The Supreme Court reviews cases under equal protection "to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action." *Baker*, 369 U.S. at 226. In *Reynolds*, it applied the mathematics of one-person, one-vote to Alabama's legislative districts. 377 U.S. at 563. It rejected discrimination against voters based on homestead or occupation and concluded that the equal protection violation was "easily demonstrable mathematically." *Id.* In response to risks of entering "mathematical quagmires," the Supreme Court responded: "a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." *Id.* at 567. Today, it allows only small mathematical variations. *See N.Y. City Bd. of Estimate v. Morris*, 489 U.S. 688, 702 (1989).

The same equal-protection, mathematical principle that voids malapportionment at the front end, when electing representatives, also voids unequal voting thresholds at the back end, when those representatives vote. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."). Equal protection mathematics requires the United States to relate the Senate's fifty-one-votes and sixty-votes thresholds to the classifications of citizens they create based on the complications the citizens face. Classifications without that rationale fail the rational basis test. *See Reynolds*, 377 U.S. at 563.

Here, no rationale justifies allowing Citizens to lose their statutory protections with just fifty-four votes in the Senate when other groups would not lose statutory protections without sixty. The Senate's two voting thresholds violate equal protection even under the rational basis test.

No matter which level of scrutiny the Court applies, this classification of citizens, into those protected by delegations to agencies and those protected by statutes directly, violates equal protection.

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

Just as the two voting thresholds in the Review Act and in the Cloture Rule violate equal protection, so do they violate substantive due process. *See Obergefell v. Hodges*, 576 U.S. 644, 672 (2015) ("The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles."). The Fifth Amendment's Due Process Clause prohibits the United States from depriving a person "of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. 5.

When statutes impact rights or liberties that qualify as "fundamental," courts use a strict scrutiny test and strike down those statutes unless the legislature "narrowly tailored [the statutes] to serve a compelling state interest." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quotations and alterations omitted)). Fundamental rights and liberties include rights to participate in politics, to vote, to marry, to have children and to raise them, to marital privacy, to contraception, to bodily integrity, to abortion, to assemble peaceably, and to keep and bear arms. *Id.*; *McDonald v. City of Chicago*, 561 U.S. 742, 759, 778 (2010); *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964); *Yick Wo*, 118 U.S. at 370. Here, as with equal protection, these two voting thresholds affect efforts to rectify errors through the democratic process, so they do not qualify for rational basis review. *See Beach Commc'ns*, 508 U.S. at 313; *Cleburne*, 473 U.S. at 440; *Vance*, 440 U.S. at 97.

Separate from fundamental rights, substantive due process requires all statutes to pass the rational basis test. Under that test, courts determine whether the statute "rationally relate[s] to

legitimate government interests." *Washington*, 521 U.S. at 728. The Senate's two voting thresholds fail both tests because the Senate's two voting thresholds accomplish no legitimate legislative objective.

A. Congress provided insufficient evidence of agency misconduct—and no evidence that the Senate's two voting thresholds would cure it.

Congress created the Senate's two voting thresholds because it assumed agency misconduct. Congress further assumed that more easily rescinding legislative rules would better discipline issuing agencies. Supreme Court precedent, however, requires courts to reject both assumptions. Without those assumptions, the Senate's two voting thresholds fail both tests.

When passing the Review Act, Congress stated that it expected an easier legislative veto would "ensure that Federal regulatory agencies are carrying out congressional intent," and would "take a major step toward holding regulatory agencies accountable for the rulemakings they issue" because the "Federal bureaucracy . . . has grown out of control." 142 CONG. REC. S3120-21 (Mar. 28, 1996) (statement of Sen. Nickles.). Congress sought a "safety valve from the oppressive hand of the regulators." 141 CONG. REC. H5099. They aimed to "to reduce—if not eliminate—unnecessary, burdensome, and excessively costly regulations." 142 CONG. REC. at S2162 (statement of Sen. Nickles). Courts reject unsupported statements like these, which malign the entire Executive Branch.

