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' MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

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[1] Pursuant to Federal Rule of Civil Procedure 25(d), Scott de la Vega is automatically substituted as a Defendant (in his official capacity) as the Acting Secretary of the Interior, Glenda Owens is automatically substituted as a Defendant (in her official capacity) as the Acting 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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INTRODUCTION

All the United States Constitution requires for proposed legislation to become law is that it be passed by both the Senate and the House of Representatives, and then be signed into law by the President (or, in the absence of the President's signature, passed by two-thirds of both houses). U.S. Const., art. I, § 7. Otherwise, absent rare exceptions not applicable here, the Constitution says nothing about the number of Senators or Representatives who must vote in favor of a particular piece of legislation, and nothing about the rules for how long a matter must be debated in either chamber. To the contrary, those matters are generally left to the discretion of the House and the Senate, as the Constitution provides explicitly that "Each House may determine the Rules of its Proceedings." U.S. Const., art. I, § 5, cl. 2. And as long as those rules do not "ignore" other "constitutional restraints or violate fundamental rights," generally, "all matters of method are open to the determination" of either House. *United States v. Ballin*, 144 U.S. 1, 5 (1892).

Plaintiffs would have this Court contravene these principles because the Congressional Review Act ("the CRA" or "the Act") provides that in the case of certain legislation—that is, resolutions disapproving of recent agency rules—Senate debate is limited to 10 hours. 5 U.S.C. § 802(d)(2). Accordingly, at least under current Senate rules, a filibuster—that is, a period of indefinite debate over proposed legislation—cannot prevent a vote on final passage of a CRA disapproval resolution, and support from 51 Senators is generally sufficient. On the other hand, most (but certainly not all) other legislation may be subject to an actual or threatened filibuster, making it practically difficult to pass without support from 60 Senators. On Plaintiffs' view, that creates a constitutional problem. But Plaintiffs fail to identify any constitutional provision that actually forbids the CRA's modest tweaks to the Senate rules, which can, in any event, still be modified by a majority of Senators at any time. *See* 5 U.S.C. § 802(g); *see generally Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553 (9th Cir. 2019) (rejecting separation-of-powers challenge to the CRA). Plaintiffs appeal to general principles of equal protection, substantive due process, and the separation of powers, but all of their claims ignore that while the Constitution forbids certain distinctions between classes of *people*, it has nothing to say about distinctions among classes of *laws*. But even if it did, Plaintiffs' claims would at most be subject to

rational-basis review, and it was rational for Congress to enact the CRA, which facilitates efficient oversight of the large and growing network of administrative agencies that Congress itself has created.

All of Plaintiffs' claims should be dismissed with prejudice for failure to state a claim.

BACKGROUND

I. The Senate Rules

The Constitution provides that "Each House" of Congress "may determine the Rules of its Proceedings." U.S. Const., art. I, § 5, cl. 2. Under the first Senate Rules, adopted in 1789, "the majority had the power to end a debate and bring a measure to an immediate vote at any time over the objection of the minority by adopting a 'motion for the previous question.'" *Common Cause v. Biden*, 909 F. Supp. 2d 9, 13 (D.D.C. 2012), *aff'd on other grounds*, 748 F.3d 1280 (D.C. Cir. 2014). "In 1806, however, the previous question motion was eliminated from the rules of the Senate, apparently at the urging of Vice President Aaron Burr." *Id.* at 14. Accordingly, "[f]rom 1806 until 1917, the Senate had no rule that allowed the majority to limit debate," so it was possible for a minority of Senators (or even a single Senator) to indefinitely "filibuster" and prevent a vote on a bill, by refusing to yield the floor to end debate. *Id.* "Despite the absence of a rule for limiting debate, filibusters were relatively rare during this period and occurred at an average rate of one every three years between 1840 and 1917." *Id.*

In 1917, however, "after a small minority of senators filibustered a bill authorizing President Wilson to arm American merchant ships, leading to public outrage, the Senate adopted the predecessor to the current Cloture Rule." *Id.* The 1917 version of the Senate's Cloture Rule "required a two-thirds vote of the Senate to end debate." *Id.* Even so, "[f]ilibusters remained relatively rare from 1917 to 1970." *Id.* In 1975, the Senate amended the Cloture Rule to "change[] the number of votes required for cloture from two-thirds of senators present and voting to three-fifths of the Senate, not merely those present and voting (*i.e.*, sixty votes)." *Id.* The substance of the Cloture Rule has been unchanged since. Even so, "[t]he number of actual or threatened filibusters has increased dramatically since 1970, and now dominates the business of the Senate," *id.*, with much legislation unable to receive a vote on final passage (as a practical matter) absent the support of 60 Senators. Still, other Senate rules operate to exempt significant portions of the legislative agenda from filibusters. *See, e.g.*, Sahil Kapur, *Senate*

passes $1.9 trillion Covid relief bill, including $1,400 stimulus checks, with no Republican support, NBC News (March 6, 2021), https://www.nbcnews.com/politics/congress/senate-passes-1-9-trillion-covid-relief-bill-including-1-n1259795 ("The final vote was 50-49.").

