No. 21-1317

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CITIZENS FOR CONSTITUTIONAL INTEGRITY, and

SOUTHWEST ADVOCATES, INC.,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

PLAINTIFFS-APPELLANTS' OPENING BRIEF

ORAL ARGUMENT REQUESTED

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RULE 26.1 DISCLOSURE

Plaintiffs-Appellants Citizens for Constitutional Integrity and Southwest Advocates, Inc., (collectively, Citizens) have no parent corporation or stock-owning, publicly-held corporation to disclose.

TABLE OF CONTENTS

Rule 26.1 Disclosure ii
Table of Contents iii
Table of Authorities vi
Glossary xii
Statement of Jurisdiction 1
Statement of Issues 3
Statement of the Case 4
I. Introduction 4
II. Statutory and Regulatory Background 7
A. The Surface Mining Control Act (SMCRA) 7
B. The Stream Protection Rule 8
C. The Administrative Procedure Act 13
D. The Cloture Rule and the Review Act 14
III. Statement of Facts 18
A. The King II Mine expanded and caused more intense impacts as Southwest Advocates fought those impacts. 19
B. The Mine takes water from the La Plata River and risks polluting groundwater. 20
IV. Procedural Background 23
Summary of Argument 23
I. The Senate's two voting thresholds create a one-way ratchet that violates the separation of powers. 23
II. The Senate's two voting thresholds violate equal protection. 25
III. The Senate's two voting thresholds violate substantive due process. 26
Standard of Review 27
Argument 29

I. The Review Act and the Cloture Rule create a one-way ratchet that violates the separation of powers. 29

A. The 2017 Statute repeals fundamental details of SMCRA. 30

B. Repealing statutory delegations with a one-way ratchet violates the separation of powers. 35

II. The Senate's two voting thresholds do not relate to the classification of citizens and therefore violate equal protection. 40

A. The Review Act and the Cloture Rule create two classes of citizens based on the nature and complexities of their problems. 43

B. The Senate's two voting thresholds violate intermediate scrutiny. 47

C. Fifty-one and sixty-votes in the Senate have no relation to the classes of citizens that Congress created. 49

D. Equal protection applies to preliminary votes that may determine the result. 52

III. The Senate's two voting thresholds violate substantive due process because they advance no legitimate objective. 54

A. The Senate's two voting thresholds only make sense by irrationally assuming pervasive agency misconduct. 54

B. Changing Article I, Section 7, voting thresholds by statute does not qualify as a legitimate objective. 59

C. Efficiency does not qualify as a legitimate government objective when the more efficient procedure violates the Constitution. 64

D. The Senate's two voting thresholds do not provide agency oversight. 67

Conclusion 69

Certificate of Compliance 71

Certificate of Service 72

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) 73

Standing Rule of the U.S. Senate XXII.2 80

Pub. L. No. 115-5, 131 Stat. 10 (Feb. 16, 2017) 83

Order of Consolidation (Apr. 21, 2021), ECF No. 46 84

Order (May 4, 2021), ECF No. 50 86

Order (Aug. 30, 2021), ECF No. 52 87

TABLE OF AUTHORITIES

Cases

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) ..58
Adarand Constructors, Inc. v Peña, 515 U.S. 200 (1995) 54
Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000) 52
Bar MK Ranches v. Yuetter, 994 F.2d 735 (10th Cir. 1993) 76
Bond v. United States, 564 U.S. 211 (2011) 47
Bradley v. Richmond Sch. Bd., 416 U.S. 696 (1974).....52
Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002) 81
City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) ...55, 56, 57, 60, 63, 66, 77
Clinton v. City of New York, 524 U.S. 417 (1998) 79, 83, 84
Coal River Mountain Watch v. Jewell, No. 1:09-cv-115-BJR (D.D.C. Jan. 16, 2009).....14
Cohens v. Virginia, 19 U.S. 264 (1821).....46
Craig v. Boren, 429 U.S. 190 (1976).....56
Dine Citizens Against Ruining Our Env't v. Bernhardt, 923 F.3d 831 (10th Cir. 2019).....31
Doe v. Sch. Dist. No. 1, 970 F.3d 1300 (10th Cir. 2020).....36
Elkins v. United States, 364 U.S. 206 (1960) 67
FCC v. Beach Commc's, Inc., 508 U.S. 307 (1993) 63, 67
Fifth Amendment 7, 8, 35
Fletcher v. Peck, 10 U.S. 87 (1810).....51
Ford v. United States, 273 U.S. 593 (1927) 83
Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010).....40, 49
Frontiero v. Richardson, 411 U.S. 677 (1973) 60
Funk v. United States, 290 U.S. 371 (1933) 64
Hall v. Hall, 138 S. Ct. 1118 (2018).....2

Hang Kannha Yuk v. Ashcroft, 355 F.3d 1222 (10th Cir. 2004).....77
Heller v. Doe, 509 U.S. 312 (1993) 78
INS v. Chadha, 462 U.S. 919 (1983). 24, 25, 26, 49, 53, 73, 79, 83, 84, 85, 86, 90
Kilbourn v. Thompson, 103 U.S. 168 (1881).....39
King v. Burwell, 576 U.S. 473 (2015).....22, 71
LaChance v. Erickson, 522 U.S. 262 (1998) 72
Lawrence v. Texas, 539 U.S. 558 (2003) 63
Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014).....46
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 62, 66, 73
Loving v. United States, 517 U.S. 748 (1996).....58
*Marbury v. Madiso*n, 5 U.S. 137, 177 (1803).....51, 82
Mathews v. Lucas, 427 U.S. 495 (1976) 67
Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985).....68, 69
Murray's Lessee v. Hoboken Land Improvement Co., 59 U.S. 272 (1855) 38
Mut. Life Ins. Co. v. Spratley, 172 U.S. 602 (1899).....51
Myers v. United States, 272 U.S. 52 (1926) 49
Nat'l Parks Conservation Ass'n v. Jewell, 62 F. Supp. 3d 7 (D.D.C. 2014) 14, 15
Nat'l Wildlife Fed'n v. Hodel, 839 F.2d 694 (D.C. Cir. 1988).....11
Ne. Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656 (1993).....55
Newton v. Comm'rs, 100 U.S. 548 (1880) 52
Nixon v. Herndon, 273 U.S. 536 (1927) 70, 71
Nixon v. Mo. Mun. League, 541 U.S. 125 (2004) 40
NLRB v. Brown, 380 U.S. 278 (1965) 8
Obergefell v. Hodges, 576 U.S. 644 (2015).....72

Opp Cotton Mills, Inc. v. Adm'r of Wage and Hour Div., 312 U.S. 126 (1941) 58
Perez v. Mortg. Bankers Ass'n, 575 U.S. 92 (2015) 19
Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) 75
Reichelderfer v. Quinn, 287 U.S. 315 (1932) 51
Reynolds v. Sims, 377 U.S. 533 (1964) 80
Robbins v. Bureau of Land Mgmt., 438 F.3d 1074 (10th Cir. 2006) 36, 37
Romer v. Evans, 517 U.S. 620 (1996) 54, 57, 59, 60, 66, 67, 74
Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 61, 62
Sable Commc's of Cal., Inc. v. FCC, 492 U.S. 115 (1989) 75
SEC v. Chenery Corp., 318 U.S. 80 (1943) 8
Seila Law v. CFPB, 140 S. Ct. 2183 (2020) 48
Smith v. Allwright, 321 U.S. 649 (1944) 70
United States v. Am. Trucking Ass'ns, 310 U.S. 534 (1940) 89
United States v. Ballin, 144 U.S. 1 (1892) 38, 39, 80
United States v. Booker, 543 U.S. 220 (2005) 40, 65
United States v. Carolene Prods. Co., 304 U.S. 144 (1938) 64
United States v. Chem. Found., Inc., 272 U.S. 1 (1926) 77
United States v. Morgan, 313 U.S. 409 (1941) 76
United States v. Salerno, 481 U.S. 739 (1987) 90
United States v. Smith, 286 U.S. 6 (1932) 37, 39
United States v. Winstar Corp., 518 U.S. 839 (1996) 51
USDA v. Moreno, 413 U.S. 528 (1973) 61
Vance v. Bradley, 440 U.S. 93 (1979) 56, 63, 72, 75
Vt. Yankee Nuclear Power Corp. v. Nat. Resources Def. Council, Inc., 435 U.S. 519 (1978) 89
Whitman v. Am. Trucking Ass'ns., Inc., 531 U.S. 457 (2001) 41, 88
Withrow v. Larkin, 421 U.S. 35 (1975) 76
Youngstown Sheet Tube Co. v. Sawyer, 343 U.S. 579 (1952) 49

Zadvydas v. Davis, 533 U.S. 678 (2001) 64

Statutes

28 U.S.C. § 1291 1
28 U.S.C. § 1331 1
30 U.S.C. § 1201 7
30 U.S.C. § 1202 8
30 U.S.C. § 1211 ..... 8, 31, 33
30 U.S.C. § 1221 8
30 U.S.C. § 1258 31
30 U.S.C. § 1260 8
30 U.S.C. § 1265 ..... 8, 31
30 U.S.C. § 1266 31
30 U.S.C. § 1270 27
30 U.S.C. § 1272 31
30 U.S.C. § 1276 33
30 U.S.C. § 1300 7
30 U.S.C. § 1361 1
5 U.S.C. § 553 14
5 U.S.C. § 706 ..... 28, 33
5 U.S.C. §§ 701-706 27
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) 4, 5, 17, 18, 24, 63
Endangered Species Act, 16 U.S.C. §§ 1531-1544 10
Mineral Leasing Act of 1920, Pub. L. No. 66-146, 41 Stat. 437 (Feb. 25, 1920) 7
Pub. L. No. 115-5, 131 Stat. 10 (Feb. 16, 2017) 4, 13, 24, 32
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) 6, 7

Other Authorities

142 CONG. REC. S2161-66 (Mar. 15, 1996) 25

142 CONG. REC. S2312 (Mar. 19, 1996) 24

142 CONG. REC. S3122 (Mar. 28, 1996) 24

ADAM JENTLESON, KILL SWITCH 210-11 (2021) 21

Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 Stan. L. Rev. 181, 182 (1997) 22

Jody Freeman & Matthew C. Stephenson, *Untapped Potential of the* [*Review Act*], Harvard Journal on Legislation, Forthcoming, Harvard Public Law Working Paper No. 21-28 (October 7, 2021) 87

JOHN HART ELY, DEMOCRACY AND DISTRUST 170 (1980) 59

MEGAN S. LYNCH & JAMES V. SATURNO, CONG. REV. SERV., THE BUDGET RECONCILIATION PROCESS: STAGES OF CONSIDERATION 8 (Jan. 21, 2021, update) 24

MR. SMITH GOES TO WASHINGTON (Columbia Pictures 1939) 21

Paul W. Kahn, Gramm-Rudman and the Capacity of Congress to Control the Future, 13 Hastings Const. L.Q. 185, 191 (1986) 50, 53

Richard Lazarus, *Envtl. Law Without Congress*, 30 J. of Land Use & Envtl. L. 15, 27 (2014) 45

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THE FEDERALIST (Random House ed., 2000) 46, 48, 81

U.S. Senate, Cloture Motions, www.senate.gov/legislative/cloture/clotureCounts.htm. 23

VALERIE HEITSHUSEN & RICHARD S. BETH, CONG. RESEARCH SERV., FILIBUSTERS AND CLOTURE IN THE SENATE ii (Apr. 7, 2017) 21, 22, 71

Rules

Fed. R. App. P. 4 1

Standing Rule of the U.S. Senate V.2 14

Standing Rule of the U.S. Senate XXII.2 ..... 4, 17, 18, 24, 29, 53, 65

Regulations

30 C.F.R. § 750.6 10

Excess Spoil, Coal Mine Waste, and Buffers for Waters of the U.S., 73 Fed. Reg. 75,814 (Dec. 12, 2008) 14

Excess Spoil; Stream Buffer Zones; Diversions [Proposed] Rule, 69 Fed. Reg. 1,036 (Jan. 7, 2004) 13

Notice of Intent to Prepare an Envtl. Impact Statement, 70 Fed. Reg. 35,112 (June 16, 2005) 13

Proposed Stream Protection Rule, 80 Fed. Reg. 44,436 (July 27, 2015) 12, 13, 15, 16

Constitutional Provisions

U.S. CONST. amend. XIV, § 3 82

U.S. CONST. amend. XXV, § 3 82

U.S. CONST. art. 2, § 2 82

U.S. CONST. art. I, § 3 ..... 82, 83

U.S. CONST. art. I, § 5 ..... 38, 78, 82

U.S. CONST. art. I, § 7 ..... 25, 26, 78, 82, 86, 90

U.S. CONST. art. V 82

In satisfaction of 10th Cir. R. 28.2(C)(3), there are no prior or related appeals.