Courts presume that agencies act with honesty and integrity. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). They reject allegations of agency misconduct without clear evidence. "Allegations of government misconduct are easy to allege and hard to disprove, so courts must insist on a meaningful evidentiary showing." *NARA*, 541 U.S. at 174 (quotations and citation omitted). Therefore, "[t]he presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged

their official duties." *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) (quoted approvingly by *NARA*, 541 U.S. at 174). Congress provided no evidence of agency misconduct, and its assumptions do not qualify as rational to satisfy the rational basis test. *See id.*; *Sable Commc's of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989) ("whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law.").

Congress's stated reasons fail the rational basis test. It can have no rational basis for curing a problem that does not exist. Without clear evidence of that harm, no "reasonably conceivable state of facts" provides "a rational basis for the classification." *Beach Commc'ns*, 508 U.S. at 313; *see Heller v. Doe*, 509 U.S. 312, 321 (1993) ("even the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation.").

Even if Congress produced some evidence of some agency misconduct, the Court can only uphold the Senate's two voting thresholds if a lower Senate voting threshold would rationally cure it. Congress produced no evidence of that connection, either. Indeed, it never considered adopting two voting thresholds in the House of Representatives. Congress lacked a rational basis for the Senate's two voting thresholds. *Cf. Tenn. Wine and Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2476 (2019) ("No evidence has been offered that [the statutory requirement] actually [accomplishes its objective], and in any event, the requirement now before us is very poorly designed to do so.").

For the same reasons, the Senate's two voting thresholds fail the higher, strict scrutiny test. Strict scrutiny requires Congress to "narrowly tailor[]" the two voting thresholds to remediate a compelling harm. *See Reno v. Flores*, 507 U.S. 292, 302 (1993). Congress's overbroad, baseless assumptions failed to target the different voting thresholds narrowly to particularly intransigent

agencies. Instead, Congress took a "scattershot" approach by giving the Senate a lower voting threshold by which to rescind *any* statutory authority that delegates authority to *any* agency for *any* reason. *Cf. Salerno*, 481 U.S. at 750 (rejecting "scattershot attempt[s]" at legislating). Because Congress did not tailor or target the two voting thresholds, they fail strict scrutiny.

B. The Constitution prohibits Congress from increasing efficiency by avoiding the Constitution's own procedures.

Even if rational basis applies, and if the Court can supply rationales for the Senate's two voting thresholds, no rationale exists to justify them. Some hypothetical increase in Senate procedural "efficiency" does not qualify as a legitimate governmental objective because it contradicts the Constitution at Article I, section 7.

The Supreme Court has recognized that, although "a given law or procedure is efficient, convenient, and useful in facilitating functions of government," that "will not save [the law] if it is contrary to the Constitution," because "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . ." *Chadha*, 462 U.S. at 944. Some Constitutional requirements "often seem clumsy, inefficient, even unworkable." *Id.* at 959. Nonetheless, the Supreme Court prohibited Congress from avoiding the "cumbersomeness and delays often encountered in complying with explicit Constitutional standards . . . ." *Id.* "[W]e have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." *Id.*

The Supreme Court has expressed no patience with Congress's efforts to alter the Article I process. It rejected two Article I innovations that Congress passed.

The Supreme Court already rejected this same—the 104th—Congress's attempt to shortcut Article I. *Clinton v. City of New York*, 524 U.S. 417, 440 (1998). The Line-Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (Apr. 9, 1996), had allowed the President, after signing a bill into

law, to "cancel" three categories of spending provisions. Pub. L. No. 104-130, § 2(a), § 1021(a); *Clinton*, 524 U.S. at 436. After the President "canceled" a statutory provision, that provision would no longer "hav[e] legal force or effect," although Congress could pass a bill to reinstate it, and the President could veto that bill. Pub. L. No. 104-130, § 2(a), § 1025(4); *Clinton*, 524 U.S. at 437. The Supreme Court saw through Congress's and the President's attempt to rewrite and to shortcut Article I. It held that the Line-Item Veto Act unconstitutionally allowed the President to change statutes' substance after Congress passed them. *Clinton*, 524 U.S. at 440.

