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

**Civil Action No. 20-cv-3668-RM-STV**

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

**Plaintiffs,**

**v.**

**THE UNITED STATES OF AMERICA;**
**THE OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT;**
**DEB HAALAND, in her official capacity as Secretary of the Interior;**
**GLENDA OWENS, in her official capacity as Acting Director of the Office of Surface Mining Reclamation and Enforcement; and**
**LAURA DANIEL-DAVIS, in her official capacity as Acting Assistant Secretary for Land and Minerals Management;**

**Defendants, and**

**GCC Energy, LLC,**

**Interested Party.**

---

# PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

---

## TABLE OF CONTENTS

## CHRONOLOGY

| Date | Event |
|---|---|
| Mar. 7, 1975 | The Senate established the Sixty-vote Cloture Rule. 121 Cong. Rec. 5651-52. |
| Mar. 29, 1996 | Congress passed the Congressional Review Act (the 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). |
| Jan. 7, 2004 | The Office of Surface Mining Reclamation and Enforcement (OSMRE) initiated the process that results in the Stream Protection Rule. Excess Spoil; Stream Buffer Zones; Diversions Rule, 69 Fed. Reg. 1,036. |
| Dec. 20, 2016 | OSMRE issued the Stream Protection Rule. 81 Fed. Reg. 93,066. |
| Feb. 16, 2017 | Congress passed a statute of disapproval under the Congressional Review Act. 131 Stat. 10. |
| Nov. 17, 2017 | OSMRE issued its Congressional Nullification of the Stream Protection Rule. 82 Fed. Reg. 54,924. |
| Mar. 27, 2018 | OSMRE issued the Modification Mine Approval. ECF No. 1-3. |
| Jan. 15, 2021 | OSMRE issued the Dunn Ranch Lease Mine Approval. Ex. 1. |

## INTRODUCTION

Whenever Congress makes rules and exceptions, it risks violating the Constitution's equal protection and due process requirements based on the classifications and objectives it advances. Everyone knows the Cloture Rule,[1] commonly known as the "filibuster," stops bills from becoming laws without sixty votes in the Senate. Because that high hurdle made passing bills so difficult, Congress made exceptions. Exceptions create classifications. Among them, the Congressional Review Act (Review Act)[2] set a lower, fifty-one-vote threshold for rescinding statutory delegations to agencies. The Senate's two voting thresholds contravene equal protection and due process protections. They also diminish the executive power and thereby violate the separation of powers. Fifty-four Senators used that unconstitutional process to allow Defendants (collectively OSMRE) to approve expanding a Colorado coal mine above-grade from Southwest Advocates' members' homes.

Fifty-one does not equal sixty, so by simple mathematics, the Senate's two thresholds violate equal protection. Equal protection compels protecting Southwest Advocates from the bill passed with just fifty-four votes—instead of the sixty that protects others. The Senate's two voting thresholds violate substantive due process because they lack a legitimate government objective. Altering the Article I, Section 7, voting thresholds for making bills laws (simple majorities and two-thirds votes to overcome vetoes) does not qualify. Embedding a one-way ratchet into Section 7, which, over time, erodes and chips away at executive power, also violates the separation of powers contrary to the Framers' intent. *Cf. United States v. Booker*, 543 U.S. 220,

[1] Rule XXII.2, Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the U.S. Senate (113th Cong., 1st Sess.).
[2] 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).

258 (2005) (rejecting the possibility that Congress intended a "one-way lever" for sentencing).

OSMRE argues that the Constitution prohibits this Court from reviewing Congress's process because it complied with bicameralism and presentment. Defs.' Mot. to Dismiss 2, 8-10 (US Br.), ECF No. 33. The Supreme Court rejected that argument in 1855. "[Due process] is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will." *Murray's Lessee et al. v. Hoboken Land Improvement Co.*, 59 U.S. 272, 276 (1855); *see Wash. Airports v. Noise Abatement Citizens*, 501 U.S. 252, 272 (1991) ("The question presented is only whether [Congress] has followed a constitutionally acceptable procedure . . . ."). When Congress's process violates a constitutional provision, courts strike it down. *Clinton v. New York*, 524 U.S. 417, 448 (1998); *INS v. Chadha*, 462 U.S. 919, 941 (1983). The Constitution compels denying OSMRE's motion to dismiss.