II. The Congressional Review Act

After passage by majorities in both houses of Congress, President Clinton signed the Congressional Review Act, 5 U.S.C. §§ 801-08, into law in 1996 as part of a package of regulatory reforms collectively known as the Small Business Regulatory Enforcement Fairness Act. *See* Pub. L. No. 104-121, § 245, 110 Stat. 847. With certain exceptions, the CRA provides that "[b]efore a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report" that includes "a copy of the rule," "a concise general statement relating to the rule," and "the proposed effective date of the rule." 5 U.S.C. § 801(a)(1)(A). Upon receipt of such a report, Congress has a period of time in which it may enact a joint resolution "disapprov[ing] the rule." *Id.* § 802(a). The Act specifies the precise language that is to be used for a joint resolution of disapproval. *See id.*

The Congressional Review Act also makes certain modifications to the default legislative procedures in the House and the Senate. For example, if a Senate committee to which a CRA resolution has been referred has not placed the resolution on the Senate calendar for consideration by the full Senate within 20 calendar days, the resolution "shall be placed on the calendar" if a discharge petition is signed by 30 Senators. *See id.* § 802(c). In addition, "[i]n the Senate, debate on the joint resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 10 hours," *id.* § 802(d)(2), which, at least under current Senate rules, has the practical effect of preventing filibusters of Congressional Review Act resolutions and allowing prompt consideration on a 51-vote threshold. These provisions of the CRA that relate only to internal congressional procedures were adopted as an exercise of the authority of each house of Congress to "determine the Rules of its Proceedings," U.S. Const. art. I, § 5, cl. 2, as explicitly stated in the statute itself:

> This section is enacted by Congress . . . as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and

> as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of a joint resolution described in subsection (a), and it supersedes other rules only to the extent that it is inconsistent with such rules; and with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

5 U.S.C. § 802(g). Accordingly, these internal procedural provisions are subject to change, "at any time," *id.*, pursuant to the authority of each house of Congress to set its own rules, *see* U.S. Const. art. I, § 5, cl. 2.

If a joint resolution of disapproval passes both houses of Congress and is signed into law by the President, two things happen. First, and most immediately, the agency rule "shall not take effect (or continue)." 5 U.S.C. § 801(b)(1). Second, the rule "may not be reissued in substantially the same form," nor may a "new rule that is substantially the same as such a rule . . . be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule." *Id.* § 801(b)(2).

III. The Stream Protection Rule

In December 2016, Defendant Office of Surface Mining Reclamation and Enforcement ("OSMRE"), a bureau within Defendant United States Department of the Interior, promulgated the Stream Protection Rule ("the Rule" or "SPR") after notice and comment. *See* 81 Fed. Reg. 93,066 (Dec. 20, 2016). That Rule revised the federal regulations that implement the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), which governs permitting and enforcement of surface coal mining operations. *See* 30 U.S.C. §§ 1201-1328. Among other things, the Stream Protection Rule modified the relevant regulations in several ways: it redefined the term "material damage to the hydrologic balance outside the permit area"; set forth new requirements for collection of pre-mining baseline data; outlined requirements for monitoring of groundwater and surface water during mining and reclamation; established requirements for protecting or restoring perennial and intermittent streams; required the use of new technologies and methodologies related to surface water and groundwater hydrology; established requirements for the restoration of land disturbed by surface coal

mining; and updated measures to protect threatened and endangered species affected by surface coal mining. *See* 81 Fed. Reg. at 93,068-69.