Even more to the point, the Supreme Court overturned the earlier, one-house legislative veto, for violating Article I. Written directly into the statutes that delegated authority to agencies, the one-house legislative veto allowed either house of Congress to veto any agency decision simply by passing a resolution. *Chadha*, 462 U.S. at 923, 925. The Supreme Court rejected that extra-constitutional procedure because "the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a *single*, finely wrought and exhaustively considered, procedure." *Chadha*, 462 U.S. at 951 (emphasis added).

Here, Congress created *two* statutory procedures for passing bills. The Constitution prohibits Congress from passing statutes that change the Article I process for passing statutes. "Congress cannot alter the procedures set out in Article I, § 7, without amending the Constitution." *Clinton*, 524 U.S. at 446; *Chadha*, 462 U.S. at 958 n.23. Creating two voting thresholds for passing bills circumvents the Article I, Section 7, procedure in violation of the Supreme Court's recognition of a *single* procedure for passing and repealing bills. Therefore, even if Congress sought more efficiency with the Review Act and the Cloture Rule, it accomplished that efficiency illegally: by amending Article I without complying with the Article V amendment process. *See Chadha*, 462

U.S. at 958 n.23. Thus, efficiency does not qualify as a legitimate purpose for creating the Senate's two voting thresholds.

This situation parallels a recent situation in which the *principal* had defined a procedure, and the *agent* illicitly changed that procedure. *Perez*, 575 U.S. 92. Under the APA, the D.C. Circuit had required agencies to use notice-and-comment rulemaking to amend interpretive rules. The Supreme Court overturned the D.C. Circuit because the APA "specifically exempts interpretive rules from the notice-and-comment requirements that apply to legislative rules." *Id.* at 101. Therefore, it held, "[b]ecause an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule." *Id.*

The Supreme Court faulted the D.C. Circuit for striking a different balance than Congress had struck. It found that, "when Congress enacted the APA, it settled long-continued and hard-fought contentions, and enacted a formula upon which opposing social and political forces have come to rest." *Id.* at 102 (quotations and citations omitted). It criticized the D.C. Circuit for changing that balance: although "the D.C. Circuit would have struck the balance differently [in the APA, that] does not permit that court or this one to overturn Congress' contrary judgment." *Id.* These principles apply here.

In *Perez*, the principal (Congress) had defined procedures for repealing interpretive rules, and the agent (the court) violated the APA by adopting different ones. Here, the principal (the People) had defined procedures for passing bills, and the agent (Congress) violated the Constitution by adopting different ones. The Fifth Amendment requires the Court to overturn Congress's judgment and to uphold the People's judgment by requiring Congress to use a single voting threshold for passing and rescinding laws.

C. Shrinking the Executive Branch does not qualify as a legitimate objective.

As a final objective, Congress intended the Review Act's one-way ratchet to shrink the Executive Branch. *See* 142 CONG. REC. at S2162. That objective, however, does not qualify as legitimate because it contravenes Article I, section 7, and Article V by changing how Congress passes bills without amending the Constitution.

Because of the Senate's two voting thresholds, when Congress takes away a statutory delegation using the Review Act, it cannot restore that statutory delegation with the same number of votes in the Senate. Here, for example, Congress rescinded statutory authority for the Stream Protection Rule with fifty-four votes in the Senate, but the Cloture Rule prohibits that Congress or future Congresses from redelegating that authority without sixty votes. Thus, the Review Act creates a one-way ratchet in favor of *rescinding* agency authorities over *expanding* agency authorities. That purpose violates Article I, section 7. *See Clinton*, 524 U.S. at 446.

No doubt, Congress possesses the power to shrink the Executive Branch incrementally: one statute or one rule at a time. Reasonable minds could disagree whether government has grown too large or whether agencies act too invasively. Unless or until Congress and the states amend the Constitution under Article V, however, the Constitution requires that political-philosophical disagreement to play out through the Article I, Section 7, process without a thumb on the scales. *See id.* at 446-49.

The Senate's two voting thresholds change not just one statutory delegation; they structurally change the Senate's voting threshold for passing future statutes related to recent rules, which violates Article I and Article V. *Clinton*, 524 U.S. at 448-49; *Chadha*, 462 U.S. at 951.