GLOSSARY

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

STATEMENT OF JURISDICTION

The district court had jurisdiction because Citizens claimed federal officers and agencies, the Office of Surface Mining Reclamation and Enforcement, the Department of the Interior, Secretary of the Interior Deb Haaland, Acting OSMRE Director Glenda Owens, and Acting Assistant Secretary for Land and Minerals Management Laura Daniel-Davis (collectively, OSMRE) violated federal laws and the Constitution. *See* 28 U.S.C. §§ 1331 (federal question), 1361 (federal officers and agencies).

This Court has jurisdiction over this appeal because the district court's August 30, 2021, order dismissed the case and all claims. II-App-211. *See* 28 U.S.C. § 1291. Citizens filed their notice of appeal sixteen days later, on September 15, 2021, which falls within the sixty-day period for appealing. II-App-212. *See* Fed. R. App. P. 4(a)(1)(B)(i)-(iii).

This Court directed the Parties to address "the jurisdictional issue of finality with respect to the appeal of an apparently final decision applicable to only one of the two consolidated cases." Order (Sept. 30, 2021), ECF No. 010110584625. The district court's consolidation order

does not change Citizens' right—and perhaps only opportunity—to appeal immediately from this decision dismissing one of the two cases.

For the convenience of the district court and the Parties, the district court consolidated two cases that challenged separate final agency actions approving separate coal mine expansions: the Modification Approval (950-acre expansion), No. 20-cv-3668-RM-STV, and the Dunn Ranch Approval (2,462-acre expansion), No. 21-cv-923-RM-STV. I-App-27; II-App-40, -204. After consolidation, the district court specifically declined to rule on the merits in both cases at once. I-App-10. Ultimately, the district court dismissed only the Modification Approval case. II-App-206. Since then, Citizens amended the Dunn Ranch complaint to add two environmental law claims, and the Court terminated the consolidation. I-App-11 to -12.

The legal construction of consolidation only makes case management more convenient; it does not merge two cases into one. *Hall v. Hall*, 138 S. Ct. 1118, 1125 (2018). Therefore, "constituent cases retain their separate identities at least to the extent that a final decision in one is immediately appealable by the losing party." *Id.* at 1131; *Wu v. Bernhardt*, No. 19-2068, at *3 (10th Cir. June 26, 2020) (unpublished).

The district court issued a final decision only on the Modification case, so consolidation does not prohibit Citizens from appealing from that order while the Dunn Ranch case proceeds. *See Hall*, 138 S. Ct. at 1131. Instead, if Citizens failed to appeal from this Order, II-App-206, nothing would stay the deadline, and they would risk their appeal. *See* Fed. R. App. 4(a)(1). Section 1291 assigns jurisdiction over this appeal from the final decision dismissing the Modification case.

STATEMENT OF ISSUES

1. Whether the Senate's two voting thresholds, one at fifty-one to reduce agency authorities and one at sixty to restore them, violate the separation of powers by creating a one-way ratchet that inexorably reduces Executive Power.

2. Whether the Senate's two voting thresholds, one set at fifty-one to rescind statutes that protect citizens by delegations to agencies, and another set at sixty for rescinding statutes that protect citizens directly, violate the Fifth Amendment equal protection guarantee.

3. Whether the Senate's two voting thresholds violate the Fifth Amendment's substantive due process requirement by justifying a lower threshold to pass more statutes rescinding agency authorities based on irrational assumptions of pervasive agency misconduct.

STATEMENT OF THE CASE

I. Introduction

The Stream Protection Rule, 81 Fed. Reg. 93,066 (Dec. 20, 2016), had protected Citizens from the King II Mine (the Mine) that loomed over them and threatened their well water and the La Plata River that runs next to their homes. With just fifty-four votes in the Senate, Congress used the Contract with America Advancement Act of 1996 § 251, Pub. L. No. 104-121, 110 Stat 847, 868 (codified at 5 U.S.C. §§ 801-808) (Mar. 29, 1996) (the Review Act), to undermine the statutory authority that directed OSMRE to issue that rule. Pub. L. No. 115-5, 131 Stat. 10 (Feb. 16, 2017) (the 2017 Statute).

The 2017 Statute jeopardized groundwater and surface water in dry, delicate areas of southwestern Colorado. Now, for Congress to restore the Stream Protection Rule that protected Citizens and their water from coal mining pollution, Citizens needs sixty votes in the Senate to overcome the Cloture Rule, Standing Rule of the U.S. Senate XXII.2.

The Senate's two-voting-threshold asymmetry violates the Constitution in three ways. First, it violates the separation of powers by creating a one-way ratchet that chips away at Executive Power.

Congress can withdraw delegations with a simple majority, but it cannot redelegate the same authority without sixty votes. Every use of the Review Act erodes Executive Power, and the structure violates the separation of powers.

Second, fifty-one does not equal sixty, so the Senate's two vote thresholds violate equal protection under the Fifth Amendment. Citizens facing complex problems and protected by statutory delegations to agencies can lose protections with just fifty-one votes; whereas citizens facing simpler problems protected by statutes directly will never lose protections without sixty votes. Problem complexity and voting thresholds have no relationship, so the Senate's two voting thresholds violate equal protection.

Third, the Senate's two vote thresholds violate substantive due process under the Fifth Amendment. Desiring to pass more statutes to stop Article II agency actions inherently assumes pervasive agency misconduct. Courts reject assumptions of agency misconduct as irrational, and the Fifth Amendment requires striking it down.

The Review Act's deep constitutional flaws manifested by threatening the quality and quantity of water in the small,

southwestern Colorado community of Hesperus. The district court dismissed these claims without applying the tests that the Supreme Court has carefully refined to determine whether statutes violate the Constitution. A rigorous application of those tests shows constitutional violations that allowed a coal mine to risk polluting Colorado's precious water. The Fifth Amendment and the separation of powers compel overturning the Senate's two-vote-thresholds system for passing laws.

Because the King II Mine Modification approval, I-App-13, rests on void statutes, the Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328), requires the Court to set it aside. *See NLRB v. Brown*, 380 U.S. 278, 292 (1965) ("Courts must, of course, set aside [agency] decisions which rest on an erroneous legal foundation.") (quotations omitted); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("if the action is based upon a determination of law . . ., an order may not stand if the agency has misconceived the law."). The Constitution compels requiring OSMRE to comply with the Stream Protection Rule.

II. Statutory and Regulatory Background

A. The Surface Mining Control Act (SMCRA)

OSMRE approved the Modification to expand the King II Mine under SMCRA and the Mineral Leasing Act of 1920, Pub. L. No. 66-146, 41 Stat. 437 (Feb. 25, 1920). I-App-13. SMCRA contains some of the most comprehensive protections from pollution. By the time Congress passed SMCRA in 1977, it had refined its approach by incorporating lessons learned from earlier environmental statutes.

Congress enacted SMCRA to protect the environment, public health, and public safety. It found "many surface mining operations" would otherwise "destroy[] or diminish[] the utility of land," cause "erosion and landslides," pollute water, destroy fish and wildlife habitats, impair natural beauty, and degrade "the quality of life in local communities." 30 U.S.C. § 1201(c). It assigned the Secretary jurisdiction over mining plans on Indian lands. *Id.* § 1300(c); 30 C.F.R. § 750.6(a).

Congress sought to "minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public." 30 U.S.C. § 1201(d). Therefore, it implemented "a nationwide program to protect society and the environment from the adverse effects

of surface coal mining operations." *Id.* § 1202(a). It created OSMRE and delegated authority to implement SMCRA. *Id.* § 1211(c)(2).

SMCRA regulates coal mining by withholding permits until mining companies commit to comply with environmental performance standards. *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 699 (D.C. Cir. 1988). Congress prohibited OSMRE from approving coal mine permits unless each mining company demonstrates that its operation minimizes disruption and prevents material damage to water resources at and near the mine. 30 U.S.C. §§ 1260(b)(2), (b)(3), 1265(b)(10). In addition, Congress directed that OSMRE to use the "best technology currently available" to "minimize disturbances and adverse impacts of the [mining] operation on fish, wildlife, and related environmental values . . . ." *Id.* § 1265(b)(24). So OSMRE could improve practices going forward, Congress subsidized universities to improve mining science, engineering, and technology. *Id.* §§ 1221-1230a.

B. The Stream Protection Rule

Congress directed OSMRE to establish rules for permitting surface mines to "protect society and the environment from the adverse effects of surface coal mining operations." *Id.* §§ 1202(a), 1211(c)(2). Starting in

2004, OSMRE spent thirteen years drafting a modern Stream Protection Rule to resolve a stream protection issue that had percolated since it issued the original regulations in 1977, and to account for thirty years of scientific developments, technologic advances, legal developments, and experiences implementing the 1977, 1979, and 1983 regulations. 81 Fed. Reg. at 93,068.

Controversies over SMCRA's protections of streams stretch back to 1977. Proposed Stream Protection Rule, 80 Fed. Reg. 44,447-44,451 (July 27, 2015). Then, OSMRE implemented some of SMCRA's water protections by barring coal mining within 100 feet of streams. *Id.* at 44,447. OSMRE weakened that rule in 1979 and again in 1983. *See id.* at 44,447-48.

In 2004, OSMRE proposed a new rule to resolve the ambiguities in the 1983 rule and to stop mining companies from dumping mining waste next to streams. *Id.* at 44,449; Excess Spoil; Stream Buffer Zones; Diversions [Proposed] Rule, 69 Fed. Reg. 1,036 (Jan. 7, 2004). OSMRE never issued a final rule because it decided to assess alternatives in an environmental analysis. Notice of Intent to Prepare an Envtl. Impact Statement, 70 Fed. Reg. 35,112 (June 16, 2005).

In 2008, OSMRE issued an expanded new rule. Excess Spoil, Coal Mine Waste, and Buffers for Waters of the U.S., 73 Fed. Reg. 75,814 (Dec. 12, 2008). Ten environmental groups challenged it. *Nat'l Parks Conservation Ass'n v. Jewell* (*NPCA*), 62 F. Supp. 3d 7 (D.D.C. 2014); *Coal River Mountain Watch v. Jewell*, No. 1:09-cv-115-BJR (D.D.C. Jan. 16, 2009). After six years of litigation, OSMRE confessed legal error for failing to consult with the Fish and Wildlife Service on impacts to species listed under the Endangered Species Act. *NPCA*, 62 F. Supp. 3d at 11.

On remand, OSMRE again expanded the rule's scope and reach in proposing the Stream Protection Rule. 80 Fed. Reg. 44,436 (July 27, 2015). As one major objective, OSMRE aimed to adopt advances, since the 1983 rules, "in information, technology, science, and methodologies related to surface and groundwater hydrology, surface-runoff management, stream restoration, soils, and revegetation." *Id.* at 44,439. OSMRE explained that the 1983 rules do not require mining companies to gather "the full suite" of water-quality parameters necessary "to establish a complete baseline against which the impacts of mining can be compared." *Id.* at 44,443. The 1983 rules do not require mining

companies to determine baseline aquatic life data. *Id.* They do not protect ephemeral streams or headwater streams, which modern studies have found important for downstream ecosystems. *Id.* at 44,443, 44,451.

The Stream Protection Rule filled these gaps. It

- Required mining companies to establish a "comprehensive baseline" of stream conditions before mining,
- Required "comprehensive monitoring" to detect and to correct water impacts timely,
- Required mining companies to protect ephemeral and headwater streams, and
- Required each permit to specify criteria at which mining impacts cause "material damage."

81 Fed. Reg. at 93,068-69. The Stream Protection Rule ultimately sought to ensure mining companies use "advances in science and technology" and "more completely implement[]" sections of SMCRA that require using the best technology currently available to minimize ecosystem impacts. *Id.* at 93,066, 93,069.

OSMRE identified voluminous benefits. It predicted that, from 2020 to 2040, the Rule would

- Restore 462 miles intermittent and perennial streams,

- Improve water quality in 5,523 miles of intermittent and perennial streams downstream of mine sites,
- Protect 84 miles of intermittent and perennial streams from excess spoil fills or coal mine waste facilities, and
- Improve reforestation on 51,828 acres of mined land.
- Create 280 jobs.
- Reduce greenhouse gas emissions by 2.6 million short tons each year, which would benefit the United States by $57 million each year in reduced carbon dioxide emissions.

Id. at 93,069.

OSMRE concluded that the Stream Protection Rule would "better protect the water resources needed by current and future generations for drinking, recreation, and wildlife from the adverse effects of coal mining." *Id.* at 93,073. It concluded that, "[e]ven if [lower impacts on water resources] were the only benefits of the Rule, and they are not, the benefits to water resources alone are sufficient to support and justify a nationwide rulemaking." *Id.* The Stream Protection Rule fundamentally changed the SMCRA regulations to better protect communities' water supplies across the United States from pollution.

