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

Civil Action No. 1:20-cv-03668-RM-STV

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

Plaintiffs,

v.

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

Defendants.[1]

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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[1] Pursuant to Federal Rule of Civil Procedure 25(d), Debra Haaland is automatically substituted as a Defendant (in her official capacity) as the Secretary of the Interior, Glenda Owens is automatically substituted as a Defendant (in her official capacity) as the Deputy Director of the Office of Surface Mining Reclamation and Enforcement, and Laura Daniel-Davis is automatically substituted as a Defendant (in her official capacity) as Senior Adviser to the Secretary, Exercising the Delegated Authority of the Assistant Secretary for Land and Minerals Management.

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Although the precise theory behind Plaintiffs' constitutional claims is often difficult to understand, Plaintiffs' opposition brief confirms that they cannot prevail on any of them. As every court to consider the question has held, there is nothing constitutionally suspect about the Congressional Review Act—let alone about the only provision actually alleged to have injured Plaintiffs here, 5 U.S.C. § 802(d)(2), which limits Senate debate on CRA disapproval resolutions to 10 hours. *See Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553 (9th Cir. 2019). Defendants' motion to dismiss should be granted, and all of Plaintiffs' claims should be dismissed with prejudice for failure to state a claim upon which relief can be granted.

I. The procedures set forth in the Congressional Review Act comply with all constitutional requirements for legislative action.

Plaintiffs have repeatedly asserted, without explanation, that the Congressional Review Act "contravenes Article I, section 7 . . . by changing how Congress passes bills without amending the Constitution." Pls.' Mot. for Summ. J. ("Pls.' MSJ"), ECF No. 26, at 25. In response to that argument, Defendants have identified the "[e]xplicit and unambiguous provisions of the Constitution" that actually "prescribe and define the respective functions of the Congress and of the Executive in the legislative process," *Chadha*, 462 U.S. at 945, and have explained how the Congressional Review Act is entirely consistent with those provisions—in particular, with the requirements of bicameralism and presentment. *See* Defs.' Mot. to Dismiss ("Defs.' MTD"), ECF No. 33, at 8-10.

Plaintiffs appear to misunderstand Defendants' motion to dismiss. Defendants do not argue that Plaintiffs' constitutional challenge is unreviewable. *See, e.g.*, Pls.' MTD Opp'n at 3. Defendants' argument, rather, is that Plaintiffs' claim is meritless. Defendants have not disputed that if, for example, the Congressional Review Act somehow violated the Due Process Clause of the Fifth Amendment, then this Court could say so—even if the statute is consistent with Article I. Instead, Defendants simply explained why, on the merits, Plaintiffs' scattered assertions that the Congressional Review Act violates Article I, Section 7 of the Constitution were baseless. As Defendants' opening brief explained, Public Law 115-5 passed both houses of Congress, and was signed into law by the President, thus satisfying the requirements of bicameralism and presentment that are the focus of

Article I, Section 7. *See* Defs.' MTD at 8-10. Section 7 contains no additional requirement that Public Law 115-5 would have violated, and it does not contain any requirement that a law pass the Senate with 60 or more votes. Plaintiffs have still not meaningfully responded to that argument—although they continue to state their contrary view (without explanation, or citation to any applicable authority). *See, e.g.*, Pls.' MTD Opp'n at 14 ("Creating a new process for implementing Congress's legislative power violates Section 7.").[2]

Plaintiffs repeatedly cite *INS v. Chadha*, 462 U.S. 919 (1983), but to the extent it applies here, *Chadha* proves Defendants' point. The one-house legislative veto was held unconstitutional in *Chadha* precisely because it violated both the bicameralism requirement and the presentment requirement, which are express requirements of the Constitution found in Article I, Section 7. *See id.* at 954-55 (Congress can enact laws "in only one way; bicameral passage followed by presentment to the President"). But the Congressional Review Act and Public Law 115-5 violate none of these requirements, so *Chadha* cannot help Plaintiffs here.

II. The Congressional Review Act does not violate equal protection principles.

Plaintiffs spend most of their opposition brief trying to explain their novel equal protection argument. But Plaintiffs' scattershot rhetoric and reliance on logic treatises cannot change the fact that the animating premise behind their lawsuit—that by adopting the CRA and the Cloture Rule, Congress has "created two categories of citizens," Pls.' MSJ at 16—is fundamentally mistaken. And even if Plaintiffs' unusual claim were to be analyzed under traditional equal protection doctrine, rational-basis review would apply, and the CRA would easily satisfy it. Plaintiffs' equal protection claim is therefore without merit and should be dismissed.