In February 2017, the House and Senate each passed a joint resolution disapproving the Stream Protection Rule pursuant to the Congressional Review Act. *See* Pub. L. No. 115-5, 131 Stat. 10 (2017) ("Congress disapproves the rule . . . , and such rule shall have no force or effect"). The House passed the joint resolution by a vote of 228-194, and the Senate passed the resolution by a vote of 54-45. *See* H.R.J. Res. 38, 115th Cong. (2017). On February 16, 2017, the disapproval resolution was signed by the President and thus became law. *See* Pub. L. No. 115-5. Thereafter, in November 2017, OSMRE effectuated the new statute by issuing a final rule implementing Congress's disapproval. *See* Congressional Nullification of the Stream Protection Rule under the CRA, 82 Fed. Reg. 54,924 (Nov. 17, 2017) ("The Stream Protection Rule shall be treated as if it had never taken effect"). In doing so, and as OSMRE explained, it was simply "effectuating . . . what congressional action has already accomplished." *Id.*

IV. This Lawsuit

On December 15, 2020, Plaintiffs Citizens for Constitutional Integrity (CCI) and Southwest Advocates, Inc. filed this suit, arguing broadly that the Congressional Review Act violates constitutional principles of equal protection, due process, and the separation of powers. *See generally* Compl., ECF No. 1. According to Plaintiffs, the CRA's unconstitutionality renders Congress's disapproval of the Stream Protection Rule invalid, which means that the Stream Protection Rule is still operative; they would therefore require OSMRE to have applied the Stream Protection Rule's requirements to the recent Mining Plan Modification of the King II Mine in Colorado, which Interior approved for the mining of federal coal pursuant to the Mineral Leasing Act of 1920. *See id.* ¶ 4. Plaintiffs ask this Court to declare the CRA unconstitutional and the Stream Protection Rule valid and enforceable; vacate and set aside Interior's approval of the King II Mining Plan Modification; remand that approval to Interior for reconsideration consistent with the Stream Protection Rule; and enjoin all mining activities under it "until the Agencies comply with the Constitution, SMCRA, the Stream Protection Rule, and the APA." *Id.* at 38 (Prayer for Relief).

Primarily, Plaintiffs argue that the Congressional Review Act violates the Constitution because "[f]ifty-one does not equal sixty," *id.* ¶ 1—that is, they consider the CRA's procedures to impermissibly "allow Congress to pass statutes with simple majorities in both houses and thereby to evade the Senate's sixty-vote Cloture Rule to end a filibuster." *Id.* ¶ 41. Plaintiffs claim that in the modern Senate "no legislation passes the Senate when forty-one senators do not consent," *id.*, and that the CRA allowing Senate passage of joint resolutions of disapproval on a 51-vote threshold thus impermissibly "treat[s] differently (a) citizens protected by statutes that delegate authorities to agencies and (b) citizens protected by other statutes." *Id.* ¶ 98. Plaintiffs further allege that the CRA violates substantive due process because no rational basis exists for the 51-vote threshold, *see id.* ¶¶ 102-05, and that it also violates the separation of powers by creating a "one-way ratchet that, over time, erodes and undermines the Executive Branch's authority" by "mak[ing] it easier to rescind statutory delegations," while the Cloture Rule "makes it harder to expand those same statutory delegations," *id.* ¶¶ 107-10. As a result of these purported constitutional violations, Plaintiffs argue that "SMCRA and the APA require the Court to hold the Mine Approval unlawful." *Id.* ¶¶ 100, 105, 110.[2]

When this case was filed, it was first assigned to the presiding AP judge, the Honorable Marcia S. Krieger, pursuant to D.C. COLO.LAPR 16.1(a), who directed the parties to confer and prepare a Joint Case Management Plan. Order, ECF No. 7. The parties submitted their proposal on February 18, 2021, which agreed that "because each claim in this case concerns the constitutionality of a federal statute alone, an administrative record will not be necessary" and that "[n]o discovery will be warranted." Joint Case Management Plan, ECF No. 18, at 5-6. Concluding *sua sponte* that Plaintiffs'

[2] To the extent that Plaintiffs believe that their claims arise under SMCRA, any such challenge would be time-barred. SMCRA provides for judicial review of rulemakings under SMCRA within 60 days "or after such date if the petition is based solely on grounds arising after the sixtieth day," and judicial review of formal adjudications within 30 days. 30 U.S.C. § 1276(a)(1-2). To be clear, Defendants do not believe this case raises any claim under SMCRA, *see* Joint Case Management Report at 5, ECF No. 18 (outlining Defendants' position that the cause of action for this case is the APA under 5 U.S.C. § 706(2)(B) alone), but Plaintiffs appear to disagree. *See id.* at 2 (identifying SMCRA's citizen suit provision as the source of jurisdiction). Regardless, to the extent any SMCRA claim exists here, it would be time-barred because OSMRE's removal of the Stream Protection Rule from the Code of Federal Regulations, and its approval of the King II Mine modification, occurred several years ago.