The magnitude of public response underscores the magnitude of these water protections for people across the United States. Members of

the public and government agencies sent 94,000 written or electronic comments. *Id.* at 93,070.

Ultimately, OSMRE never applied the Stream Protection Rule because Congress quickly passed a statute that purported to rescind the statutory authority for it. OSMRE issued the rule in December 2016. *Id.* at 93,066. Two months later, the House approved House Joint Resolution 38. 2017 Statute. The Senate approved it the next day by a vote of 54 to 45. 163 CONG. REC. S632 (Feb. 2, 2017). The President signed the statute two weeks later. 2017 Statute. OSMRE withdrew the Stream Protection Rule. Congressional Nullification, 82 Fed. Reg. 54,924 (Nov. 17, 2017). It restored the objectively inferior 1983 rule. *See id.*

C. The Administrative Procedure Act

The Supreme Court has recognized Congress's broad authority to delegate legislative rulemaking authority to the agencies. The Constitution requires only an "intelligible principle" to guide the agency. *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quotations omitted). When agencies issue "legislative rules," like the Stream Protection Rule, through the APA's three-step procedure for notice-and-

comment rulemaking, those rules have the "force and effect of law." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (quotations omitted); *see* 5 U.S.C. § 553.

Once Congress delegates legislative authority by statute, the Constitution prohibits any individual in Congress, any single house of Congress, or Congress alone from changing the agency's authority in any way other than by enacting additional statutes. *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986).

D. The Cloture Rule and the Review Act

The claims here arise from different Senate rules for passing bills. Generally, the Senate considers itself a continual body, so unlike the House of Representatives, which passes new rules every two years, the Senate's Standing Rules state that they apply perpetually because two-thirds of the body carries on each Congress. *See* Standing Rule of the U.S. Senate V.2. A majority of Senators present and voting can pass most bills, but most bills cannot reach that up-or-down vote without overcoming a filibuster. When sixty senators invoke the Cloture Rule, it sets a time limit on debate. Without a time limit, the Senate does not

vote on or approve bills. Only nominations, budget-related bills, and a few other exceptions can pass with a simple majority.

Since the Senate changed the Cloture Rule in 1975, filibusters have not worked like the talking filibuster in MR. SMITH GOES TO WASHINGTON (Columbia Pictures 1939), in which a senator can stop a bill by holding the floor with talking and fortitude. For most bills, the modern "silent filibuster" allows a senator, with a phone call, to switch "the threshold on any bill or nomination . . . from a majority to a supermajority." ADAM JENTLESON, KILL SWITCH 210-11 (2021) (former chief of staff to a Senate majority leader).

The term "filibuster" in the Senate refers broadly to various "dilatory or obstructive tactics to block a measure by preventing it from coming to a vote." *See* VALERIE HEITSHUSEN & RICHARD S. BETH, CONG. RESEARCH SERV., FILIBUSTERS AND CLOTURE IN THE SENATE ii (Apr. 7, 2017). The Cloture Rule allows the Senate to stop filibusters by setting a thirty-hour time-limit and forcing a vote on the bill when that time expires. *Id.* at 12-13. With narrow exceptions, bills do not pass when the Senate does not invoke cloture. *Id.* at 18. The sixty-vote Cloture Rule creates "the Senate's normal 60-vote filibuster requirement." *See King v.*

Burwell, 576 U.S. 473, 492 (2015); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 Stan. L. Rev. 181, 182 (1997) ("filibustering has in effect created a supermajority requirement for the enactment of most legislation.").

The modern, silent filibuster makes it "an entirely different-and generally more powerful-weapon than the filibuster of the past." *The Filibuster*, 49 Stan. L. Rev. at 184. In 2019-20, the Senate filed over eight times as many cloture motions (328) as in 1975-76 (39). U.S. Senate, Cloture Motions, www.senate.gov/legislative/cloture/clotureCounts.htm.

To end filibusters and to avoid the onerous Cloture Rule, the Senate has created lower vote thresholds for certain bills. Congress often uses the Budget Act's reconciliation process, with its simple majority vote, to set a twenty-hour-debate limit on statutes that affect taxes or spending. *See* The Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (July 12, 1974) (codified as amended at 2 U.S.C. §§ 621-688, 636(b)(1)); MEGAN S. LYNCH & JAMES V. SATURNO, CONG. REV. SERV., THE BUDGET RECONCILIATION PROCESS: STAGES OF CONSIDERATION 8 (Jan. 21, 2021, update) ("20 hours") (citing 2 U.S.C. § 636).

As another exception to the Cloture Rule, Congress passed the Review Act to replace the one-house veto the Supreme Court struck down in 1983. *See* 142 CONG. REC. S3122 (Mar. 28, 1996) (statement of Sen. Levin); 142 CONG. REC. S2312 (Mar. 19, 1996) (statement of Sen. Glenn); *see also INS v. Chadha*, 462 U.S. 919, 954 (1983). By then, Congress had inserted almost 200 "one-house veto" provisions in various statutes. *Chadha*, 462 U.S. at 967 (White, J., dissenting). Those provisions allowed one house of Congress to invalidate an Executive-Branch decision or rule. *Id.* at 923 (majority op.). The Supreme Court overturned those vetoes as unconstitutional because they allowed one house to legislate without complying with Article I, Section 7. *Id.* at 956-959.

As intended, the Review Act avoids the Cloture Rule's supermajority-vote threshold and allows a simple majority to repeal authority for recently passed legislative rules: "We have expedited procedures in the bill so no one can filibuster, or stop the will of the majority." *See* 142 CONG. REC. S2161 (Mar. 15, 1996) (statement of Sen. Nickles). The Review Act sets a ten-hour countdown for compelling a vote in the Senate. 5 U.S.C. § 802(d)(2). With its simple majority vote, this rule

allows Congress to pass more statutes to rescind agency decisions and rules than it could pass through the Cloture Rule. The Review Act calls the bills "joint resolutions," *id.* § 802, but the Constitution ignores formalistic distinctions among bills, orders, resolutions, and votes. Art. I, § 7, cl. 3; *Chadha*, 462 U.S. at 946-49.

If a statute invokes specific words for a recently passed, target rule, the Review Act carves out and rescinds whatever statutory delegation the agency could have relied on to issue the target rule. *See* 5 U.S.C. § 801(b)(1); *Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 562 (9th Cir. 2019). Statutes under the Review Act contain only these words: "That Congress disapproves the rule submitted by the _____ relating to _____, and such rule shall have no force or effect." 5 U.S.C. § 802(a). After Congress passes statutes under the Review Act, the Review Act prohibits the agency from issuing any "substantially the same" future rule. *Id.* § 801(b)(2).

III. Statement of Facts

When Congress and OSMRE took the Stream Protection Rule out of the way, GCC Energy, LLC, wasted no time in seeking to expand the

King II Mine twice. As it delves deeper into the arid land in southwest Colorado, it threatens to pollute that community's water supply.

A. The King II Mine expanded and caused more intense impacts as Southwest Advocates fought those impacts.

The King Coal Mine (King I Mine) started southwest of Hesperus, Colorado, in 1938 as a small, mom-and-pop mine, but it has expanded dramatically since GCC bought it in 2005. *See* I-App-28. In 2000, King I produced approximately 160,000 tons of coal. II-App-22. By 2014, the company was mining at a rate six times as fast. *See* I-App-30. The mine jeopardizes the groundwater that feeds Southwest Advocates' members wells, and it takes surface water from the La Plata River, which now runs dry as never before.

GCC is now expanding its mining operations deeper underneath Ute Mountain Ute land with the 950.55-acre Modification expansion and a 2,462-acre Dunn Ranch expansion. I-App-27, -28; II-App-40. These expansions have dramatic environmental and community impacts. For instance, where 18-28 trucks per day used County Road 120 in 2001 only during business hours, GCC anticipates 140 trucks hauling coal, "around the clock" to their cement plants—either directly or by train via the Gallup, New Mexico, BNSF Railway Co. terminal. II-App-29; I-App-

30, -54. Between the Modification and the Dunn Ranch Lease, GCC intends to continue mining until 2043. II-App-42.

B. The Mine takes water from the La Plata River and risks polluting groundwater.

For years, Southwest Advocates fought the Mine expansion's water impacts in front of the La Plata County Commission. II-App-63. It also submitted voluminous comments to OSMRE on the Modification. II-App-249 to -52.

As the Mine intensified coal production, Southwest Advocates' members have watched it change their homes and their ways of living. *See id.* Members who live near the Mine see grave risks on the horizon as it expands. Member Julia Dengel is a former documentary filmmaker. II-App-173 to -174. She lives downgrade from the mine and loves seeing the nearby bobcats, prairie dogs, coyotes, harrier hawks, kestrels, and golden eagles, and fears that, as the Mine takes more water, the ecosystem will support less wildlife. II-App-174 to -177. Ms. Dengel uses her well water for laundry and bathing, and she plans to use the water for horses. II-App-175 to -176. If the Mine polluted her well water, she would have to haul water periodically. *Id.*

Member Lisa Hanna-Floyd is a recently retired ecology professor. II-App-179. For decades, she has kept a house on the La Plata River, downstream of the King II Mine diversion. II-App-179 to -180. Until recently, the river flowed year-round. *Id.* Ms. Hanna-Floyd loves the piñon-juniper landscape and seeing the deer, bobcats, great-horned owls, and willow flycatchers. II-App-178 to -180. She expects the Mine is taking so much more water from the La Plata River that the river now runs dry every year. II-App-180 to -182.

Past impacts near Hay Gulch have demonstrated mining's pollution. Hay Gulch Ditch, Inc., owns the water rights in the Hay Gulch Irrigation Ditch, and it diverts water from the La Plata River south of Highway 160 through Hay Gulch. II-App-78. Some water returns to the La Plata River. II-App-80. By 1985, the U.S. Geological Survey recognized that coal mining had already polluted the aquifers and groundwater in Hay Gulch. II-App-151. Those effects may extend to "distant drainages," and more "data collection would provide a more complete framework for assessing" the impacts of mining on groundwater quality. *Id.*

Recent expert analysis confirms that expanded mining risks pollution reaching community members' wells. Registered professional environmental engineer Randolph Fischer found the Mine's "potential water quality impacts may result in possible human health and environmental consequences" and that pollution from the mine could migrate downgrade to contaminate groundwater and well water. II-App-64. Fischer concluded that unmapped interconnections among the geologic formations in and near the mine could transport that pollution, and ultimately could drain into the La Plata River, where it would degrade surface water quality and damage the aquatic ecosystem. II-App-64 to -65.

Fisher also found that mining subsidence could create cracks and leaks that drain the water from perched aquifers supplying residents' well water. *See id.* Even if the Mine is removing coal from below household wells, settling ground could cause wells to go dry. *See id.*

The mining is already impacting local well water. OSMRE acknowledged that "[a]jacent landowners are reporting coal dust and methane smell in well water." I-App-41.

This Court recently recognized that, in this area in particular, "the water-resources impacts [are] important." *Dine Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 858 (10th Cir. 2019). If OSMRE had complied with the Stream Protection Rule's requirements for comprehensive baseline assessment of water quality, monthly monitoring of surface and groundwater, and ecological impacts, that analysis would almost certainly have resulted in a different decision on the expansions.

IV. Procedural Background

In October 2020, Citizens sent OSMRE a notice of intent to sue. II-App-164. It waited sixty days before filing the Complaint in December 2020. I-App-4. Seeing no need for discovery or a complete administrative record, Citizens moved for summary judgment. I-App-8. OSMRE cross-moved to dismiss. *Id.* The Court granted OSMRE's motion and denied Citizens' motion as moot. II-App-206.

SUMMARY OF ARGUMENT

I. The Senate's two voting thresholds create a one-way ratchet that violates the separation of powers.

The Review Act and the Cloture Rule create a one-way ratchet that diminishes Article II Executive Power and violates the separation of

powers. Under the Review Act, Congress can rescind statutory delegations to agencies with fifty-one votes in the Senate. Under the Cloture Rule, Congress cannot delegate or redelegate statutory authorities—even the exact same statutory authorities that it withdrew under the Review Act—without sixty votes. That creates a one-way ratchet that inexorably results in fewer agency delegations.

The 2017 Statute fundamentally altered SMCRA by taking away OSMRE's ability to issue rules that follow science, use the best technology, and find feasible alternatives. Right now, OSMRE has no clear path for implementing SMCRA's direction to keep its rulemaking updated. OSMRE cannot regain that power without sixty votes the Senate.