## ARGUMENT

### I. Satisfying bicameralism and presentment does not immunize Congressional action from other constitutional restraints.

Citizens' opening brief demonstrated that the Senate's two voting thresholds violate the Fifth Amendment's equal protection and substantive due process requirements, and the separation of powers. In its motion to dismiss, OSMRE argued that Congress complied with bicameralism or presentment. US Br. 8-10. Citizens do not claim Congress violated those requirements. OSMRE merely distracts from the Constitutional restraints that Congress violated. *See* RUGGERO ALDISERT, LOGIC FOR LAWYERS 170 (3d ed. 1997) ("too often counsel choose to 'go in' with an argument favorable to them, but miss the point that is critical to the decision.").

OSMRE asserts that, "for proposed legislation to become law," the Constitution only requires (a) both houses to pass the bill and the President to sign it, or (b) both houses to overcome a

presidential veto with a two-thirds vote. US Br. 2, 8-10. Later, it references an unidentified "handful of rules that govern the legislative process." *Id.* at 8. OSMRE assumes that Section 7 defines all constraints on the process by which a bill becomes a law. It does not. Passing laws requires Congress to follow procedures that comply with all of the Constitution's provisions—not just some of them. *See Marbury v. Madison*, 5 U.S. 137, 179 (1803).

OSMRE contends that Citizens identified no "constitutional provision that actually forbids" modifying the Senate Rules. US Br. 2. Citizens identified them as the Fifth Amendment and separation of powers.[3] The Fifth Amendment guarantees "due process" of law. It applies to all processes, which include the Section 7 process for making bills law. *See Murray's Lessee*, 59 U.S. at 276. Equal protection, due process, and the separation of powers do not stop at the doors to the Capitol. The Constitution assigns courts a "duty . . . to determine . . . whether the powers of any branch of the government, and *even those of the legislature in the enactment of laws*, have been exercised in conformity to the Constitution." *Kilbourn v. Thompson*, 103 U.S. 168, 199 (1881) (quotations omitted, emphasis added). Courts do not excuse Congress from complying with every constitutional provision because Congress forgot one, or because passing statutes that comply with every provision is too hard. *See Booker*, 543 U.S. at 247. When Senate rules affect individuals, courts review them for compliance with every "constitutional restraint[]." *United States v. Ballin*, 144 U.S. 1, 5 (1892); *United States v. Smith*, 286 U.S. 6, 29, 33 (1932).

OSMRE also argues that Congress had plenary discretion to define its own rules. US Br. 10. It does not. Section 5 indeed empowers "Each House [to] determine the Rules of its Proceedings," but that "broad" power does not stand "absolute and beyond the challenge of any

[3] The Constitution has no "'separation of powers clause' . . . . [That and other] foundational doctrines are instead evident from the Constitution's vesting of certain powers in certain bodies." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2205 (2020).

other body or tribunal." *Ballin*, 144 U.S. at 5; *NLRB v. Noel Canning*, 573 U.S. 513, 550-51 (2014). Courts review even Congress's internal rules to ensure they comply with other "constitutional restraints," like equal protection, due process, and the separation powers. *See Ballin*, 144 U.S. at 5; *Smith*, 286 U.S. at 29, 33; *Wash. Airports*, 501 U.S. at 272; *Chadha*, 462 U.S. at 941.

OSMRE contends that Citizens' claims lack merit because the current Senate rules can "still be modified by a majority of Senators at any time." US Br. 2, 12. Hypothetical future changes do not affect judicial review of existing laws. "The 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). Individuals need not wait for Congress to fix an unconstitutional law. "An individual can invoke a right to constitutional protection when he or she is harmed . . . even if the legislature refuses to act." *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015). Regardless of future changes, the Senate Rules violated the Constitution when Congress passed the law to rescind the Stream Protection Rule delegation. Act of Feb. 16, 2017, Pub. L. No. 115-5, 131 Stat. 10; *see Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 426 n.1 (1982).[4]

[4] OSMRE argues that Citizens filed too late under 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), 30 U.S.C. § 1276, to challenge the [OSMRE] Congressional Nullification of the Stream Protection Rule, 82 Fed. Reg. 54,924 (Nov. 17, 2017). US Br. 7 n.2. Citizens do not challenge that rule under that subsection. As masters of their complaint, Citizens have unqualified authority to designate the final agency action they challenge: the Modification Mine Approval, ECF No. 1-3. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 395, 395 n.7 (1987); *Colo. Farm Bureau v. U.S. Forest Serv.*, 220 F.3d 1171, 1173 (10th Cir. 2000).