claims "can be resolved more efficiently if this case is removed from the AP docket," Judge Krieger issued an order terminating the AP designation of the case and reassigning the case for resolution on the merits. *See* Order, ECF No. 19. Upon reassignment, the parties were ordered to file dispositive motions no later than March 10, 2021. *See* Minute Order, ECF No. 23. Plaintiffs filed a motion for Summary Judgment on March 2, 2021. ECF No. 26.[3]

ARGUMENT

The Constitution specifies only a handful of rules that govern the legislative process, and the Congressional Review Act complies with all of them. Plaintiffs' attempts to craft new, atextual requirements that appear nowhere in the Constitution should be rejected. The CRA is constitutional in all respects, including under principles of equal protection, due process, and separation of powers.[4]

I. The procedures set forth in the Congressional Review Act comply with all requirements for the legislative process that appear in the Constitution.

"Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process." *INS v. Chadha*, 462 U.S. 919, 945 (1983). Article I of the United States Constitution provides:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." U.S. Const. art. I, § 1.
>
> "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; . . . ." U.S. Const. art. I, § 7, cl. 2.

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[3] Defendants will file a separate response to Plaintiffs' motion for summary judgment at a later date. Defendants will likewise file a separate response to the motion to intervene that was filed earlier today by GCC Energy, LLC, ECF No. 28.

[4] Defendants do not dispute that Plaintiff Southwest Advocates, Inc. has Article III standing. But the second plaintiff in this case, an organization called the Citizens for Constitutional Integrity (CCI), does not. The complaint states only that "[t]hey are citizens holding governments accountable to their constitutions" and that CCI "watches for actions that contravene our bedrock, fundamental principles, circumstances, and motivations that drove the Founding Fathers and the people in drafting and adopting the Constitution." *See* Compl. ¶ 22. But the "generalized interest of all citizens in constitutional governance" is an "inadequate basis on which to grant . . . standing." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992). Nevertheless, Defendants recognize that the Court will need to reach the merits to address the claims of Plaintiff Southwest Advocates.

> "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill." U.S. Const. art. I, § 7, cl. 3.

Chadha, 462 U.S. at 945-46 (emphases omitted). Although these requirements—colloquially known as bicameralism and presentment—are few in number, "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." *Id.* at 951.

The Congressional Review Act, and joint resolutions of disapproval enacted pursuant to the Act, are consistent with that "finely wrought" procedure in every respect. First, they satisfy the bicameralism requirement: A joint resolution of disapproval under the CRA, "before it become[s] a law," must have "passed the House of Representatives and the Senate" by majority vote. U.S. Const. art. I, § 7, cl. 2; *see also* 5 U.S.C. § 802(b) ("A joint resolution described in subsection (a) shall be referred to the committees in each House of Congress with jurisdiction.") (emphasis added); 5 U.S.C. § 802(f) (describing the procedure by which one house of Congress considers a joint resolution of disapproval under the CRA when, "before the passage by one House of a joint resolution . . . , that House receives from the other House a joint resolution described in subsection (a)"). Plaintiffs appear not to dispute that joint resolutions of disapproval under the CRA satisfy the bicameralism requirement. Nor could they. *See* Compl. ¶ 74 (noting that the joint resolution of disapproval at issue in this case did, in fact, receive a majority of votes in both the House and the Senate).

Second, CRA resolutions satisfy the presentment requirement: a joint resolution of disapproval under the CRA is not effective until it is "presented to the President of the United States; and" is either "approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives. . . ." U.S. Const. art. I, § 7, cl. 3; *see* 5 U.S.C. § 801(a)(3)(B) (referring to the possibility that the "the President signs a veto of such resolution" and "either House of Congress votes and fails to override the veto of the President"). Again, Plaintiffs do not

meaningfully dispute that joint resolutions of disapproval under the CRA satisfy the presentment requirement. Nor could they. *See* Compl. ¶ 74 ("[T]he President signed it.").[5]

Because the Congressional Review Act—and joint resolutions of disapproval enacted pursuant to it—are consistent with bicameralism and presentment, they accord entirely with the legislative process set forth in the Constitution, which includes no additional requirements relevant here. *See Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 561-62 (9th Cir. 2019) (in rejecting constitutional challenge to the CRA and to a CRA disapproval resolution, noting that "Congress complied with the process of bicameralism and presentment"). Notably, for example, no constitutional provision mandates either the House or the Senate to always employ a bare-majority voting threshold for every type of vote. To the contrary, the Constitution broadly empowers "[e]ach House" of Congress to "determine the Rules of its Proceedings." U.S. Const., art. I, § 5, cl. 2; *accord United States v. Ballin*, 144 U.S. 1, 5 (1892). And in fact, Congress has often required less, or more, than 60 Senators for certain types of votes: the Cloture Rule did not exist at the Founding, *see supra* at 3-4, and has gone through many changes over the years—as recently as 1975, the voting threshold dropped from two-thirds of Senators present (as many as 66 votes) to 60 votes. *See Common Cause*, 909 F. Supp. 2d at 13-14. Moreover, other statutes provide for streamlined approval procedures similar to the CRA. *See* 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).