The President obtains Executive Powers from only two sources: (1) the Constitution and (2) statutory delegations. The Constitution empowers departments and officers to implement the Executive Power, and Article II protects agency authorities from Congress altering the Constitution's checks and balances. In addition, the Constitution prohibits past Congresses from prohibiting future Congresses from amending their bills. By creating a legislative structure that inexorably

undermines, erodes, and chips away at Article II Executive Power, the Senate's one-way ratchet violates the separation of powers.

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

Fifty-one does not equal sixty. The Review Act and the Cloture Rule set different voting thresholds for laws that affect different groups without any connection between the voting thresholds and the groups they create.

The Review Act and the Cloture Rule divide citizens into two groups:

1. Citizens protected by statutes that delegate authorities to agencies and
2. Citizens protected by statutes directly.

The first receives only fifty-one-vote protection in the Senate, but the second receives sixty-vote protection. Those people differ only by the complexity of the problems Congress sought to solve. When Congress solves easier problems, it legislates directly; when it solves more complicated problems, it delegates them to agencies.

The Senate's two voting thresholds require intermediate scrutiny because they rig democracy and make fixing problems harder for future Congresses. A delegation mistakenly rescinded with fifty-one votes requires sixty votes to fix the mistake. Intermediate scrutiny requires

Congress affirmatively to explain a substantial relationship between the classification and an important governmental objective. Here Congress never justified its unequal treatment of the different groups, so the Senate's two voting thresholds fail intermediate scrutiny.

The voting thresholds also fail the rational basis test. That test requires the legislative classification to bear a rational relationship to some conceivable legitimate government objective. But nothing links people suffering from more complicated problems with fifty-one votes in the Senate and people suffering from simpler problems with sixty votes. The Senate's two voting thresholds violate the Fifth Amendment's equal protection guarantee.

III. The Senate's two voting thresholds violate substantive due process.

Congress also based the Senate's two voting thresholds on an unreasonable assumption, so they fail the rational basis test under Fifth Amendment's substantive due process requirement. That rational basis test requires a rational connection between the means Congress chose and some legitimate government objective, based on some conceivable, reasonable factual assumption.

Although Congress already could have overseen agencies through the Cloture Rule, it created the Review Act with a lower voting threshold. It could only have intended to pass more statutes. Desiring to pass more statutes to amend delegations to agencies could only arise from Congress assuming pervasive agency misconduct. But courts reject assumptions of agency misconduct without evidence. Because Congress based the Senate's two voting thresholds on an unreasonable assumption, the two voting thresholds fail the rational basis test.

STANDARD OF REVIEW

This Court reviews de novo both (a) district court dismissals for failure to state a claim and (b) interpretations of the Constitution. *Doe v. Sch. Dist. No. 1*, 970 F.3d 1300, 1309 (10th Cir. 2020); *Robbins v. Bureau of Land Mgmt.*, 438 F.3d 1074, 1085 (10th Cir. 2006).

Citizens brought their claim under SMCRA's citizen-suit provision, which provides jurisdiction to enforce the Stream Protection Rule. 30 U.S.C. § 1270(c). When statutes set no other standards for judicial review of agency actions, courts use the standards under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, 701; *United States v. Bean*, 537 U.S. 71, 77 (2002); *Robbins*, 438 F.3d at 1085.

The APA assigns courts a duty to "decide all relevant questions of law, [to] interpret constitutional and statutory provisions, and [to] determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. Upon that review, the APA directs courts to "hold unlawful and set aside agency action, findings, and conclusions" if the agency abused its discretion or acted "contrary to constitutional right, power, privilege, or immunity." *Id.* § 706(2)(B); *Robbins*, 438 F.3d at 1085.

When plaintiffs challenge Congress's rules that "affect[] persons other than members of the Senate," courts review them to ensure they comply with the Constitution. *United States v. Smith*, 286 U.S. 6, 29-33 (1932); *United States v. Ballin*, 144 U.S. 1, 5 (1892). Although the Constitution delegated to each House broad power to "determine the Rules of its Proceedings . . .," U.S. CONST. art. I, § 5, that power does not stand "absolute and beyond the challenge of any other body or tribunal." *Ballin*, 144 U.S. at 5. Neither house of Congress may "ignore constitutional restraints or violate fundamental rights." *Id.*

The Due Process Clause and the separation of powers restrain "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 v. Hoboken Land Improvement Co.*, 59 U.S. 272, 276 (1855); *see Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 272 (1991). When Senate rules affect individuals, courts review them for compliance with every "constitutional restraint[]." *Ballin*, 144 U.S. at 5; *Smith*, 286 U.S. at 29-33; *see Kilbourn v. Thompson*, 103 U.S. 168, 199 (1881) (recognizing a court's "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." (quotations omitted, emphasis added)).

ARGUMENT

I. The Review Act and the Cloture Rule create a one-way ratchet that violates the separation of powers.

The separation of powers prohibits Congress from creating new legislative structures that inexorably reduce Executive Power, like this one-way ratchet innovation. *Compare* 5 U.S.C. § 802(d)(2) (majority), *with id.* § 801(b)(2) *and* Senate Rule XXII.2 (supermajority) (collectively, the one-way ratchet). If Congress can rescind agency

authorities with fifty-one votes in the Senate, but cannot delegate new authorities or redelegate those same authorities without sixty votes, agency authorities will inexorably decrease over time.

It matters not that the President signed the 2017 Statute and acquiesced in the Legislative Branch taking its authority; the one-way ratchet violates the separation of powers and voids the statutes. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010); c*f. United States v. Booker*, 543 U.S. 220, 258 (2005) (rejecting a "one-way lever"); *Nixon v. Mo. Mun. League*, 541 U.S. 125, 137 (2004) (holding a one-way ratchet absurd).

A. The 2017 Statute repeals fundamental details of SMCRA.

Congress may never have conceived that the 2017 Statute would change the duties it assigned OSMRE in SMCRA, because it used sixty-two words of banal language simply "disapproving" the Stream Protection Rule. 2017 Statute. But when Congress yanked statutory authority for that rule, it violently altered SMCRA's fundamental details. The Review Act now stops OSMRE from issuing rules "substantially the same" as the repealed statutory delegation. 5 U.S.C. § 801(b)(2). That leaves OSMRE with no clear pathway for complying

with SMCRA and the 2017 Statute. Congress hid an elephant in a mousehole. *But see Whitman v. Am. Trucking Ass'ns., Inc.*, 531 U.S. 457, 468 (2001).

SMCRA requires OSMRE to "issue new regulations . . . to deal with changing conditions or changed technology." 30 U.S.C. § 1273(b). It directs OSMRE to use science, engineering, and the "best technology currently available" to regulate coal mining and to protect water sources and listed species. *Id.* §§ 1211(c)(10), 1258(a)(5), 1265(b)(10)(B)(i), (b)(24), 1266(b)(9)(B), (b)(11), 1272(a)(1). It requires OSMRE to ensure mining companies use "known technology" to prevent material subsidence damage "to the extent technologically and economically feasible . . . ." *Id.* § 1266(b)(1). OSMRE spent thirteen years drafting new regulations that incorporate thirty years of "advances in science and technology." 81 Fed. Reg. at 93,066. Now, OSMRE threw all of that out and is implementing the 1983 rule, which OSMRE knows is inferior at achieving the metrics Congress set in SMCRA. Congressional Nullification, 82 Fed. Reg. 54,924; *see* Stream Protection Rule, 81 Fed. Reg. 93,070 ("Almost all the literature surveys and studies reviewed for this rulemaking process have been published

since [1983] . . . ., which underscores the need to update our regulations to reflect new scientific understanding of impacts . . . .").

By prohibiting OSMRE from issuing any "substantially the same" rule, the Review Act puts OSMRE in a currently impossible situation. OSMRE issued the Stream Protection rule by following modern science and technology and by describing in voluminous detail where its analysis led. Modern science directed OSMRE to require mining companies to protect ephemeral streams and headwaters, to develop a comprehensive baseline, to monitor continually, and to specify criteria for impacts that rise to "material damage." 81 Fed. Reg. at 93,068-69.

But now the Review Act prohibits a new rule from following "substantially the same" science. OSMRE had identified the best technology currently available; now, the Review Act prohibits it from relying on the best technology. Where the Stream Protection Rule had identified feasible processes throughout the rule, the Review Act prohibits it from using substantially similar processes.

The 2017 Statute eviscerated OSMRE's ability to issue new regulations, so no one can wonder why it has made not one step toward issuing another rule to meet its SMCRA obligations to issue updated

rules. 30 U.S.C. § 1211(c)(2). Conceivably, OSMRE could find a way out of the box Congress created by finding new scientific principles or as-yet unknown "best" technologies that are not substantially similar to technologies identified in the Stream Protection Rule. But OSMRE just overcame bureaucratic inertia to complete a Herculean, thirteen-year, comprehensive rulemaking with 380 pages in the Federal Register and an environmental impact statement that accounted for 94,000 comments. 81 Fed. Reg. at 93,070. Even if OSMRE found some circuitous rulemaking path, its sheer circuitousness would likely lead to failing judicial review as "arbitrary, capricious, or otherwise inconsistent with" SMCRA. *See* 30 U.S.C. § 1276(a); *see also* 5 U.S.C. § 706(2)(a). As a consequence for OSMRE completing the duties Congress assigned, Congress gutted its current rulemaking authority.

And OSMRE likely cannot regain that authority. With fifty-four votes, Congress locked a SMCRA amendment in a box that only sixty votes can unlock. Congress will not likely find those sixty votes. It has not issued a significant, new environmental law since 1990. Richard Lazarus, *Envtl. Law Without Congress*, 30 J. of Land Use & Envtl. L. 15, 27 (2014).

The one-way ratchet changes the way the Executive Branch implements its Executive Power. Its chilling effect "undermine[s] the authority and independence" of the Executive Branch. *Mistretta*, 488 U.S. at 382. Agencies will rationally decline to implement some rules to the full extent of their delegated, Executive Power for fear: not fear that Congress would revise that power, but fear that the agency would lose that power forever because Congress could never redelegate it. That fear would restrain agencies from "more completely implement[ing]" the directions Congress provided, and that fear would cause them to shrink from their assignments. *See* 81 Fed. Reg. at 93,069.

Those chilling consequences undermine the grand design of the Constitution. "Energy in the Executive is a leading character in the definition of good government." THE FEDERALIST 70, at 447 (Alexander Hamilton) (Random House ed., 2000). Hamilton argued that a "feeble Executive implies a feeble execution of the government," and that leads to "bad execution" and ultimately to a "bad government." *Id.* at 448. This one-way-ratchet drains energy from the Executive Branch and violates the separation of powers.

B. Repealing statutory delegations with a one-way ratchet violates the separation of powers.

The district court dismissed Citizens' claim because it raised an issue of first impression. II-App-211. Chief Justice John Marshall, however, directed courts to answer constitutional issues like this despite doubts, complexities, or difficulties that may arise: "the judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) ("a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." (quotations omitted)). The Supreme Court has recognized courts' duty to carefully analyze litigants' separation-of-powers arguments—even when the litigants belong to no branch of government. *Bond v. United States*, 564 U.S. 211, 222 (2011).

When analyzing separation of powers arguments, courts do not require the separation of powers to accomplish "a hermetic division among the Branches," but require Congress to conform to the "carefully crafted system" of checks and balances. *Mistretta*, 488 U.S. at 381; *Bowsher*, 478 U.S. at 730 ("structural protections against abuse of power [are] critical to preserving liberty.").

The separation of powers prohibits even complicated methods of evading these requirements. James Madison cautioned that Congress could "mask under complicated and indirect measures the encroachments which it makes on the coordinate departments." THE FEDERALIST No. 48 at 317; *Metro. Wash. Airports*, 501 U.S. at 277. Consequently, the Supreme Court does not "overlook" even the "mildest and least repulsive" intrusions because "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Stern v. Marshall*, 564 U.S. 462, 503 (2011) (quotations omitted).

Reductions in agency authorities reduce Executive Power. The Framers assigned the President responsibility to execute federal laws, but knew "no single person could fulfill that responsibility alone . . . ." *Seila Law v. CFPB*, 140 S. Ct. 2183, 2191 (2020). Article II, Sections 2, 3, and 4, therefore anticipate departments and executive officers who "wield" Executive Power. *Id.* Indeed, except for the powers the Constitution confers directly, the Executive Branch obtains its authority solely by Congress creating departments and agencies and

assigning them powers and tasks. *See Youngstown Sheet Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

Although Congress can define and revise agency authorities, the separation of powers prevents Congress from impairing the Executive Branch "in the performance of its constitutional duties." *Free Enter.*, 561 U.S. at 500 (quotations omitted). The Framers never "intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously to weaken it." *Myers v. United States*, 272 U.S. 52, 127 (1926).