Subsection 1276 applies to claims brought under "under this subsection," but Citizens brought their claim under Subsection 1270. Compl. ¶¶ 16, 21, 95, ECF No. 1. Anyway, the sixty-day timeframe in Subsection 1276 would not make sense because sixty days after November 2017 means the January 2018 deadline would have run before OSMRE issued the Mine Approval in March 2018 and Citizens' claims had even ripened. Moreover, Subsection 1276 requires the plaintiff to have "participated in the administrative proceedings." *Id.* But OSMRE

**II. The Senate's two voting thresholds violate equal protection mathematics.**

In their opening brief, Citizens explained that fifty-one does not equal sixty, and that mathematical inequality in the Senate's two voting thresholds violates the "pledge of the protection of equal laws." Pls.' Mot. for Summ. J. and Br. in Supp. 11-19 (Pls.' Br.), ECF No. 26; *see Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *see also Reynolds v. Sims*, 377 U.S. 533, 563 (1964) (holding a non-suspect-class, equal protection violation when "[t]he resulting discrimination . . . is easily demonstrable mathematically.").

When Congress could not get its work done under the Senate's Cloture Rule's sixty-vote threshold, it started carving out exceptions that led to these constitutional violations. In 1975, the Senate adopted the current Cloture Rule. 121 Cong. Rec. 5651-52 (Mar. 7, 1975). In 1996, Republicans initially sought a moratorium on all new regulations. 141 Cong. Rec. S4749-50 (Mar. 29, 1995) (statement of Sen. Daschle). They compromised by creating the Review Act exception to the Cloture Rule, so they could more easily rescind statutory delegations to agencies. *See id.*; 141 Cong. Rec. H5099 (May 17, 1995) (statement of Rep. Gekas); 142 Cong. Rec. S2312 (Mar. 19, 1996) (statement of Sen. Glenn).

A single voting threshold with no exceptions could cause no mathematical inequality to violate equal protection. If the Cloture Rule stopped all bills, all citizens would suffer equally. But Congress focused the suffering with unequal voting thresholds that better protected powerful

---

conducted no administrative proceedings for the nullification. Its nullification merely restored the Code of Federal Regulations. OSUMF 40. Citizens could not have brought that claim.

Instead, as SMCRA allows, Citizens brought their claims under the citizen-suit subsection's timelines. 30 U.S.C. § 1270(a), (b) ("any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this chapter," but "[n]o action may be commenced . . . prior to sixty days after the plaintiff has given notice in writing of such action to the Secretary [of the Interior] . . . ."); Compl. ¶¶ 16, 21, 95. Citizens followed SMCRA, and SMCRA provides a cause of action, jurisdiction, and a waiver of sovereign immunity. *See id.* § 1270(a) ("The district courts shall have jurisdiction").

constituencies—here the coal mining industry—at the expense of individuals living near coal mines. Equal protection "largely [exists] to protect against substantive outrages by requiring that those who would harm others must at the same time harm themselves—or at least widespread elements of the constituency on which they depend for reelection." JOHN HART ELY, DEMOCRACY AND DISTRUST 170 (1980).

OSMRE points out other exceptions exist to the Cloture Rule. US Br. 3-4, 10-12. Instead of normalizing the constitutional violations between the Cloture Rule and the Review Act, the Congressional Budget and Impoundment Control Act of 1974 and the Trade Act of 1974 only demonstrate additional inequalities.[5] Under those acts, Congress can roll back regulations, cut taxes, and implement free-trade treaties with only fifty-one votes in the Senate. But the Cloture Rule stops most other measures with sixty votes. These are the type of "indiscriminate imposition of inequalities" that the Supreme Court rejects. *See Shelley v. Kramer*, 334 U.S. 1, 22 (1948) (quoted approvingly by *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

A. Although a final vote may comply with equal protection, earlier votes must also comply.

OSMRE contends that the Cloture Rule and the Review Act do not change vote thresholds at all because "final passage of legislation requires only a majority of Senators to vote in favor." US Br. 11-12. In the white primary cases, the Supreme Court rejected the argument that equal protection applies only to final votes. It applies equal protection to preliminary votes, too.