[5] Plaintiffs do repeatedly state (in conclusory fashion) in their motion for summary judgment that the Congressional Review Act somehow violates Article I of the Constitution. *See, e.g.*, Pls.' Mot. for Summ. J. ("Pls.' MSJ"), ECF No. 26, at 25 (asserting that the Congressional Review Act "contravenes Article I, section 7 . . . by changing how Congress passes bills without amending the Constitution"). But they never explain how or why, nor do they offer any specific arguments as to how the Congressional Review Act (or joint resolutions of disapproval enacted pursuant to the Act) are inconsistent with principles of bicameralism and presentment, or with any other constitutional requirements that appear in Article I.

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

Unable to identify any conflict between the Congressional Review Act and the constitutional provisions that actually define the legislative process, Plaintiffs try arguing that the CRA violates principles of equal protection. But the entire premise of Plaintiffs' argument—that Congress has "created two categories of citizens," Pls.' MSJ at 16—is fundamentally mistaken, for several reasons. And even if Plaintiffs' curious theory were to be analyzed under traditional equal protection doctrine, rational-basis review would still apply, and the Congressional Review Act would easily satisfy it. Plaintiffs' equal protection claim is therefore without merit.

a. The Congressional Review act does not create two classes of citizens. Plaintiffs' equal protection theory is based on the premise that the Congressional 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." Pls.' MSJ at 14. Plaintiffs believe that citizens in the former category are protected only by a "simple-majority-vote threshold" (because of the CRA), while citizens in the latter category are protected by "the Senate's sixty-vote threshold" (because of the current version of the Senate's Cloture Rule). *Id.* at 10.

The support for this argument is difficult to divine. First, it is inaccurate to say that either the Congressional Review Act or the Cloture Rule changes the voting "threshold" for passage of legislation in the Senate. Final passage of any bill through the Senate requires a majority of Senators, except in specific instances for which a supermajority is expressly required by the Constitution. *Compare, e.g.*, U.S. Const., art. I, § 5 ("a majority of each [House] shall constitute a quorum to do business"), *with* U.S. Const., art. II, § 2, cl. 2 (the President "shall have Power . . . to make Treaties, provided two thirds of the Senators present concur"). The Congressional Review Act and the Cloture Rule speak only to the amount of time a particular piece of legislation may be debated in the Senate. *See* Rule XXII, the Standing Rules of the United States Senate (setting forth procedures "to bring to a close the debate"); 5 U.S.C. § 802(d)(2) ("debate" on a CRA resolution "shall be limited to not more than 10 hours"). To be sure, as a practical matter, under current Senate rules, "[s]imply threatening to filibuster can give Senators great influence over whether the Senate considers a bill, when it

considers it, and how it may be amended." *The Legislative Process on the Senate Floor: An Introduction*, CONGRESSIONAL RESEARCH SERVICE (July 22, 2019), at 4, https://crsreports.congress.gov/product/pdf/RL/96-548. But neither the Cloture Rule, nor the CRA actually changes the fact that final passage of legislation requires only a majority of Senators to vote in favor. *See* U.S. Const. art. I, § 7 (any bill that "shall have passed" the House and Senate "shall . . . be presented" to the President and "shall become a Law" unless vetoed).

Second, the Congressional Review Act creates no new power that the Senate did not already possess. Even without the CRA, if the President and majorities in both houses of Congress are dissatisfied with any agency rule, Congress could enact (and the President could sign into law) a bill that would repeal that agency rule. And, to the extent that a majority of Senators felt that Senate rules (including but not limited to the Cloture Rule) made that outcome too difficult to achieve, a bare majority of Senators can always amend the Senate Rules. In fact, the Senate has done so on several occasions in recent years.[6]

Third, and most fundamentally, even ignoring all of the other misunderstandings at the heart of Plaintiffs' equal protection claim, it is simply untrue that the Congressional 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." Pls.' MSJ at 14. That distinction is nonsensical—*all* public laws are passed by Congress and signed into law by the President for the benefit of the United States of America as a whole. *All* citizens are "protected by statutes directly," and *all* citizens are "protected by statutes that delegate authorities to agencies." To be sure, some individual citizens may be more or less directly affected than others by some statutes (and by some agency regulations). And some individual citizens will agree or disagree with the wisdom of some statutes (and some agency regulations) more than others. But the animating premise of our