This one-way ratchet crosses the line by changing the system of checks and balances in the Constitution in a way that inexorably leads to reductions in Executive Power. Undoubtedly, Congress could reduce Executive Power one statute at a time. *See Chadha*, 462 U.S. at 959 (recognizing the Framers intended "legislation by the national Congress be a step-by-step, deliberate and deliberative process."). But here, it engrafted a new, structural, one-way ratchet that only reduces Executive Power. When Congress "undermine[s]" or "erode[s]" the authority of another branch, the Supreme Court does "not hesitate[] to

strike down [those] provisions of law." *Mistretta*, 488 U.S. at 382; *Chadha*, 462 U.S. at 958; *see also Stern*, 564 U.S. at 502-03 ("A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely.").

This one-way ratchet also violates Congress's power to alter any past statute because the Cloture Rule stops future Congresses from restoring statutory delegations an earlier Congress rescinded under the Review Act. *See Paul W. Kahn, Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 Hastings Const. L.Q. 185, 191 (1986) (describing first-order and second-order rules and criticizing statutory second-order rules that constrain "future legislative authority"). The Constitution ensures that "each subsequent legislature has *equal power* to legislate upon the same subject." *Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 621 (1899) (emphasis added); *Marbury v. Madiso*n, 5 U.S. 137, 177 (1803) (recognizing every statute is "alterable when the legislature shall please to alter it.").

Chief Justice John Marshall recognized that "one legislature cannot abridge the powers of a succeeding legislature," and "[t]he correctness of this principle, so far as respects general legislation, can never be

controverted." *Fletcher v. Peck*, 10 U.S. 87, 136 (1810). *See also United States v. Winstar Corp.*, 518 U.S. 839, 872-73 (1996) (plurality opinion); *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932); *Manigault v. Springs*, 199 U.S. 473, 487 (1905); *Newton v. Comm'rs*, 100 U.S. 548, 559 (1880) ("It is vital to the public welfare" that each Congress can respond to "varying circumstances and present exigencies . . . . A different result would be fraught with evil."). When a Congress rescinds a statutory delegation under the Review Act with fifty-one votes, the Cloture Rule prohibits a future Congress from restoring it without sixty votes.[1] If this Court allows this "evil" to stand, *Newton*, 100 U.S. at 559, each Congress could seek to insulate every bill from later Congresses by using this same mechanism. *See Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 Hastings Const. L.Q. at 231 ("Legislatures may . . . not try directly to control future legislatures . . . [except by] passage of a constitutional amendment. There should be no

[1] Although the Senate could conceivably change its rules, hypothetical future laws 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); *see Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 711 (1974).

statutory short-cuts."). The one-way ratchet violates the separation of powers by seeking to control future Congresses.

The Senate's two voting thresholds inexorably undermine and chip away at Executive Power. *See Mistretta*, 488 U.S. at 382; *Chadha*, 462 U.S. at 957-58; *Stern*, 564 U.S. at 502-03. Courts strike down even the "mildest and least repulsive" violation of separation of powers. *See Stern*, 564 U.S. at 503. The separation of powers compels voiding this one-way ratchet.

II. The Senate's two voting thresholds do not relate to the classification of citizens and therefore violate equal protection.

The Senate's two voting thresholds protect some citizens from some legislation with fifty-one votes, and some citizens from other legislation with sixty votes. Here, with fifty-four votes in the Senate, GCC obtained its objective of rescinding the Stream Protection Rule. If a non-delegating statute had protected Citizens, GCC would have needed sixty votes in the Senate to rescind that statute. That fundamental, mathematical inequality violates Citizens' right to equal protection. *See Adarand Constructors, Inc. v Peña*, 515 U.S. 200, 213-18 (1995) (applying equal protection to the United States through the Fifth Amendment due process clause).

As a "[c]entral [principle] both to the idea of the rule of law and to our own Constitution's guarantee of equal protection," the Constitution requires government to "remain open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996). When a law makes it "more difficult for one group of citizens than for all others to seek aid from the government," that law denies "equal protection of the laws in the most literal sense." *Id.*; *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("the equal protection of the laws is a pledge of the protection of equal laws"); *cf. Ne. Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group," equal protection injury arises from "the imposition of the barrier" that stops "compe[tition] on an equal footing").

When analyzing equal protection claims, the Supreme Court applies three tiers of scrutiny: strict scrutiny, intermediate scrutiny, and rational basis. Three steps help break down the process:

1. Identify the classification the legislature created and determine the level of scrutiny;

2. Identify the target harm, determine the legislative facts, and determine whether the harm's severity meets the level of scrutiny; and

3. Ensure the likelihood that the classification fits as tightly to remediate that harm as the level of scrutiny requires.

See City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440-42 (1985); *Cleburne*, 473 U.S. at 453 (Stevens, J., concurring); *Vance v. Bradley*, 440 U.S. 93, 97 (1979) ("legislative facts"); *Craig v. Boren*, 429 U.S. 190, 199, 202 (1976) (analyzing a statute's "fit" as the precision by which a statute classifies citizens to meet its objective.),

When statutes classify individuals based on race, national origin, or citizenship, courts apply strict scrutiny. *Cleburne*, 473 U.S. at 440. A statute violates strict scrutiny unless the legislature "suitably tailored [it] to serve a compelling [governmental] interest." *Id.*

When statutes classify based on gender or birth to unwed parents, courts apply intermediate scrutiny. *See id.* at 440-41. Intermediate scrutiny requires the legislature to affirmatively identify an "important governmental objective[]," a "substantial[]" relationship to the classification, and an "exceedingly persuasive justification" showing the classification would accomplish that objective. *See id.*; *United States v. Virginia*, 518 U.S. 515, 531 (1996).

Finally, when a statute categorizes citizens in any other way, courts apply the rational basis test. *See Romer*, 517 U.S. at 631-32. The rational basis test requires a statute's classifications to "bear a rational relationship to a legitimate governmental interest." *Id.* at 635.

A. The Review Act and the Cloture Rule create two classes of citizens based on the nature and complexities of their problems.

When plaintiffs bring equal protection claims, courts recognize that "most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Id.* at 631. The Senate's two voting thresholds create two categories of citizens:

1. Citizens facing complex problems and protected by statutes that delegate authorities to agencies (fifty-one votes can rescind these laws) and

2. Citizens facing simpler problems and protected by statutes directly (only sixty votes can rescind these laws).

The disadvantages falls on the first classification.

The first classification includes citizens facing problems for which Congress delegated statutory authorities to agencies. Congress delegates authority to agencies when it faces "complex conditions involving a host of details with which [it] cannot deal directly." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935). If Congress lacked authority to delegate, the Government could not

operate. *Loving v. United States*, 517 U.S. 748, 758 (1996) ("To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government."); *Opp Cotton Mills, Inc. v. Adm'r of Wage and Hour Div.,* 312 U.S. 126, 145 (1941).

The second classification includes citizens who face less-complex issues that Congress can solve directly by statute without delegating to an agency. The second category includes people protected by immigration, minimum-wage, and campaign finance laws, which have perennially failed to gain enough votes to invoke the Cloture Rule.

Thus, the two classifications differ by the complexity of the issues the citizens face. These are the type of "unusual" discriminations or "indiscriminate imposition of inequalities" that the Supreme Court rejects. *See Romer*, 517 U.S. at 633 (quotations omitted). 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). Here, as in *Romer*, the two Senate voting

thresholds "impose[] a special disability upon" citizens protected by statutory delegations compared to citizens protected by statutes directly. 517 U.S. at 631.

The district court tripped on step 1 by ignoring the important distinctions between citizens with complicated problems protected by delegating statutes, and citizens with simpler problems protected by statutes directly. It concluded that equal protection did not apply to the Senate's two-voting-threshold classifications at all because citizens could conceivably switch classes. *See* II-App-209 to -210. But equal protection does not require permanent class membership, although most higher tiers of scrutiny have permanent characteristics. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality). For non-suspect classifications, courts recognize separate classes if they merely have "distinguishing characteristics." *Cleburne*, 473 U.S. 441.

Equal protection applies even if the people in the classifications can shift. In a classic equal protection case, 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. *USDA v. Moreno*, 413 U.S. 528, 529, 538 (1973). Although those

unrelated people later may move out, and thus change their categories voluntarily, that did not stop the Supreme Court from striking down the categories for violating equal protection. *Id.*

Nor does it make a difference that the different voting thresholds appear in different rules: one in the Review Act and one in the Cloture Rule. The Senate connected them by implementing the Review Act for the express purpose of avoiding the Cloture Rule. 142 CONG. REC. S2161. In any event, when applying equal protection, the Supreme Court 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. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438 (1982) (Blackmun, J., concurring) (four justices), 443 (Powell, J., concurring) (two justices). Courts do not allow the government to divide and conquer by defending each classification on independent bases. *Royster Guano*, 253 U.S. at 414.

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

Although the Senate's two voting thresholds do not categorize citizens based on any suspect class, by changing the democratic process for rectifying mistakes, the Fifth Amendment requires intermediate scrutiny. Because Congress never explained the relation between each vote threshold and the classification of citizens to which it applied, the Senate's two voting thresholds violate steps 2 and 3 of intermediate scrutiny.

With only fifty-four votes in the Senate, Congress rescinded the statutory delegation for the Stream Protection Rule. 163 CONG. REC. S632. Suppose that this or a later Congress decided it erred. Then, only sixty votes in the Senate could redelegate that authority. Because the Senate's two voting thresholds make rectifying errors through democracy harder, the Supreme Court's justifications for deferential rational basis review do not apply.

The Senate's two voting thresholds rig the democratic system and consequently deserve no rational basis deference. Courts defer to legislatures' "economic or tax legislation" under the rational basis test because they expect the democratic process to rectify any errors that

legislatures make. *Lawrence v. Texas*, 539 U.S. 558, 579-80 (2003); *FCC v. Beach Commc's, Inc.*, 508 U.S. 307, 313 (1993); *Cleburne*, 473 U.S. at 440; *Vance*, 440 U.S. at 97.

Here, in contrast, the Senate's two voting thresholds impede the democratic process's efforts to rectify errors. Because the error-rectifying rationale for the rational basis test does not apply, the rule cannot apply. *See Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) ("the rationale of a legal rule no longer being applicable, that rule itself no longer applies"); *Funk v. United States*, 290 U.S. 371, 384 (1933). This situation fits the language from the second sentence of famous footnote 4 of *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). There, four members of the Supreme Court suggested this exception to the rational basis test: "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny . . . ." The Fifth Amendment, therefore, requires intermediate scrutiny.

Intermediate scrutiny requires the United States to demonstrate affirmatively "that the challenged classification serves important

governmental objectives and that the discriminatory means employed are substantially related" to accomplishing that objective. *Virginia*, 518 U.S. at 534 (quotations and alterations omitted). It requires the government to prove an "exceedingly persuasive justification" that "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Id.* at 524, 533 (quotations omitted). OSMRE has no means to carry its burden. In enacting the Review Act, Congress never explained why it was treating the different categories of people differently. It does not matter that Congress may not have seen this problem. The Constitution applies even to "legislatively unforeseen constitutional problem[s]." *Booker*, 543 U.S. at 247.

Those two principles leave OSMRE in the lurch. The Constitution requires contemporaneous justification for steps 2 and 3, but it can only produce *post hoc* rationalizations for Congress's classifications. Because the Senate's two voting thresholds lack that contemporaneous, compelling rationale, they fail intermediate scrutiny.

C. Fifty-one and sixty-votes in the Senate have no relation to the classes of citizens that Congress created.

If intermediate scrutiny does not apply, the rational basis test applies. *See Romer*, 517 U.S. at 630. The Senate's two-voting-threshold

system fails even that deferential test. The system violates step 3 of the equal protection test. Nothing conceivably relates the Senate's fifty-one-vote threshold to citizens facing complex problems, and nothing conceivably relates the Senate's sixty-vote threshold to citizens facing simpler problems. *See Logan*, 455 U.S. at 443 (Powell, J., concurring) (two justices) (overturning a state's different treatment of "claimants with identical claims, despite equal diligence in presenting them" based on a government body's hearing schedule); *id.* at 438-39 (Blackmun, J., concurring) (four justices). "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446.

When courts review statutes in search of a rational basis, they do not require legislatures to identify the target harm; instead, courts require challengers to prove a negative: to prove no "reasonably conceivable basis which might support" the statute exists—whether that basis "actually motivated the legislature" or not. *Beach Commc's*, 508 U.S. at 313 (quotations omitted). Of course, "as a practical matter it is never easy to prove a negative." *Elkins v. United States*, 364 U.S. 206, 218 (1960).

Nonetheless, courts do not conduct a "toothless" inquiry when applying the rational basis test. *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). Courts always "insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 630. Here, nothing conceivably relates (a) a fifty-one vote-threshold in the Senate to citizens with complex problems protected by statutory delegations to agencies, and (b) a sixty-vote threshold in the Senate to citizens with simpler problems protected by statutes directly.