In 1923 Texas, for example, the Democratic Party had prohibited black party members from voting in primaries, although the State of Texas allowed them to vote in the general election. *Nixon v. Herndon*, 273 U.S. 536, 540 (1927). The Supreme Court made short work of the

[5] Congressional Budget and Impoundment Control Act of 1974, Pub. L. 93-344, 88 Stat. 297 (July 12, 1974) (codified as amended at 2 U.S.C. § 621-691f); Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (Jan. 3, 1975) (codified as amended at 19 U.S.C. §§ 2101-2467).

argument that the equal protection clause does not apply to the primary votes. It held that, because the primary election "may determine the final result," equal protection applies to the primary. *Id.*; *see also Smith v. Allwright*, 321 U.S. 649, 661 (1944). So too here.

The Review Act and the Cloture Rule set votes on whether to force a final vote. *Compare* Rule XXII.2 *with* 5 U.S.C. § 802(d)(1). Without a time limit on debate, the Senate does not vote on the final bill. Congress's own research body concluded that, without sixty votes "invok[ing] cloture . . ., the measure . . . that is being filibustered will not receive chamber approval . . . ." VALERIE HEITSHUSEN & RICHARD S. BETH, CONG. RESEARCH SERV., FILIBUSTERS AND CLOTURE IN THE SENATE 18 (Apr. 7, 2017). *See also King v. Burwell*, 576 U.S. 473, 492 (2015) (recognizing "the Senate's normal 60-vote filibuster requirement"). Therefore, the vote on whether to force a final vote "may determine the final result." Equal protection applies to the Cloture Rule's and the Review Act's votes on closing debate.

B. Heightened scrutiny under equal protection applies because the justification for applying rational basis does not hold when altering democratic processes.

In their opening brief, Citizens explained that the rational basis test does not apply to the Senate's two voting thresholds because they do not qualify as economic or tax legislation. The Supreme Court extends rational basis deference because the "Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Lawrence v. Texas*, 539 U.S. 558, 579-80 (2003) (quotations omitted). Here, however, the two voting thresholds alter the democratic process itself, so Citizens explained that a more exacting scrutiny applies to these voting thresholds. Pls.' Br. 13-14. "[W]here the reason of a rule ceased, the rule also ceased." *Funk v. United States*, 290 U.S. 371, 384 (1933).

In response, OSMRE contends that the level of scrutiny turns entirely on the general rule that the class of plaintiffs determines the level of scrutiny. US Br. 13-14. In so doing, OSMRE is "too

quick to generalize." *McClendon v. City of Albuquerque*, 630 F.3d 1288, 1292 (10th Cir. 2011). It committed "the logical fallacy of *dicto simpliciter* (fallacy of accident)" by applying a general rule to an exceptional circumstance. *United States v. Ezeiruaku*, 936 F.2d 136, 142-43 (3d Cir. 1991); *McClendon*, 630 F.3d at 1292; LOGIC FOR LAWYERS 193-94.

When legislatures make "discriminations of an unusual character," they "especially require careful consideration." *United States v. Windsor*, 570 U.S. 744, 770 (2013) (quotations omitted). Equal protection and "the rule of law" require "government and each of its parts remain open *on impartial terms* to all who seek its assistance." *Romer*, 517 U.S. at 633 (emphasis added). When Congress rigs democracy against an unusual group, it violates equal protection. Here, that group includes citizens with complex problems protected by delegations to agencies. "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." *Id.* Equal protection compels heightened scrutiny here.

C. Equal protection applies to laws that indirectly classify people.

Citizens demonstrated that the Senate's two thresholds fail every level of scrutiny because nothing connects them to the two classes of citizens they create: (1) citizens protected by statutes that delegate authorities to agencies and (2) citizens protected by statutes directly. Pls.' Br. 13-19. In other situations, the Supreme Court struck down statutes that unequally divided state legislative representation between urban and rural voters. *Reynolds*, 377 U.S. at 563. It struck down statutes that distributed different amounts from Alaska's mineral royalties based on how long citizens lived there. *Zobel v. Williams*, 457 U.S. 55, 59-60 (1982).