[6] *See* Paul Kane, THE WASHINGTON POST, *Reid, Democrats trigger 'nuclear' option; eliminate most filibusters on nominees* (Nov. 21, 2013), http://wapo.st/1c6f4AH?tid=ss_mail; Susan Davis, NPR.ORG, *Senate Pulls 'Nuclear' Trigger to Ease Gorsuch Confirmation* (April 6, 2017), https://www.npr.org/2017/04/06/522847700/senate-pulls-nuclear-trigger-to-ease-gorsuch-confirmation

constitutional republic is that the People's representatives in Congress, and the President (with the assistance of his subordinates throughout the Executive Branch), represent the interests of the United States as a whole. That some laws are subject to a filibuster while others are not does nothing to change this principle.

What Plaintiffs truly complain about is not a difference in the treatment of individuals, but a difference in the treatment of particular laws. That is evidenced by the fact that individuals affected by actions taken by Congress under the CRA, or indeed other laws that require only a simple majority to proceed to a vote on final passage, will change based on the policies at issue.[7] And while the Equal Protection Clause prohibits drawing certain distinctions among classes of *citizens*, it says nothing about distinctions between classes of *statutes*. *See* U.S. Const. amend. XIV, § 1 (government may not "deny *to any person* . . . the equal protection of the laws") (emphasis added). In short, Plaintiffs have not plausibly alleged that the challenged actions "divide citizens into two groups" at all, Pls.' MSJ at 14; *see* Compl. ¶ 97—making it irrelevant whether any such distinction would survive the applicable level of equal-protection scrutiny.

b. At most, rational-basis review applies. Even if Plaintiffs could overcome those mistaken factual and legal premises that undermine their equal-protection theory at the threshold, ultimately, at most, rational-basis review would apply—as Plaintiffs all but concede. In Plaintiffs' words, when adjudicating equal-protection claims, "[c]ourts apply strict scrutiny to statutes that classify individuals based on race, national origin, or citizenship," and "apply intermediate scrutiny to statutes that classify based on gender or birth to unwed parents." Pls.' MSJ at 12. But "when a statute categorizes citizens on any basis to which the other tiers do not apply," "courts usually apply the rational basis test." *Id.* at 12-13; *see also, e.g.*, *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.").

[7] For example, Plaintiffs here may object to the repeal of the Stream Protection Rule, but they presumably would have favored an action by Congress under the CRA to overturn an agency decision to withdraw that (or a similar) rule.

Nevertheless, Plaintiffs argue that "this situation prohibits the Court" from "leap[ing] directly to the rational basis test." Pls.' MSJ at 13. According to Plaintiffs, "[t]he 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." *Id.* But levels of constitutional scrutiny do not turn on what laws "deserve," nor is there any "rigged-system" exception to basic equal protection doctrine. Plaintiffs cite no authority to the contrary. Rational-basis review is thus the only conceivable level of scrutiny that could apply to Plaintiffs' equal-protection claims, which do not challenge alleged discrimination against any suspect class.[8]

c. The Congressional Review Act has a rational basis. The Congressional Review Act would easily survive rational-basis review. Rational-basis review "is a paradigm of judicial restraint," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993); it is "the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989). Under this standard, the challenged statute enjoys "a strong presumption of validity," and the challenger bears "the burden 'to negative every conceivable basis which might support it'" without regard to "whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach*, 508 U.S. at 314-15 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). "Courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993); *accord Beach*, 508 U.S. at 313-15 (a law survives rational-basis review "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," because "a legislative choice . . . may be based on rational speculation unsupported by evidence or empirical data.").

[8] Curiously, Plaintiffs do cite (at Pls.' MSJ at 13) *FCC v. Beach Communications*, 508 U.S. 307 (1993), but that is a classic case about rational-basis review. Plaintiffs also cite the canonical definition of a suspect class that appears in *United States v. Carolene Products*, 304 U.S. 144, 152, 152 n.4 (1938), but that language has never been read to stand for anything like a "rigged-system" exception. And as already explained, Plaintiffs are not suing on behalf of a "discrete and insular minorit[y]" subject to heightened protections under equal protection doctrine. *Id.*

The Congressional Review Act "was designed to give Congress an expedited procedure to review and disapprove federal regulations." *Center for Biological Diversity*, 946 F.3d at 556. 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. Accordingly, the Congressional Review Act has a rational basis.[9]

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

Plaintiffs also bring a substantive-due-process claim, which fails for multiple reasons, including many of the same reasons as above.