The third step of equal protection analysis requires the government to explain both sides of its classifications: the class it hurts and the class it helps. In district court, OSMRE never explained any rational justification for treating the classes differently; it just denied the classification exists. It sought to justify the Review Act's lower voting threshold by explaining it allowed Congress more easily to oversee the agencies. II-App-198. That one-sided explanation does not satisfy equal protection.

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). There, the

Supreme Court struck down an Alabama law that taxed out-of-state insurance companies at a higher rate than domestic insurance companies. *Id.* at 871, 882-83. It rejected the justification of "promotion of domestic industry" as a legitimate objective because accepting that premise would "eviscerate the Equal Protection Clause in [that] context." *Id.* at 882. Applied here, even if OSMRE could frame the question by justifying *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 explanations violate equal protection. *See id.* OSMRE never sought to justify the higher voting threshold in the Cloture Rule on any basis. For that reason alone, its half-rationale fails even the rational basis test. *See id.*

Congress lacks a rational basis for the Senate's two voting thresholds that divide people into classes based on the complexity of their problems. Equal protection requires striking them down.

D. Equal protection applies to preliminary votes that may determine the result.

The district court held that equal protection does not apply because, although the Review Act and the Cloture Rule require different vote

thresholds at preliminary stages of the legislative process, the final votes both require simple majorities. II-App-210. In the white primary cases, however, the Supreme Court rejected the argument that equal protection applies only to final votes. *Nixon v. Herndon*, 273 U.S. 536, 540 (1927). Equal protection applies to preliminary votes, too.

In 1923 Texas, the Democratic Party had prohibited black party members from voting in primary elections, although the State of Texas allowed them to vote in general elections. *Id.* at 540. The Supreme Court easily dismissed the argument that the equal protection clause does not apply to primary elections. It held that, because the primary election "may determine the final result," equal protection applies. *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). Because only time limits on debate can force the Senate to vote, FILIBUSTERS AND CLOTURE 18; *see also King*, 576 U.S. at 492, votes on whether to set a time limit and force a vote "may determine the final result." *Nixon v. Herndon*, 273 U.S. at 540. Equal protection applies to

the Cloture Rule's and the Review Act's different votes on closing debate. Nothing justifies their unequal treatment of citizens.

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

A. The Senate's two voting thresholds only make sense by irrationally assuming pervasive agency misconduct.

Only rarely will a court confront a situation in which Congress made assumptions that the Supreme Court already rejected as irrational. Here, Congress irrationally assumed pervasive agency misconduct. That contradicts the venerable presumption of regularity. Congress violated substantive due process's rational basis test by making irrational assumptions.

The district court rejected Citizens' substantive due process arguments without analysis. II-App-210. It applied no level of scrutiny, and that mistake led it to the wrong conclusion.

When statutes do not impact fundamental rights, substantive due process requires statutes to pass a rational basis test similar to the equal protection test.[2] The rational basis test requires three steps:

[2] In contrast, when a statute impacts "fundamental" rights or liberties, courts use a strict scrutiny test and strike down the statute unless the legislature "narrowly tailored [the statute] to serve a compelling state

1. Determine whether the legislature sought to accomplish a legitimate objective based on rational assumptions,

2. Identify the method the legislature adopted to accomplish that legitimate objective.

3. Determine whether that method rationally could accomplish that legitimate objective.

See Washington, 521 U.S. at 728; *Vance*, 440 U.S. at 111 (requiring rational assumptions to form a rational basis); *see also Obergefell v. Hodges*, 576 U.S. 644, 672 (2015) ("The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles.").

The district court upheld the Senate's two thresholds because, it found, Congress was using the Review Act for "oversight of federal agencies." II-App-210. That does not reach the deeper issue. *See Logan*, 455 U.S. at 441 (Blackmun, J., concurring) ("That is a mere tautological recognition of the fact that the legislature did what it intended to do." (quotations and alteration omitted)). Congress already could oversee federal agencies by passing statutes using the Cloture Rule. "The

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interest." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quotations and alterations omitted)). Procedural due process separately requires notice and a meaningful opportunity to be heard. *LaChance v. Erickson*, 522 U.S. 262, 266 (1998).

Constitution provides Congress with abundant means to oversee and control its administrative creatures." *Chadha*, 462 U.S. at 955 n.19.

The rational basis test, at step 3, requires the Court to find a particular legitimate objective accomplished by the particular means Congress chose. Here, it demands to know what Congress could have intended with the Senate's two voting thresholds that it could not already accomplish with the Senate's existing, single voting threshold. *See Romer*, 517 U.S. at 630. Because Congress could already oversee agencies, that objective does not qualify.

By reducing lowering the Cloture Rule to a simple majority in the Review Act, the Senate could only have intended to pass a larger quantity of bills. *See* 142 CONG. REC. S2161. Congress thought it needed more bills because it saw not just some agency misconduct, but pervasive agency misconduct. One senator explained he saw voluminous, self-aggrandizing bad faith by agencies: "We can cite time after time after time examples of regulators or regulation enforcers that set up their own little fiefdom, and they are king for a day." *Id.* at S2160 (statement of Sen. Burns). Congress explained it sought a "safety valve

from the oppressive hand of the regulators." 141 CONG. REC. H5099 (May 17, 1995) (Statement of Rep. Gekas).

Congress described a world in which agencies pass "ludicrous" rules, "bad rule[s]," "idiotic" rules, "too expensive" rules, and rules that "do not make sense." 142 CONG. REC. S2161-62 (statement of Sen. Nickles). Congress aimed to "to reduce—if not eliminate—unnecessary, burdensome, and excessively costly regulations." *Id.* Congress members likely hear horror stories every day from their constituents—one-sided stories that fail to explain the agency's reasons. But Congress held no hearing to find any truth to these anecdotes or to hear any agency's perspective.

Normally, Congress could pass the rational basis test without providing "empirical evidence [that] supports the assumptions underlying the legislative choice." *Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004). But courts do not accept legislative facts blindly when considering issues of constitutional law. *Sable Commc's of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989). In particular, plaintiffs prevail when "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental

decisionmaker." *Vance*, 440 U.S. at 111. Here, Congress could not reasonably have assumed pervasive agency misconduct.

Article II agencies work hard on behalf of United States citizens as they seek to implement their complex missions with difficult and sometimes conflicting directions from Congress. Courts assume administrators are people "of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *United States v. Morgan*, 313 U.S. 409, 421 (1941). When litigants assault those "collaborative instrumentalities of justice," courts respect agencies' appropriate independence. *See id.*

The Supreme Court has seen all manner of maligning these Article II officers. As a result of that experience, it rejects assumptions of agency misconduct without clear evidence. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993). "Allegations of government misconduct are easy to allege and hard to disprove, so courts must insist on a meaningful evidentiary showing." *National Archives and Rs. Admin. v. Favish*, 541 U.S. 157, 174 (2004) (quotations and citation omitted). Therefore, "[t]he presumption of regularity supports the official acts of public officers, and, in the

absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926); *Hang Kannha Yuk v. Ashcroft*, 355 F.3d 1222, 1232 (10th Cir. 2004).

Here, Congress did not simply seek to oversee agencies, but sought to cure assumed, pervasive agency misconduct. Its assumptions consequently do not qualify as rational or even arguable. Courts strike down "irrational prejudice[s]" for lacking a rational basis. *See Cleburne*, 473 U.S. 450. Because Congress lacked a rational, factual basis for the Senate's two voting thresholds, this Court can only strike them down. *See Heller v. Doe*, 509 U.S. 312, 321 (1993) ("even the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation.").

B. Changing Article I, Section 7, voting thresholds by statute does not qualify as a legitimate objective.

In district court, OSMRE never explained Congress's reasons as rational. Instead, it defended the Senate's two voting thresholds by proffering a new objective: creating a second, more efficient procedure for congressional oversight, under Congress's Article I, Section 5, power to "determine the Rules of its Proceedings." II-App-187 to -188, -198, -

200; 5 U.S.C. § 802(g). But Article I, Section 7, already defines the voting threshold at a simple majority. Section 5 does not authorize Congress to create two voting thresholds without amending the Constitution. Because the objective of creating new procedures under Section 7 does not qualify as a legitimate objective, this objective fails step 1 of the rational basis test.

When Congress's action has "the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch," Congress uses its legislative power in Section 7. *Chadha*, 462 U.S. at 952, 953 n.7. Congress has no discretion to create new procedures under Section 5 that overwrite Section 7. *Id.* at 955-56. Section 7 requires Congress to exercise its "legislative power . . . in accord with a *single*, finely wrought and exhaustively considered, procedure." *Id.* at 951 (emphasis added). 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 v. City of New York*, 524 U.S. 417, 449 (1998).

Although Section 7 leaves many other, unspecified procedures open for Congress to define using its Section 5 power, the Constitution already specifies the voting threshold. Historical practice, the Federalist Papers, and the applicable textual canons of construction demonstrate Section 7 already determines the voting threshold at a majority of the quorum. Historically, "the 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 v. Sims*, 377 U.S. 533, 566 (1964) ("Our constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures."). The Supreme Court recognizes that rule as "the rule for all time," unless the "organic act under which the body is assembled [here, the Constitution] have prescribed specific limitations." *Ballin*, 144 U.S. at 6. In other words, the Constitution can specify a supermajority, but when it does not, it sets the voting threshold at a majority of a quorum.

In the Federalist 58, James Madison made this simple-majority requirement clear. He acknowledged that a supermajority vote for every bill might have stopped "hasty and partial measures." THE FEDERALIST

58 at 377. But he rejected structures in which the majority would not rule because then, "the fundamental principle of free government would be reversed." *Id.* Hamilton agreed. *See* THE FEDERALIST 76, at 482.

Finally, the Constitution's seven particular supermajority votes compel the conclusion that simple majorities decide all other matters. Under the *expressio unius est exclusion alterius* canon, "one item of [an] associated group or series excludes another left unmentioned." *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80-81 (2002). The Constitution mandates supermajorities in seven situations:

1. Overriding presidential vetoes,
2. Trying impeachments,
3. Expelling members,
4. Approving treaties,
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. V; Amend. XIV, § 3; Amend. XXV, § 3. By listing these seven supermajority votes, the Constitution implied that all other votes would follow the default, majority-of-the-quorum rule. *See Marbury v. Madison*, 5 U.S. at 174 (applying the *expressio*

unius canon to the Constitution because "[a]ffirmative words are often, in their operation, negative of other objects than those affirmed . . . .").

Section 7 confirms the *expressio unius* canon applies. That section specifically sets the two-thirds-vote for overriding vetoes, so it confirms the Framers did not leave simple majorities to pass routine statutes as a "result of inadvertence or accident." *Ford v. United States*, 273 U.S. 593, 612 (1927) (quotations omitted); *see Clinton*, 524 U.S. at 439. The Supreme Court already applied the *expressio unius* canon to Section 7 when explaining the legislative powers that flow from it require actions by two houses. *See Chadha*, 462 U.S. at 956.

Finally, interpreting the Constitution to allow a supermajority vote threshold in the Senate would undermine the Vice President's lawmaking authority to vote in the Senate precisely when the members "be equally divided." Art. I, sec. 3.

The Supreme Court has expressed no patience with Congress's efforts to alter the Article I process by statute. It already struck down, for violating Article I, another law the 104th Congress passed. Days after passing the Review Act, it passed the Line-Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (Apr. 9, 1996), to allow the President, after

signing a bill into law, to "cancel" three categories of spending provisions. *Id.* § 2(a), § 1021(a). The Supreme Court rejected the rewrite and shortcut of Section 7 that allowed the President to amend bills after Congress passed them. *Clinton*, 524 U.S. at 440.

Even more to the point, the Supreme Court overturned the earlier one-house legislative veto for violating Article I, Section 7. Those vetoes allowed either house of Congress, alone, to undo any agency decision by resolution. *Chadha*, 462 U.S. at 923, 925. The Supreme Court rejected that extra-constitutional procedure for violating Section 7 by legislating with two procedures. *Id.* at 951.

Here, Congress created two procedures for making policy with different vote thresholds. That objective does not qualify as a legitimate, so it violates step 1 of the rational basis test.

C. Efficiency does not qualify as a legitimate government objective when the more efficient procedure violates the Constitution.

OSMRE and the Court referred to the Review Act's efficiency objective to uphold it. II-App-186, -198, -200; II-App-207, -210. But efficiency does not justify the Senate's two voting thresholds over the constraints in the Constitution.