Under the rational basis test, courts require a statute's classifications to "bear a rational relationship to a legitimate governmental interest." *Romer*, 517 U.S. at 632. OSMRE suggests that Congress had no idea it was classifying individuals when it passed the Review Act on top of

the Cloture Rule, and the Constitution excuses inadvertent classifications. *See* US Br. 11-15. It does not. The Constitution applies even to "legislatively unforeseen constitutional problem[s]." *Booker*, 543 U.S. at 247. When applying equal protection, the Supreme Court often considers "two statutes . . . together as parts of one and the same law . . . ." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 414 (1920). It applies equal protection even if "it is probable that the unequal operation of the [system] was due to inadvertence rather than design," *id.* at 416, and even if, on their faces the statutes do not classify citizens at all. *Zimmerman Brush*, 455 U.S. at 438 (Blackmun, J., concurring) (four justices), 443 (Powell, J., concurring) (two justices).

OSMRE contends that the Cloture Rule and the Review Act do not classify citizens, but statutes, so equal protection does not apply. US Br. 13. The Supreme Court rejected that argument in *Romer*, where it struck down under rational basis review, a State of Colorado constitutional amendment that banned particular state laws. 517 U.S. at 624, 631. The amendment banned state laws that "prohibit[ed] discrimination on the basis of 'homosexual, lesbian or bisexual orientation, conduct, practices or relationships.'" *Id.* (quoting the amendment). Thus, the amendment directly classified laws, and only indirectly classified citizens. The Supreme Court saw through that extra layer because "most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Id.* at 631. In other words, statutes almost always create buckets for treating people differently.

Ultimately, OSMRE does not dispute that these two Senate voting thresholds allowed Congress to remove the Stream Protection Rule more easily than Congress could remove protections for other citizens. *See* US Br. 11-15. As in *Romer*, the two Senate voting thresholds "impose[] a special disability upon" citizens protected by statutory delegations compared to those protected by statutes directly. 517 U.S. at 631.

OSMRE's proffered objective of "streamlining procedures for review and disapproval of agency rules," however, does not rationally relate to any legitimate government objective because it fails to justify the Cloture Rule's sixty-vote threshold baseline. US Br. 15. OSMRE admits the tautology that the Senate wanted to protect some citizens less than others, but argues it had a legitimate reason. It gives only half of a reason. The Supreme Court "insist[s] on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. OSMRE frames its argument as justifying why it can lower protections for citizens with complex problems. But equal protection does not "depend[] primarily on how a [government] framed its purpose—as benefiting one group or as harming another." *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 882 (1985). Even if OSMRE frames the question to justify *harming* citizens protected by statutory delegations with fifty-one votes, equal protection requires it also to justify *benefitting* citizens protected by statutes directly with sixty votes; laws without both violate equal protection. *See id.*

In *Metropolitan Life*, Alabama enacted a higher tax against foreign-state corporations, and it sought to justify the tax as benefitting domestic corporations. *Id.* The Supreme Court struck down the distinction as a violation of equal protection because recognizing "promotion of domestic industry [a]s always a legitimate state purpose under equal protection analysis would eviscerate the Equal Protection Clause in this context." *Id.* Recognizing "streamlining procedures" as a legitimate objective for treating some citizens worse would similarly eviscerate equal protection. Equal protection also requires OSMRE to explain the higher, sixty-vote threshold, which it cannot. Equal protection requires striking down the Senate's two thresholds.

From another perspective, equal protection analysis requires assessing how the baseline and the exception, together, advance a rational basis—not one at a time. *See USDA v. Moreno*, 413

U.S. 528, 529, 538 (1973). Most statutes have obvious baseline objectives, so courts do not discuss them. In *Moreno*, the Supreme Court struck down an exception, from the Food Stamp Act of 1964, that withheld food stamps from otherwise qualifying recipients if they lived with unrelated people. 413 U.S. at 529, 538. It searched for a rational basis for the whole program: the baseline of giving food stamps, combined with the purpose to withhold them from some people. *Id.* at 533-34. For the same reason, equal protection requires searching for a rational basis for the baseline of setting a sixty-vote threshold for some citizens, combined with using a fifty-one-vote threshold for others. OSMRE identifies no legitimate objective for the combination, but assumes some rational purpose for the Cloture Rule and defends the Review Act exception. That half-rationale fails even the rational basis test. *See id.*; *Metro. Life*, 470 U.S. at 882.