"Substantive due process bars certain government actions regardless of the fairness of the procedures used to implement them," and it "limits what the government may do in both its legislative and executive capacities." *Abdi v. Wray*, 942 F.3d 1019, 1027 (10th Cir. 2019) (citation omitted). "The Supreme Court has found substantive due process violations where government action has infringed a 'fundamental' right without a 'compelling' government purpose, *Washington v. Glucksberg*, 521 U.S. 702, 721-22 (1997), as well as where government action deprives a person of life, liberty, or property in a manner so arbitrary it 'shocks the conscience,' *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)." *Abdi*, 942 F.3d at 1027. The Tenth Circuit "held in *Halley v. Huckaby* that 'we apply the

[9] Plaintiffs' only argument to the contrary appears to be a tortured analogy to malapportionment cases decided under the "one-person-one-vote" principle. *See* Pls.' MSJ at 17-19. Those cases are inapplicable here. *See e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) ("We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.") (cited in Pls.' MSJ at 15, 17). They are especially inapposite in a case that effectively amounts to a challenge to Senate Rules, as the United States Senate is famously *not* designed to comply with one-person-one-vote apportionment principles—per one of the Constitution's basic structural compromises, each State has exactly two Senators, regardless of population. *See* U.S. Const., art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each state.").

fundamental-rights approach when the plaintiff challenges legislative action, and the shocks-the-conscience approach when the plaintiff seeks relief for tortious executive action,' 902 F.3d 1136, 1153 (10th Cir. 2018)." *Abdi*, 942 F.3d at 1027.

In this case, Plaintiffs challenge legislative action,[10] so the analysis required by the Tenth Circuit "proceeds in three steps." *Abdi*, 942 F.3d at 1028. "First, the reviewing court must determine whether a fundamental right is at stake either because the Supreme Court or the Tenth Circuit has already determined that it exists or because the right claimed to have been infringed by the government is one that is objectively among those 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty' such that it is 'fundamental.' *Glucksberg*, 521 U.S. at 720-21." *Id.* Second, "the court must determine whether the claimed right . . . has been infringed." *Id.* "Third, if the right infringed is a fundamental right, the court must determine whether the government has met its burden to show that the law or government action interfering with the right is narrowly tailored to achieve a compelling government purpose." *Id.* But "[i]f the right is not fundamental," the Court must "apply rational basis review." *Id.*

Here, Plaintiffs' substantive-due-process claim founders at the first step. Plaintiffs' claimed right—seemingly, the "right" to be free of legislation that is supported by fewer than 60 Senators—is plainly not one that "the Supreme Court or the Tenth Circuit" has "already determined . . . exists." *Abdi*, 942 F.3d at 1028. Plaintiffs do not even claim to the contrary. In fact, in Plaintiffs' own words, "[f]undamental 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." Pls.' MSJ at 19. But no such right is at stake in this case, nor anything analogous. Nor is any such right "objectively among those 'deeply rooted in this Nation's history and tradition'" such that it is "implicit in the concept of ordered liberty." *Abdi*, 942 F.3d at 1028 (quoting *Glucksberg*, 521 U.S. at 720-21). In fact, the majority of "this Nation's history,"

[10] Even if Plaintiffs' claims could be construed as challenging "executive action," they plainly do not challenge allegedly "tortious executive action." *Abdi*, 942 F.3d at 1027. And even if they did, the Senate employing varying voting thresholds for different types of votes does not "shock[] the conscience." *Lewis*, 523 U.S. at 846. Plaintiffs do not argue otherwise.

id., included no Cloture Rule at all, and hardly any filibusters—an unremarkable fact, given that neither is required by the Constitution. *See Common Cause*, 909 F. Supp. 2d at 13-14.

Accordingly, rational-basis review applies to Plaintiffs' substantive-due-process claim. And as already explained above in the context of Plaintiffs' equal protection claim, *see supra* at 14-15, there is (at least) one rational basis for the Congressional Review Act, and in particular for its provision limiting Senate debate to 10 hours on joint resolutions of disapproval: providing a more efficient procedure for congressional oversight of agency rules.