OSMRE explained that "streamlining procedures for review and disapproval of agency rules" would more easily allow "Congress to provide efficient oversight of the large and growing network of administrative agencies . . . ." II-App-198. The Supreme Court rejected that rationale for the one-house veto. Even assuming a second procedure is more "efficient, convenient, and useful in facilitating functions of government," it held, "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . ." *Chadha*, 462 U.S. at 944. "[W]e have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." *Id.*

The district court found that the Cloture Rule and the Review Act made an "arrangement" that allowed Congress to "legislate[]" a new "way to have the final say with respect to when new rules . . . will become law." II-App-210. Congress can require more reporting or delays, but the Constitution prohibits changing the voting thresholds. "The explicit prescription for legislative action contained in Art. I cannot be amended by legislation." *Chadha*, 462 U.S. at 958 n.23. Although the Senate's two voting thresholds may make a "convenient

shortcut" or an "appealing compromise," they circumvent Section 7 and are precisely the type of "political invention" the Supreme Court struck down. *Id.* at 945, 958. Changing voting thresholds does not qualify as a legitimate objective. OSMRE's efficiency explanation does not substitute in to satisfy the rational basis test.

The two thresholds ultimately lead to absurd results. Two professors recently explained in intricate detail a ludicrous, but technically feasible application of the Review Act. Jody Freeman and Matthew C. Stephenson, *Untapped Potential of the* [*Review Act*], Harvard Journal on Legislation, Forthcoming, Harvard Public Law Working Paper No. 21-28 (October 7, 2021). It relies on the principle of "two wrongs making a right."

They explain that, if a court interprets a statute in a way the party in power dislikes, the agency could issue a rule confirming that interpretation, and then Congress could use the Review Act to pass a statute disapproving of that unliked interpretation—thereby approving the desired interpretation. *Id.* at 8-10. The article describes a hypothetical in which EPA interprets a statute allowing more regulation of greenhouse gases, and a court reverses. Then, the EPA

could issue a rule confirming it lacks authority to regulate those gases, and Congress could pass a statute under the Review Act reversing the EPA. That statute would overrule the court and restore the EPA's initial interpretation of broader authority. This absurd mechanism further illustrates a legislative process that the Framers never intended and would never have approved.

D. The Senate's two voting thresholds do not provide agency oversight.

The objective of "oversight of federal agencies" fails as a legitimate government objective for another reason. II-App-210. It fails the rational basis test step 3 because lower voting thresholds in the Review Act provide no agency oversight. It either surreptitiously alters SMCRA's fundamental details and violates the separation of powers, or it irrationally makes work for OSMRE. Neither of those effects qualifies as agency oversight.

If Congress "alter[ed] the fundamental details of a regulatory scheme" and "hid[] elephants in mouseholes," *Whitman*, 531 U.S. at 468, Congress violated the separation of powers. *Supra* Argument Part I.A. If, however, the Review Act allows OSMRE to implement SMCRA's fundamental principles of science, best technology, and feasibility, then

OSMRE could reissue exactly the same rule after redoing the APA process and environmental analyses it already completed. This result would not oversee the agency at all; it would just waste effort and create thirteen years of make-work to reach the same outcome. Make-work accomplishes no legitimate government objective. *See United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (rejecting statutory interpretations that lead "to absurd or futile results"); *see also Vt. Yankee Nuclear Power Corp. v. Nat. Resources Def. Council, Inc.*, 435 U.S. 519, 551 (1978) ("Time and resources are simply too limited" to require agencies to analyze remote or speculative alternatives). For this additional reason, explaining the Senate's two voting thresholds as overseeing federal agencies fails step 3 of the rational basis test.

One could argue that shrinking the Executive Branch could serve as a legitimate objective for the Senate's two voting thresholds. *See* 142 CONG. REC. S2165-66 (Mar. 15, 1996) (Statement of Sen. Baucus). It does not. If Congress wants to shrink government, the Constitution requires it to do so one step at a time—not by grafting a new structure onto Article I, Section 7. *See Chadha*, 462 U.S. at 959. Shrinking

government does not qualify as a legitimate objective, and therefore fails step 1 of the rational basis test.

No conceivable, rational objective exists for the Senate's two voting thresholds, so they violate substantive due process. The Fifth Amendment requires the Court to overturn them.

CONCLUSION

The Senate's two voting thresholds violate the separation of powers, equal protection, and due process. These facial challenges succeed because "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Consequently, Congress invalidly enacted the 2017 Statute. The Constitution and SMCRA entitle Citizens to an order (1) setting aside the 2017 Statute, (2) declaring the Senate's two-voting thresholds unconstitutional, (3) restoring the Stream Protection Rule, and (4) vacating the Modification Approval, I-App-13.

Citizens requests oral argument because this case presents issues of first impression and raises complex and fundamental questions about constitutional constraints.

Dated: November 9, 2021,

/s/ Jared S. Pettinato

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Circuit Rule 32(a)(7)(B)(i) because it contains 12,929 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(B). I counted the words using Microsoft Word.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A), the type style requirements of Fed. R. App. P. 32(a)(6), and the font-size direction in 10th Cir. R. 32(A) because I prepared it in a 14-point, proportionally spaced typeface, Century Schoolbook, using Microsoft Word.

Dated: November 9, 2021, */s/ Jared S. Pettinato*
Jared S. Pettinato

CERTIFICATE OF SERVICE

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

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Dated: November 9, 2021, */s/ Jared S. Pettinato*
Jared S. Pettinato

record a written finding, with reasons therefor, that those requirements would not advance the effective participation of small entities in the rulemaking process. For purposes of this subsection, the factors to be considered in making such a finding are as follows:

"(1) In developing a proposed rule, the extent to which the covered agency consulted with individuals representative of affected small entities with respect to the potential impacts of the rule and took such concerns into consideration.

"(2) Special circumstances requiring prompt issuance of the rule.

"(3) Whether the requirements of subsection (b) would provide the individuals identified in subsection (b)(2) with a competitive advantage relative to other small entities.".

5 USC 609 note.

(b) SMALL BUSINESS ADVOCACY CHAIRPERSONS.—Not later than 30 days after the date of enactment of this Act, the head of each covered agency that has conducted a final regulatory flexibility analysis shall designate a small business advocacy chairperson using existing personnel to the extent possible, to be responsible for implementing this section and to act as permanent chair of the agency's review panels established pursuant to this section.

5 USC 601 note.

SEC. 245. EFFECTIVE DATE.

This subtitle shall become effective on the expiration of 90 days after the date of enactment of this subtitle, except that such amendments shall not apply to interpretative rules for which a notice of proposed rulemaking was published prior to the date of enactment.

Subtitle E—Congressional Review

SEC. 251. CONGRESSIONAL REVIEW OF AGENCY RULEMAKING.

Title 5, United States Code, is amended by inserting immediately after chapter 7 the following new chapter:

"CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

"Sec.
"801. Congressional review.
"802. Congressional disapproval procedure.
"803. Special rule on statutory, regulatory, and judicial deadlines.
"804. Definitions.
"805. Judicial review.
"806. Applicability; severability.
"807. Exemption for monetary policy.
"808. Effective date of certain rules.

"§ 801. Congressional review

Reports.

"(a)(1)(A) Before 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 containing—

"(i) a copy of the rule;

"(ii) a concise general statement relating to the rule, including whether it is a major rule; and

"(iii) the proposed effective date of the rule.

"(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

"(i) a complete copy of the cost-benefit analysis of the rule, if any;

"(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

"(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

"(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

"(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

"(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B). Reports.

"(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

"(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of— Effective dates.

"(A) the later of the date occurring 60 days after the date on which—

"(i) the Congress receives the report submitted under paragraph (1); or

"(ii) the rule is published in the Federal Register, if so published; Federal Register, publication.

"(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

"(i) on which either House of Congress votes and fails to override the veto of the President; or

"(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

"(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

"(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1). Effective date.

"(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802. Effective dates.

"(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

"(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a

rule may not 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.

"(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

"(2) Paragraph (1) applies to a determination made by the President by Executive order that the rule should take effect because such rule is—

"(A) necessary because of an imminent threat to health or safety or other emergency;

"(B) necessary for the enforcement of criminal laws;

"(C) necessary for national security; or

"(D) issued pursuant to any statute implementing an international trade agreement.

"(3) An exercise by the President of the authority under this subsection shall have no effect on the procedures under section 802 or the effect of a joint resolution of disapproval under this section.

"(d)(1) In addition to the opportunity for review otherwise provided under this chapter, in the case of any rule for which a report was submitted in accordance with subsection (a)(1)(A) during the period beginning on the date occurring—

"(A) in the case of the Senate, 60 session days, or

"(B) in the case of the House of Representatives, 60 legislative days,

before the date the Congress adjourns a session of Congress through the date on which the same or succeeding Congress first convenes its next session, section 802 shall apply to such rule in the succeeding session of Congress.

"(2)(A) In applying section 802 for purposes of such additional review, a rule described under paragraph (1) shall be treated as though—

Federal Register, publication.

"(i) such rule were published in the Federal Register (as a rule that shall take effect) on—

"(I) in the case of the Senate, the 15th session day, or

"(II) in the case of the House of Representatives, the 15th legislative day,

after the succeeding session of Congress first convenes; and

"(ii) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

"(B) Nothing in this paragraph shall be construed to affect the requirement under subsection (a)(1) that a report shall be submitted to Congress before a rule can take effect.

"(3) A rule described under paragraph (1) shall take effect as otherwise provided by law (including other subsections of this section).

Effective date.

"(e)(1) For purposes of this subsection, section 802 shall also apply to any major rule promulgated between March 1, 1996, and the date of the enactment of this chapter.

"(2) In applying section 802 for purposes of Congressional review, a rule described under paragraph (1) shall be treated as though—

"(A) such rule were published in the Federal Register on the date of enactment of this chapter; and Federal Register, publication.

"(B) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

"(3) The effectiveness of a rule described under paragraph (1) shall be as otherwise provided by law, unless the rule is made of no force or effect under section 802.

"(f) Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.

"(g) If the Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval.

"§ 802. Congressional disapproval procedure

"(a) For purposes of this section, the term 'joint resolution' means only a joint resolution introduced in the period beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress and ending 60 days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), the matter after the resolving clause of which is as follows: 'That Congress disapproves the rule submitted by the ____ relating to ____, and such rule shall have no force or effect.' (The blank spaces being appropriately filled in).

"(b)(1) A joint resolution described in subsection (a) shall be referred to the committees in each House of Congress with jurisdiction.

"(2) For purposes of this section, the term 'submission or publication date' means the later of the date on which—

"(A) the Congress receives the report submitted under section 801(a)(1); or

"(B) the rule is published in the Federal Register, if so published. Federal Register, publication.

"(c) In the Senate, if the committee to which is referred a joint resolution described in subsection (a) has not reported such joint resolution (or an identical joint resolution) at the end of 20 calendar days after the submission or publication date defined under subsection (b)(2), such committee may be discharged from further consideration of such joint resolution upon a petition supported in writing by 30 Members of the Senate, and such joint resolution shall be placed on the calendar.

"(d)(1) In the Senate, when the committee to which a joint resolution is referred has reported, or when a committee is discharged (under subsection (c)) from further consideration of a joint resolution described in subsection (a), it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for a motion to proceed to the consideration of the joint resolution, and all points of order against the joint resolution (and against consideration of the joint resolution) are waived. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the joint resolution is agreed

to, the joint resolution shall remain the unfinished business of the Senate until disposed of.

"(2) In 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, which shall be divided equally between those favoring and those opposing the joint resolution. A motion further to limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the joint resolution is not in order.

"(3) In the Senate, immediately following the conclusion of the debate on a joint resolution described in subsection (a), and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the Senate, the vote on final passage of the joint resolution shall occur.

"(4) Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a joint resolution described in subsection (a) shall be decided without debate.

"(e) In the Senate the procedure specified in subsection (c) or (d) shall not apply to the consideration of a joint resolution respecting a rule—

"(1) after the expiration of the 60 session days beginning with the applicable submission or publication date, or

"(2) if the report under section 801(a)(1)(A) was submitted during the period referred to in section 801(d)(1), after the expiration of the 60 session days beginning on the 15th session day after the succeeding session of Congress first convenes.

"(f) If, before the passage by one House of a joint resolution of that House described in subsection (a), that House receives from the other House a joint resolution described in subsection (a), then the following procedures shall apply:

"(1) The joint resolution of the other House shall not be referred to a committee.

"(2) With respect to a joint resolution described in subsection (a) of the House receiving the joint resolution—

"(A) the procedure in that House shall be the same as if no joint resolution had been received from the other House; but

"(B) the vote on final passage shall be on the joint resolution of the other House.

"(g) This section is enacted by Congress—

"(1) 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

"(2) 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.

"§ 803. Special rule on statutory, regulatory, and judicial deadlines

"(a) In the case of any deadline for, relating to, or involving any rule which does not take effect (or the effectiveness of which is terminated) because of enactment of a joint resolution under section 802, that deadline is extended until the date 1 year after the date of enactment of the joint resolution. Nothing in this subsection shall be construed to affect a deadline merely by reason of the postponement of a rule's effective date under section 801(a).