In a footnote, OSMRE disparages Citizens' equal protection arguments by hypothesizing that, if OSMRE had rescinded the Stream Protection Rule, and if Congress had withdrawn the statutory authority for OSMRE's withdrawal (thus restoring the rule), then Citizens would have favored the lower threshold. US Br. 3 n.7. That may be so, but under that hypothetical, the Senate's two voting thresholds would violate mining companies' equal protection. Every application of the Senate's two voting thresholds violates someone's equal protection.

**III. More efficiency for withdrawing statutory authorities than for expanding them does not satisfy due process's strict scrutiny or rational basis tests.**

A. The Supreme Court's rationale for the rational basis test does not apply.

Citizens explained in their opening brief that the Senate's two voting thresholds violate substantive due process under both tiers of scrutiny because the Senate advanced no legitimate legislative objective by creating an additional Article I, Section 7, procedure with different voting thresholds for passing bills. Pls.' Br. 19-26. Section 7 describes the process of both houses passing a bill and the president signing it, or both houses overcoming a veto by two-thirds votes.

Citizens argued that the justification for the rational basis test does not apply when Congress is rigging the democratic system. *Id.* at 19-20. In response, OSMRE contends that Citizens have failed to satisfy the requirements to compel strict scrutiny. US Br. 15-17. Under strict scrutiny, courts strike down statutes unless the legislature "narrowly tailored [the statutes] to serve a compelling state interest." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). OSMRE never argued that the Senate's two thresholds could satisfy strict scrutiny, so it effectively concedes that, if heightened scrutiny applies, it loses.

OSMRE cites *Abdi v. Wray*, 942 F.3d 1019, 1027 (10th Cir. 2019), for the United States Court of Appeal for the Tenth Circuit's three-part screening test before even applying strict scrutiny. US Br. 15-16.[6] OSMRE's argument suffers from the same fallacy of accident that invalidates its argument on the equal protection tier of scrutiny. Here, too, the Senate's two voting thresholds do not qualify as "economic or tax legislation" that the democratic process will fix. *Lawrence*, 539 U.S. at 579-80. Instead of implementing any social or economic policy, the Senate's two voting thresholds change the democratic process for passing bills. In this situation, because the rationale for the rule ceased, the rule also ceased. *See Funk*, 290 U.S. at 384.

Ultimately, this Court need not resolve the tier of scrutiny to strike down the Senate's two voting thresholds. The Supreme Court defers to no one when ruling whether "procedures authorized by [an act] are not authorized by the Constitution . . . ." *Clinton*, 524 U.S. at 448. Because OSMRE only defends the Senate's two voting thresholds as a Section 5 procedure (instead of an Section 7 voting threshold), US Br. 15-17, this Court can review OSMRE's purported legitimate objective for absolute compliance with the Constitution.

[6] OSMRE references the "shocks the conscience" standard for executive action. The Parties agree that standard does not apply to Citizens' claims rooted in legislative actions. US Br. 15-16.

B. OSMRE concedes that it created a new process for passing statutes, and that illicit objective fails the rational basis test.

In their opening brief, Citizens explained that the Senate's two voting thresholds fail the rational basis test because they relate to no legitimate government objective. Pls.' Br. 19-20. Under the rational basis test, courts ensure statutes "rationally relate[] to legitimate government interests." *See Glucksberg*, 521 U.S. at 728. Citizens negated three possible government objectives; among them, it demonstrated that the Constitution does not allow Congress to justify them as a more efficient process for passing bills. Pls.' Br. 22-24. In response, OSMRE concedes that the two Senate voting thresholds created a second, "more efficient procedure for congressional oversight of agency rules" that satisfies the rational basis test. US Br. 17. By affecting individuals outside Congress, the new procedure implements Congress's legislative power under Section 7. *See Chadha*, 462 U.S. at 952. 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. *See id.*

The Supreme Court has twice rejected attempts to create new Section 7 procedures: it overturned the one-house legislative veto in *Chadha*, and it overturned the line-item veto in *Clinton*. OSMRE contends that Congress used its Section 5 powers here to create new procedures for passing laws—with different voting thresholds and time periods. US Br. 15, 17. Whenever Congress exercises its legislative power to pass laws, however, the Supreme Court requires it to comply with Section 7's procedures. *Chadha*, 462 U.S. at 952.