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[2] If Plaintiffs were correct that the Constitution requires the Senate to always use a 60-vote threshold, then countless other bills that have passed the Senate with less than 60 votes would also be subject to legal challenge. *See, e.g.*, Congressional Budget and Impoundment Control Act of 1974, *as amended*, 2 U.S.C. §§ 601-688 (congressional procedures regarding the U.S. budget process); Trade Act of 1974, *as amended*, 19 U.S.C. §§ 2191-2194 (fast-track authority for some trade agreements). Indeed, Plaintiffs appear to concede as much. *See* Pls.' MTD Opp'n at 7 (claiming that these statutes "only demonstrate additional inequalities").

a. The Congressional Review Act does not create two classes of citizens. Plaintiffs' equal protection theory continues to rely on the confusing and unsupported threshold premise that the Congressional Review Act and the Cloture Rule combine to "create" "two classes of citizens": "(1) citizens protected by statutes that delegate authorities to agencies and (2) citizens protected by statutes directly." Pls.' MTD Opp'n at 9. In their motion to dismiss, Defendants explained why that premise was both incorrect and lacking a foothold in the law of equal protection. *See* Defs.' MTD at 11-13. None of Plaintiffs' responses are persuasive.

First, Plaintiffs misconstrue both the Congressional Review Act and the Cloture Rule, claiming (without any citation) that by adopting those procedures, Congress intended to "better protect[] powerful constituencies" like "the coal mining industry," on one hand, while "focus[ing] the suffering" on "individuals living near coal mines," on the other. Pls.' MTD Opp'n at 6-7. In fact, neither the Congressional Review Act nor the Cloture Rule draws any distinction between laws that favor or disfavor the coal-mining industry, or "individuals living near coal mines." *Id.* Even accepting the premise that agency rules or federal statutes can be neatly categorized as pro-coal-mining or anti-coal-mining (or as favoring or disfavoring "individuals living near coal mines," a group that presumably will often include those who are employed by coal mines and thus desire their continued operation), both the Congressional Review Act and the Cloture Rule apply identically to all such rules and laws. Plaintiffs concede, for example, that an agency rule benefiting the coal-mining industry can be subject to a CRA disapproval resolution in exactly the same way as an agency rule burdening the coal-mining industry. *See* Pls.' MTD Opp'n at 12.

Second, in response to Defendants' argument that, at most, the CRA and the Cloture Rule draw distinctions between types of *laws*, rather than between types of *individuals*, and thus are not even amenable to a traditional equal-protection analysis, Plaintiffs assert that "the Supreme Court rejected that argument" in *Romer v. Evans*, 517 U.S. 620 (1996). Pls.' MTD Opp'n at 10. But Plaintiffs misread *Romer*, which involved a Colorado constitutional amendment that "impos[ed] a broad and undifferentiated disability on a single named group," which the State of Colorado had defined in the text of the challenged amendment as "homosexual, lesbian or bisexual orientation, conduct, practices

or relationships." *Id.* at 624, 632. The Supreme Court held that Colorado's law lacked a rational basis, because it "seem[ed] inexplicable by anything but animus toward the class it affect[ed]." *Id.* at 632. The Colorado constitutional amendment at issue in *Romer* bears no resemblance to either the CRA or the Cloture Rule, neither of which target any discrete "class" of individuals. *Id.*

Accordingly, it remains the case that "Plaintiffs have not plausibly alleged that the challenged actions 'divide citizens into two groups' at all—making it irrelevant whether any such distinction would survive the applicable level of equal-protection scrutiny." Defs.' MTD at 13 (citations omitted).

b. At most, rational-basis review applies. Even if Plaintiffs were correct that either the Congressional Review Act or the Cloture Rule somehow (without saying so) divides individuals into pro-regulation or anti-regulation camps, at most, rational-basis review would apply. That is because neither the Supreme Court nor the Tenth Circuit has ever recognized any remotely similar suspect class. *See Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002) ("[W]hen legislation categorizes persons on the basis of a non-suspect classification, we apply rational basis review."). Plaintiffs hardly argue to the contrary, stating only (without citation) that "[w]hen Congress rigs democracy against an unusual group, it violates equal protection." Pls.' MTD Opp'n at 9. Even ignoring that Congress has not "rigged democracy" in the CRA, let alone "against" any particular group, that is still not an argument for heightened scrutiny—only an argument that the challenged distinctions are unconstitutional, on the merits. Accordingly, even ignoring all of the threshold problems with Plaintiffs' equal protection theory, at most, rational-basis review would apply.