In their motion for summary judgment, Plaintiffs argue that "Congress created the Senate's two voting thresholds because it assumed agency misconduct," and because it "assumed that more easily rescinding legislative rules would better discipline issuing agencies." Pls.' MSJ at 20. Plaintiffs further argue that because both of those assumptions are factually erroneous, there is no rational basis for the Congressional Review Act. This argument is meritless. At the outset, Plaintiffs offer no citation for the idea that Congress "assumed agency misconduct," that that assumption was wrong, or that that assumption being right was central to the passage of the Congressional Review Act. But even if Plaintiffs had plausibly alleged any of those premises, the argument fundamentally misconceives the concept of rational-basis review. A law survives rational-basis review "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," because "a legislative choice . . . may be based on rational speculation unsupported by evidence or empirical data." *Beach*, 508 U.S. at 313-15. Accordingly, Plaintiffs may believe that Congress made speculative assumptions, "unsupported by evidence," *id.*, in enacting the Congressional Review Act. But none of that is relevant under rational-basis review—all that is relevant is whether any conceivable rational basis exists. And one does.

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

In their third and final claim, Plaintiffs assert that the Congressional Review Act creates an impermissible "one way ratchet that, over time, erodes and undermines the Executive Branch's authority," in violation of the separation of powers doctrine. Compl. ¶ 108. To arrive at this conclusion, Plaintiffs claim that the CRA's purported 51-vote threshold operates to "mak[e] it easier

to rescind statutory delegations, [while] the Cloture Rule makes it harder to expand those same statutory delegations." *Id.* ¶ 109. Even assuming the truth of this unsupported assertion,[11] disapproval resolutions under the CRA are regular exercises of Congress' legislative power, *see supra* at 8-10—they do not impermissibly interfere with any inherent Executive authority, and are consistent with the separation of powers.

The separation of powers doctrine "safeguard[s] against the encroachment or aggrandizement of one branch at the expense of the other." *Morrison v. Olson*, 487 U.S. 654, 693-94 (1988) (citing *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). The Supreme Court, however, has long "recognized, as [James] Madison admonished at the founding, that . . . the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). Each branch of government often takes action that influences the authorities of a coordinate branch without constitutional infirmity. *Morrison*, 487 U.S. at 693-94 ("[W]e have never held that the Constitution requires that the three branches of Government operate with absolute independence.") (internal citations and quotations omitted); *see also Nixon v. Admin'r of Gen. Servs.*, 433 U.S. 425, 442-43 (1977) ("[T]he [Supreme] Court squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches."). Notwithstanding this interconnected dynamic, however, a court faced with a separation-of-powers claim must inquire whether a challenged action is an inappropriate "assumption of the constitutional field of action of another branch," *Buckley*, 424 U.S. at 122.

Tellingly, Plaintiffs fail to identify any inherent Executive Branch function with which the CRA's purported "one way ratchet" interferes. *See* Compl. ¶¶ 107-11. Except for inherent Article II functions, of course, the Constitution gives Congress the power to define the Executive's regulatory

[11] Plaintiffs appear to wrongly presume that CRA disapproval resolutions always inhere to the detriment of the Executive's regulatory authority; Congress may, of course, use the CRA to disapprove of a fundamentally de-regulatory agency rule just as it may a pro-regulatory one. And the President may choose to sign into law only CRA resolutions that accommodate Executive Branch authority, vetoing the rest. Furthermore, Congress may be more likely to delegate significant authority to administrative agencies if it knows that future oversight of agency exercises of that authority can be accomplished through the CRA's streamlined procedures.

authority through the legislative process, *see, e.g.*, *Youngstown Sheet Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952); the CRA thus does not pose any "dange[r] of congressional usurpation of Executive Branch functions" in violation of separation of powers. *Compare, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 727 (1986) (statute setting up office of the Comptroller General violated separation of powers because it interfered with the President's removal power); *Chadha*, 462 U.S. at 958 (legislative veto improperly interfered with requirements of bicameralism and presentment). Indeed, the Executive Branch's power over the administrative state is fundamentally an exercise of its power to "take Care that the Laws be faithfully executed." 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. *See supra* at 8-10 (describing how the CRA accords with bicameralism and presentment); *accord Center for Biological Diversity*, 946 F.3d at 562 (in rejecting constitutional challenge to a CRA resolution, noting that "validly enacted legislation that requires an agency to take a specified action does not impinge on the Take Care Clause or violate separation-of-powers principles"). The Executive Branch has no independent constitutional interest in a regulatory regime, like the Stream Protection Rule, that is no longer authorized by law. And like any law that has been enacted through the Article I legislative processes of bicameralism and presentment, CRA disapproval resolutions redefine the scope of the Executive's regulatory authority in the first place—they do not improperly interfere with Executive Branch authority. *See Center for Biological Diversity*, 946 F.3d at 561-62 (rejecting separation-of-powers challenge to the Congressional Review Act).

CONCLUSION

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

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