"The procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself." *Clinton*, 524 U.S. at 439. Therefore, the Supreme Court requires Congress to exercise its "legislative power . . . in accord with a *single*, finely wrought and exhaustively considered, procedure." *Chadha*, 462

U.S. at 951 (emphasis added). When its actions have "the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch," the Supreme Court concludes that it is using that legislative power, and it requires Congress to comply with Section 7. *Id.* at 952. Therefore, if Congress wants to create "a new procedure" for passing laws using its legislative power, 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.[7]

To be clear, Congress could use its Section 5 powers to change a host of other internal procedures because some would not "alter[] the legal rights, duties, and relations of persons . . . outside the Legislative Branch." *Chadha*, 462 U.S. at 952. Either house could, for example, refer some military funding bills to committees, but not some criminal law bills. Either house could change who can make what points of order, and who can move for reconsideration of what. But by changing the voting threshold for passing bills, Congress took the procedure out of Section 5, where Congress has discretion, and moved it to Section 7, where Congress does not. *See Clinton*, 524 U.S. at 448; *Chadha*, 462 U.S. at 952.

Section 7 sets the voting thresholds at a majority of the quorum. "[T]he general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. *Ballin*, 144 U.S. at 6; *Reynolds*, 377 U.S. at 566. The Supreme Court recognizes that as "the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations." *Ballin*, 144 U.S. at 6. James Madison made this clear in the Federalist 58. In rejecting any requirement for a supermajority quorum, he recognized that a supermajority vote for every bill might have stopped "hasty and

[7] In contrast to these statutory or rulemaking efforts to amend Section 7 that violate the Constitution, *Clinton*, 524 U.S. at 449, the Fifth Amendment's due process and equal protection principles apply to the Section 7 process. *See Murray's Lessee*, 59 U.S. at 276

partial measures," but he rejected structures in which the majority would not rule. *Id.* The Constitution prohibits Congress from changing those voting thresholds without amending it. *Clinton*, 524 U.S. at 448-49.

OSMRE insists that "no constitutional provision mandates either the House or the Senate to always employ a bare-majority voting threshold for every type of vote." US Br. 10. That clever statement is true, but incomplete. The Constitution mandates supermajorities in seven distinct situations: (1) overriding presidential vetoes, (2) trying impeachments (Senate only), (3) expelling members, (4) approving treaties (Senate only), (5) amending the Constitution, (6) allowing insurgents to hold office, and (7) removing the President for inability. Art. I, §§ 3, 5, 7; Art. 2, § 2; Art. 5; Amend. XIV, § 3; Amend. XXV, § 3. These specific supermajority votes compel the Court to apply the *expressio unius est exclusion alterius* canon. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80-81 (2002). Under it, "one item of [an] associated group or series excludes another left unmentioned." By listing the specific situations that required supermajorities, the Constitution implied the rest would follow the default, majority-of-the-quorum rule. *See Marbury v. Madison*, 5 U.S. at 174 ("Affirmative words are often, in their operation, negative of other objects than those affirmed . . . ."). Section 7 sets the two-thirds-vote for overriding vetoes, so it implicitly set a majority-of-the-quorum vote for initial passage.

Congress intended the Review Act to bypass the Cloture Rule, as OSMRE explains, to "streamlin[e] procedures for review and disapproval of agency rules . . . ." US Br. 15; 142 CONG. REC. S2161 (Mar. 15, 1996) (statement of Sen. Don Nickles). OSMRE's banal label of "streamlining procedures" misapprehends the Cloture Rule's and the Review Act's fundamental and drastic changes to Section 7 voting thresholds. Congress's efforts to create new voting thresholds do not qualify as legitimate objectives. Thus, the Senate's two thresholds violate the

rational basis test, and the Fifth Amendment requires the Court to declare them unconstitutional.

**IV. The Senate's two voting thresholds violate the separation of powers by eroding the Executive Branch's executive power.**

Citizens demonstrated in their opening brief that the Senate's two voting thresholds violate the separation of powers by creating a one-way ratchet that erodes executive power: with fifty-one votes in the Senate, Congress can rescind statutory delegations to agencies, but it takes sixty to repass the same delegation. Pls.' Br. 26-28.[8] In response, OSMRE argues that the statutes that Congress passes completely define the executive power (aside from the power the Constitution gives directly), so Congress can do whatever it wants to executive power. US Br. 18-19. The Supreme Court rejected that interpretation because it would undermine the President's own, independent executive powers that Article II delegates. *Myers v. United States*, 272 U.S. 52, 123-126 (1926). Here, the Article II executive power modestly prohibits Congress from creating new structures that inevitably reduce executive power, like this one-way ratchet that the Framers never could have conceived.[9] *See Booker*, 543 U.S. at, 258.