c. The Congressional Review Act has a rational basis. The Congressional Review Act "was designed to give Congress an expedited procedure to review and disapprove federal regulations." *Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 556 (9th Cir. 2019). In doing so, "[t]he CRA assists Congress in discharging its responsibilities for overseeing federal regulatory agencies." *Id.* In particular, one way the CRA furthers those goals is by making clear that "[i]n the Senate, debate on [a] joint resolution [of disapproval] . . . shall be limited to not more than 10 hours," 5 U.S.C. § 802(d)(2). "Congress was not irrational to conclude that by streamlining procedures for review and disapproval of agency rules, it would be easier for Congress to provide efficient oversight of the large and growing

network of administrative agencies that Congress itself had created." Defs.' MTD at 15. On this point, Plaintiffs appear not to have offered any argument to the contrary in their opposition.

d. Defendants need not separately justify the Cloture Rule, which is not the cause of Plaintiffs' alleged injuries, and the legality of which is therefore not before the Court. Plaintiffs also include a new argument that appears nowhere in any of their prior filings: that the Constitution "implicitly" requires that the Senate generally use "a majority-of-the-quorum rule," by otherwise specifying a supermajority requirement for certain specific types of votes. Pls.' MTD Opp'n at 15-16 ("By listing the specific situations that required supermajorities, the Constitution implied the rest would follow the default, majority-of-the-quorum rule."); *see also id.* at 11 ("Equal protection also requires OSMRE to explain the higher, sixty-vote threshold, which it cannot."). But even if the Cloture Rule or the filibuster were unconstitutional, standing alone—and none of Plaintiffs' authorities comes close to establishing that dramatic and novel proposition of constitutional law—Plaintiffs' claims would still fail, for several reasons.

As a threshold matter, it bears repeating that final passage of any Senate bill requires only a bare majority, even if the Cloture Rule (when it applies) requires 60 votes to cut off debate. *See* Defs.' MTD at 11-12. But even if the Constitution—without actually saying so anywhere in the text of the document—forbids the creation of congressional rules that required more, that is still no help to these Plaintiffs, in this case. To the contrary, such a conclusion would make the filibuster (or the Cloture Rule) unconstitutional, thereby requiring only a bare majority for the passage of any bill in Congress. But that result—the approval of laws by a simple majority—*is the entire basis for Plaintiffs' constitutional challenges in the present lawsuit*. According to Plaintiffs, they were injured by the passage of Public Law No. 115-5, 131 Stat. 10 (2017) (disapproving of the Stream Protection Rule), pursuant to the Congressional Review Act, on a 51-vote threshold, which they believe violated the Constitution precisely because it was *not* subject to a filibuster. *See, e.g.*, Compl., ECF No. 1, ¶ 6 ("To rescind the Stream Protection Rule, Congress relied on the unconstitutional Congressional Review Act."); *id.* ¶ 10 ("Because Congress used an unconstitutional procedure to withdraw the Stream Protection Rule, the withdrawal is void. Consequently, the Stream Protection Rule remains in force, and OSMRE violated

the Constitution, [SMCRA, and the APA], by failing to apply it to the Mine Approval.") (internal citations omitted). It is difficult to understand how Plaintiffs could simultaneously argue that the Constitution mandates both that the filibuster be available for all laws (including the one at issue in this case) and that a supermajority vote is permissible only in certain specified instances (not including the one at issue in this case).

Although Defendants' interpretation of Plaintiffs' filings is that Plaintiffs do not actually intend to challenge the legality of the filibuster or the Cloture Rule directly, even if they wanted to, Plaintiffs could not do so here, because they would lack Article III standing to bring such a claim. To show Article III standing, a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). And here, Plaintiffs' only alleged injury stems from the withdrawal of the Stream Protection Rule, after Congress enacted a CRA disapproval resolution that was *not* subject to a filibuster. In any case, were there any doubt on the matter, Plaintiffs previously represented that this case raises a challenge *only* to the Congressional Review Act, and not to the Cloture Rule, agreeing that "each claim in this case concerns the constitutionality of a federal statute alone," and that "[n]o administrative record is necessary" because all of Plaintiffs' claims turn "exclusively on the question of whether the Congressional Review Act violates the Constitution." Joint Case Management Statement, ECF No. 18, at 5.