Any other supposed purposes will result in the same Article I, section 7, violations. Congress could advance no legitimate governmental objective by setting two voting thresholds in the

Senate without amending the Constitution. For failing to identify a legitimate government objective, the Senate's two thresholds violate due process.

III. The Review Act's one-way ratchet violates the separation of powers by eroding and undermining the Executive Branch.

The same one-way ratchet that unconstitutionally shrinks government also violates the structural limits on separation of powers by its one-way ratchet in favor of shrinking Executive Branch authority. Congress rescinded OSMRE's authority to issue the Stream Protection Rule with fifty-four votes, but it cannot redelegate that authority without sixty. *See* 163 CONG. REC. at S632. That likely puts another Stream Protection Rule out of reach for years or decades more—until the next time one party controls the Presidency, the House of Representatives, and sixty votes in the Senate.

Courts address individual litigants' separation-of-powers arguments even when the litigants belong to no branch of government. *Bond v. United States*, 564 U.S. 211, 222 (2011) ("individuals, too, are protected by the operations of separation of powers and checks and balances; and they are not disabled from relying on those principles in otherwise justiciable cases and controversies."). Courts do not require the separation of powers to accomplish "a hermetic division among the Branches," but courts require the branches to adhere to the "carefully crafted system" and structure of checks and balances. *Mistretta*, 488 U.S. at 381; *Bowsher*, 478 U.S. at 730 ("The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty."). The Supreme Court has accordingly "not hesitated to strike down provisions of law" that "undermine" or "erode[]" the authority of another branch. *Mistretta*, 488 U.S. at 382; *Chadha*, 462 U.S. at 958; *see also Stern*, 564 U.S. at 502-03 ("A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely."). The Supreme Court does not "overlook" even the "mildest and least

repulsive" intrusions because "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Stern*, 564 U.S. at 503 (quotations omitted).

Except for the powers the Constitution confers directly, the Executive Branch obtains its authority solely by Congress creating Executive departments and agencies and by assigning them powers and tasks. *See Youngstown Sheet Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). Over time, the two voting thresholds create a one-way ratchet that only decreases the number of delegations to agencies. If it takes sixty votes to delegate additional authorities, but fifty-one to rescind authorities, the volume of delegated authorities will decrease over time. Thus, Congress unconstitutionally aggregated power to itself. *See Freytag v. Comm'r*, 501 U.S. 868, 878 (1991) ("Our separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch.").[7]

By this complicated one-way ratchet, the Review Act and the Cloture Rule create a structure for passing bills that erodes, undermines, and chips away at the Executive Branch's authority. James Madison cautioned that Congress could "mask under complicated and indirect measures the encroachments which it makes on the coordinate departments." The Federalist No. 48 at 317 (Random House, Inc. 2000); *Metro. Wash. Airports*, 501 U.S. at 277. The Review Act and the Cloture Rule, together, qualify as one of these complicated and indirect encroachments. But they unconstitutionally encroach nevertheless.

[7] Even if, like here, the Executive Branch acquiesces in the Legislative Branch taking its authority, the Constitution's separation-of-powers principles still prohibit those actions. *See Free Enter. Fund*, 561 U.S. at 497 ("the separation of powers does not depend on the views of individual Presidents, nor on whether the encroached-upon branch approves the encroachment" (quotations and citations omitted)).

Congress chipped away at OSMRE's authority by rescinding the authority for the Stream Protection Rule with fifty-four votes in the Senate, although the Cloture Rule prohibits redelegating that authority without sixty. By creating different vote thresholds for rescinding verses re-passing bills to delegate authority to the Executive Branch, the Senate's two voting thresholds violate the separation of powers.

CONCLUSION

The Congressional Review Act and the Cloture Rule, together, violate equal protection, substantive due process, and the separation of powers. The Court's ruling on the merits will clarify the appropriate remedies, and the Parties can brief remedies then. At the least, the Constitution requires this Court to declare the Senate's two, unequal voting thresholds unconstitutional, to restore the Stream Protection Rule, to set aside the Mine Approval for violating the Constitution, and to enjoin further mining of the areas OSMRE approved.

Respectfully submitted, March 2, 2021,

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