The Constitution described the executive power "in general terms strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where limitation is needed." *Myers*, 272 U.S. at 128. Although the Framers assigned the executive power to the President, they knew "no single person could fulfill that responsibility alone . . . ." *Seila Law*,

[8] OSMRE objects that Citizens did not cite, in their Complaint, the Article II provision that the Senate's two thresholds violate. US Br. 18. The Complaint objected to Congress restricting the "Executive Branch . . . powers." Compl., ¶ 108, ECF No. 1. That references Article II, Section 1: "The executive Power shall be vested in a President of the United States of America."

[9] OSMRE argues that Congress could use the Review Act to expand executive authority—but it skips the text's language. US Br. 18 n.11. When Congress passes laws under the Review Act, the Act prohibits the agency from reissuing the rescinded rule "in substantially the same form," and from issuing a new rule "that is substantially the same." Section 801(b)(2). If the President had withdrawn the Stream Protection Rule, and if Congress rescinded the statutory authority for the withdrawal, then later presidents could not withdraw it. *Id.* Laws passed under the Review Act always decrease executive power.

140 S. Ct. at 2191. Article II, Sections 2, 3, and 4 referenced departments and executive officers as agents to "wield" the President's executive power. *Id.* Chipping away or eroding the agents' powers with a one-way ratchet thus chips away at the executive power.

The Supreme Court already rejected the argument that Congress has plenary power to define the executive power however it wants. "It could never have been 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*, 272 U.S. at 127. "Congress has plenary authority in all areas in which it has substantive legislative jurisdiction," but only so long as it "does not offend some other constitutional restriction," like the separation of powers. *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (citation omitted); *Chadha*, 462 U.S. at 940. If Congress had sought, with the Cloture Rule and the Review Act, to reduce executive powers one statute at a time with the same voting threshold, Congress could do that. But here, it engrafted a new, structural one-way ratchet that only reduces executive power. It crossed the line. *Cf. Booker*, 543 U.S. at 258 (rejecting a "one-way lever"); *Nixon v. Mo. Mun. League*, 541 U.S. 125, 137 (2004) (holding a one-way ratchet absurd).

OSMRE insists that courts "must inquire whether a challenged action is an inappropriate assumption of the constitutional field of action of another branch." US Br. 18 (quotations omitted). This premise reflects the fallacy of denying the antecedent. OSMRE contends that, if one branch assumes the power of another branch, then the action violates separation of powers; so, if no branch assumes another branch's power, then the action does not violate the separation of powers. That contention has no force. *See Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 702-03 n.20 (2d Cir. 1980) ("The proposition that 'A implies B' is not the equivalent of 'non-A implies non-B,' and neither proposition follows logically from the other. The process of inferring

one from the other is known as 'the fallacy of denying the antecedent.'" (citing J. COOLEY, A PRIMER OF FORMAL LOGIC 7 (1942)) (cited by LOGIC FOR LAWYERS 162).

One branch can violate the separation of powers by creating a structure that diminish another branch's power. The Supreme Court struck down the *Chadha* one-house-veto because it diminished the President's authority. *Bond v. United States*, 564 U.S. 211, 223 (2011). It struck down two restrictions on the executive power to remove officers under the separation of powers, although neither restriction aggregated power to Congress. *Seila Law*, 140 S. Ct. at 2206; *Free Enter. Fund v. Pub. Co.*, 561 U.S. 477, 497 (2010). The Senate's two thresholds create a one-way ratchet that diminishes executive power. The separation of powers prohibits Congress from eliminating regulatory authority more easily than delegating or redelegating it.

## CONCLUSION

For the foregoing reasons, equal protection, due process, and the separation of powers require the Court to deny OSMRE's motion to dismiss.

Respectfully submitted, March 31, 2021,

*/s/ Jared S. Pettinato*
JARED S. PETTINATO
The Pettinato Firm
3416 13th St. NW, #1
Washington, DC 20010
(406) 314-3247
Jared@JaredPettinato.com

Attorney for Plaintiffs