In short, although Plaintiffs have not demonstrated that the Cloture Rule itself is unconstitutional, that question is not presented by this lawsuit, which instead challenges only the Congressional Review Act, and in particular 5 U.S.C. § 802(d)(2), the provision that limits Senate debate on CRA disapproval resolutions to 10 hours.[3]

[3] For these reasons, Plaintiffs are correct that Defendants have not previously sought to identify any rational basis for the filibuster or the Cloture Rule—that question is simply not at issue in this case. But were it necessary, rational bases are easy to hypothesize (*e.g.*, encouraging the Senate to reach bipartisan consensus, ensuring vigorous debate on matters of importance, protecting the rights of the Senate minority, and so on). In all events, if this case actually presented a direct challenge to the constitutionality of the filibuster (or the Cloture Rule) standing alone, Defendants would likely

III. The Congressional Review Act does not violate substantive due process.

Defendants' opening brief set forth the applicable standard for a substantive-due-process claim in the Tenth Circuit, relying primarily on a 2019 decision that prescribes that standard in detail. *See Abdi v. Wray*, 942 F.3d 1019, 1027 (10th Cir. 2019). Defendants also explained why *Abdi* confirms that rational-basis review applies to Plaintiffs' substantive-due-process claim. *See* Defs.' MTD at 15-17. In response, Plaintiffs do not meaningfully dispute that *Abdi* offers the appropriate doctrinal framework here—nor could they.

Instead, Plaintiffs largely rehash the argument that the Congressional Review Act is inconsistent with the procedures required by Article I, Section 7 of the Constitution (i.e., bicameralism and presentment). *See, e.g.*, Pls.' MTD Opp'n at 14 ("Creating a new process for implementing Congress's legislative power violates Section 7, and by presenting an illegitimate objective, the Senate's two thresholds violate substantive due process under every tier of scrutiny."). But as explained above, that argument is meritless. *See supra*, Section I. And either way, it has little, if anything, to do with substantive due process.[4]

When it comes to substantive due process, all that matters here is that "Congress was not irrational to conclude that by streamlining procedures for review and disapproval of agency rules, it would be easier for Congress to provide efficient oversight of the large and growing network of administrative agencies that Congress itself had created." Defs.' MTD at 15. That is fatal to Plaintiffs' substantive-due-process claim. *See Abdi*, 942 F.3d at 1027-28 (rational-basis review applies to substantive due process claims unless a fundamental right is being infringed).

IV. The Congressional Review Act does not violate the separation of powers.

As for Plaintiffs' separation of powers claim, Defendants' motion to dismiss explained that "the Executive Branch's power over the administrative state is fundamentally an exercise of its power

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have raised other arguments (including threshold jurisdictional and justiciability arguments) that would have been independently fatal to any such claims.

[4] To that end, if Plaintiffs were right that the Congressional Review Act is inconsistent with Article I, Section 7, then it would be unconstitutional, full stop—without the need for any additional analysis of substantive-due-process doctrine.

to 'take Care that the Laws be faithfully executed.'" Defs.' MTD at 19 (quoting U.S. Const. art. II, § 3, cl. 5). "But of course 'the Laws' are those passed by both houses of Congress and signed by the President—including the Congressional Review Act, and CRA disapproval resolutions." *Id.* Plaintiffs respond with conclusory, *ipse dixit* assertions like "[t]he separation of powers prohibits Congress from eliminating regulatory authority more easily than delegating or redelegating it." Pls.' MTD Opp'n at 19. But that unsupported statement misunderstands the basis for the Executive Branch's authority over administrative agencies—all of which are ultimately creatures of Congress, and the laws enacted by Congress. And those laws include the Congressional Review Act, and CRA disapproval resolutions like Public Law 115-5.

Defendants will not repeat all of the arguments that appeared in their motion to dismiss, except to emphasize that an agency "may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (citation omitted). And that authority can be expanded or contracted, at any time, pursuant to legislative action. *See, e.g.*, *CFTC v. Schor*, 478 U.S. 833, 845 (1986). Therefore, the mission of the Department of the Interior, for example, and the nature of the statutory authority at its disposal to carry out that mission, are always subject to revision from Congress, in either direction (subject, as always, to the President's veto). Because the Department of the Interior only has the authority to issue binding regulations to the extent that authority is delegated by Congress, the Executive Branch suffers no constitutional injury when Congress amends that delegation of authority, as it did here by both (1) declaring that the Stream Protection Rule shall have no further force and effect and (2) prohibiting the issuance of any substantially similar rules in the future (that is, unless and until Congress amends that delegation once again). *See Center for Biological Diversity*, 946 F.3d at 561-62 (rejecting separation-of-powers challenge to the Congressional Review Act).

This is not to say that "Congress can do whatever it wants to executive power," Pls.' MTD Opp'n at 17—it is simply a recognition that no inherent Article II authority has been infringed upon by Public Law No. 115-5, and that it falls well within Congress's authority to amend its delegations to

an agency, using whatever procedural rules it sees fit in considering that legislation. *See* U.S. Const., art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings.")

CONCLUSION

For these reasons, Defendants' motion to dismiss should be granted, and all of Plaintiffs' claims should be dismissed with prejudice for failure to state a claim upon which relief can be granted.

Dated: April 14, 2021

Respectfully submitted,

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