"(b) The term 'deadline' means any date certain for fulfilling any obligation or exercising any authority established by or under any Federal statute or regulation, or by or under any court order implementing any Federal statute or regulation.

"§ 804. Definitions

"For purposes of this chapter—

"(1) The term 'Federal agency' means any agency as that term is defined in section 551(1).

"(2) The term 'major rule' means any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—

"(A) an annual effect on the economy of $100,000,000 or more;

"(B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

"(C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.

"(3) The term 'rule' has the meaning given such term in section 551, except that such term does not include—

"(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing;

"(B) any rule relating to agency management or personnel; or

"(C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

"§ 805. Judicial review

"No determination, finding, action, or omission under this chapter shall be subject to judicial review.

"§ 806. Applicability; severability

"(a) This chapter shall apply notwithstanding any other provision of law.

"(b) If any provision of this chapter or the application of any provision of this chapter to any person or circumstance, is held

invalid, the application of such provision to other persons or circumstances, and the remainder of this chapter, shall not be affected thereby.

"§ 807. Exemption for monetary policy

"Nothing in this chapter shall apply to rules that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.

"§ 808. Effective date of certain rules

"Notwithstanding section 801—

"(1) any rule that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping, or

"(2) any rule which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest,

shall take effect at such time as the Federal agency promulgating the rule determines.".

SEC. 252. EFFECTIVE DATE.

5 USC 801 note.

The amendment made by section 351 shall take effect on the date of enactment of this Act.

SEC. 253. TECHNICAL AMENDMENT.

The table of chapters for part I of title 5, United States Code, is amended by inserting immediately after the item relating to chapter 7 the following:

"8. Congressional Review of Agency Rulemaking ..... 801".

20.2 2. The Presiding Officer may submit any question of order for the decision of the Senate.

21 RULE XXI

SESSION WITH CLOSED DOORS

21.1 1. On a motion made and seconded to close the doors of the Senate, on the discussion of any business which may, in the opinion of a Senator, require secrecy, the Presiding Officer shall direct the galleries to be cleared; and during the discussion of such motion the doors shall remain closed.

21.2 2. When the Senate meets in closed session, any applicable provisions of rules XXIX and XXXI, including the confidentiality of information shall apply to any information and to the conduct of any debate transacted.

22 RULE XXII

PRECEDENCE OF MOTIONS

22.1 1. When a question is pending, no motion shall be received but—

To adjourn.

To adjourn to a day certain, or that when the Senate adjourn it shall be to a day certain.

To take a recess.

To proceed to the consideration of executive business.

To lay on the table.

To postpone indefinitely.

To postpone to a day certain.

To commit.

To amend.

Which several motions shall have precedence as they stand arranged; and the motions relating to adjournment, to take a recess, to proceed to the consideration of executive business, to lay on the table, shall be decided without debate.

22.2 2.[5] Notwithstanding the provisions of rule II or rule IV or any other rule of the Senate, at any time a motion signed by sixteen Senators, to bring to a close the debate upon any measure, motion, other matter pending before the Senate, or the unfinished business, is presented to the Senate, the Presiding Officer, or clerk at the direction of the Presiding Officer, shall at once state the motion to the Senate,

[5] As amended by S. Res. 28, 99–2, Feb. 27, 1986.

and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and direct that the clerk call the roll, and upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by a yea-and-nay vote the question:

"Is it the sense of the Senate that the debate shall be brought to a close?" And if that question shall be decided in the affirmative by three-fifths of the Senators duly chosen and sworn—except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting—then said measure, motion, or other matter pending before the Senate, or the unfinished business, shall be the unfinished business to the exclusion of all other business until disposed of.

Thereafter no Senator shall be entitled to speak in all more than one hour on the measure, motion, or other matter pending before the Senate, or the unfinished business, the amendments thereto and motions affecting the same, and it shall be the duty of the Presiding Officer to keep the time of each Senator who speaks. Except by unanimous consent, no amendment shall be proposed after the vote to bring the debate to a close, unless it had been submitted in writing to the Journal Clerk by 1 o'clock p.m. on the day following the filing of the cloture motion if an amendment in the first degree, and unless it had been so submitted at least one hour prior to the beginning of the cloture vote if an amendment in the second degree. No dilatory motion, or dilatory amendment, or amendment not germane shall be in order. Points of order, including questions of relevancy, and appeals from the decision of the Presiding Officer, shall be decided without debate.

After no more than thirty hours of consideration of the measure, motion, or other matter on which cloture has been invoked, the Senate shall proceed, without any further debate on any question, to vote on the final disposition thereof to the exclusion of all amendments not then actually pending before the Senate at that time and to the exclusion of all motions, except a motion to table, or to reconsider and one quorum call on demand to establish the presence of a quorum (and motions required to establish a quorum) immediately before the final vote begins. The thirty hours may be increased by the adoption of a motion,

decided without debate, by a three-fifths affirmative vote of the Senators duly chosen and sworn, and any such time thus agreed upon shall be equally divided between and controlled by the Majority and Minority Leaders or their designees. However, only one motion to extend time, specified above, may be made in any one calendar day.

If, for any reason, a measure or matter is reprinted after cloture has been invoked, amendments which were in order prior to the reprinting of the measure or matter will continue to be in order and may be conformed and reprinted at the request of the amendment's sponsor. The conforming changes must be limited to lineation and pagination.

No Senator shall call up more than two amendments until every other Senator shall have had the opportunity to do likewise.

Notwithstanding other provisions of this rule, a Senator may yield all or part of his one hour to the majority or minority floor managers of the measure, motion, or matter or to the Majority or Minority Leader, but each Senator specified shall not have more than two hours so yielded to him and may in turn yield such time to other Senators.

Notwithstanding any other provision of this rule, any Senator who has not used or yielded at least ten minutes, is, if he seeks recognition, guaranteed up to ten minutes, inclusive, to speak only.

After cloture is invoked, the reading of any amendment, including House amendments, shall be dispensed with when the proposed amendment has been identified and has been available in printed form at the desk of the Members for not less than twenty-four hours.

3.[6] If a cloture motion on a motion to proceed to a measure or matter is presented in accordance with this rule and is signed by 16 Senators, including the Majority Leader, the Minority Leader, 7 additional Senators not affiliated with the majority, and 7 additional Senators not affiliated with the minority, one hour after the Senate meets on the following calendar day, the Presiding Officer, or the clerk at the direction of the Presiding Officer, shall lay the motion before the Senate. If cloture is then invoked on the motion to proceed, the question shall be on the motion to proceed, without further debate.

[6] As amended by S. Res. 16, 113–1, Jan. 24, 2013.

Public Law 115–5
115th Congress

Joint Resolution

Feb. 16, 2017
[H.J. Res. 38]

Disapproving the rule submitted by the Department of the Interior known as the Stream Protection Rule.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Office of Surface Mining Reclamation and Enforcement of the Department of the Interior relating to the "Stream Protection Rule" (published at 81 Fed. Reg. 93066 (December 20, 2016)), and such rule shall have no force or effect.

Approved February 16, 2017.

LEGISLATIVE HISTORY—H.J. Res. 38:

CONGRESSIONAL RECORD, Vol. 163 (2017):
Feb. 1, considered and passed House. Considered in Senate.
Feb. 2, considered and passed Senate.
DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS (2017):
Feb. 16, Presidential remarks.

○

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

Civil Action No. 20-cv-03668-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.

ORDER OF CONSOLIDATION

This matter is before the Court on Plaintiffs' Unopposed Motion to Consolidate (ECF No. 45). Pursuant to Fed. R. Civ. P. 42(a), the Court finds that this case and *Citizens for Constitutional Integrity v. United States*, No. 21-cv-00923-REB, involve common questions of law or fact, including common parties and common claims, before this Court. The Court further finds that consolidation of these two actions will promote judicial efficiency and avoid unnecessary costs and delays. *See Ellerman Lines, Ltd. v. Atl. & Gulf Stevedores, Inc.*, 339 F.2d

673, 675 (3d Cir. 1964) (stating that Fed. R. Civ. P. 42(a) "confers upon a district court broad power, whether at the request of a party or upon its own initiative, to consolidate causes for trial as may facilitate the administration of justice").

It is therefore ORDERED that case number 20-cv-03668-RM-STV and case number 21-cv-00923-REB are hereby CONSOLIDATED for all purposes, and future filings in either of these actions shall contain the caption as set forth above and shall be docketed under the case number 20-cv-003668-RM-STV. This Order shall also be filed in case number 21-cv-00923-REB.

DATED this 21st day of April, 2021.

BY THE COURT:

RAYMOND P. MOORE
United States District Judge

Activity in Case 1:20-cv-03668-RM-STV Citizens for Constitutional Integrity et al v. USA et al Order on Motion for Order

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U.S. District Court - District of Colorado

District of Colorado

Notice of Electronic Filing

The following transaction was entered on 5/4/2021 at 4:13 PM MDT and filed on 5/4/2021

Case Name: Citizens for Constitutional Integrity et al v. USA et al

Case Number: 1:20-cv-03668-RM-STV

Filer:

Document Number: 50(No document attached)

Docket Text:

ORDER: Before the Court is the Parties' Joint Motion for a Case Management Order [49], seeking direction from the Court on how this consolidated case will proceed. Having considered the proposed approaches, the Court finds that Defendants' would be more efficient. Accordingly, the Joint Motion is GRANTED IN PART, and Defendants' deadline to Answer or otherwise respond to the Complaint in Civil Action No. 21-cv-00923-RM is hereby extended until fourteen days from the Court's rulings on the pending motions for summary judgment [26] and to dismiss [33]. The Joint Motion is otherwise DENIED. SO ORDERED by Judge Raymond P. Moore on 5/4/2021. (Text Only Entry)(rmsec)

1:20-cv-03668-RM-STV Notice has been electronically mailed to:

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1:20-cv-03668-RM-STV Notice has been mailed by the filer to:

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

Civil Action No. 20-cv-03668-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 Department of the Interior;
GLENDA OWENS, in her official capacity as Acting Director of the Office of Surface Mining Reclamation and Enforcement; and
KATE MACGREGOR, in her official capacity as Acting Assistant Secretary for Land and Minerals Management,

Defendants,

and

GCC ENERGY, LLC,

Interested Party.

ORDER

This consolidated case is before the Court on Defendants' Motion to Dismiss (ECF No. 33), which has been fully briefed (ECF Nos. 40, 44, 51). The Court grants the Motion for the reasons below. In addition, Plaintiffs' Motion for Summary Judgment (ECF No. 26) is denied as moot, and Interested Party GCC Energy, LLC's Motion to Intervene (ECF No. 28) is denied without prejudice.

I. LEGAL STANDARD

In evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court must accept as true all well-pleaded factual allegations in the complaint, view those allegations in the light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor. *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1136 (10th Cir. 2014); *Mink v. Knox*, 613 F.3d 995, 1000 (10th Cir. 2010). The complaint must allege a "plausible" right to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007); *see also id.* at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level."). Conclusory allegations are insufficient, *Cory v. Allstate Ins.*, 583 F.3d 1240, 1244 (10th Cir. 2009), and courts "are not bound to accept as true a legal conclusion couched as a factual allegation," *Twombly*, 550 U.S. at 555 (quotation omitted).

II. BACKGROUND

This case presents questions on the constitutionality of the Congressional Review Act ("CRA"), and the facts pertaining to its application in this case are not in dispute. Enacted as part of the Contract with America Advancement Act of 1996, the CRA "assists Congress in discharging its responsibilities for overseeing federal regulatory agencies" and was designed to provide "an expedited procedure to review and disapprove federal regulations." *Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 556 (9th Cir. 2019) ("*CBD*"). Pursuant to the CRA, before a new rule promulgated by a federal agency can take effect, the agency must submit to Congress a report containing a concise general statement about the rule. *See id.* Congress then has a period of time, typically sixty days, to object to the rule by passing a joint resolution of disapproval. *Id.* at 557. The CRA limits debate on a joint resolution to only ten hours and

allows it to be placed on the Senate calendar on an expedited schedule. *See id.* This procedure bypasses the possibility of a filibuster in the Senate, which normally precludes enacting legislation unless it has the support of sixty Senators. Once the President signs a joint resolution passed by a simple majority in the House and Senate, the agency's rule cannot take effect or continue, and the agency is proscribed from issuing a new rule that is substantially the same as the disapproved rule unless specifically authorized to do so by new legislation. *See id.*

In December 2016, Defendant Office of Surface Mining Reclamation and Enforcement ("OSMRE") promulgated the stream protection rule, which modified various regulations pertaining to coal mining permits and monitoring of groundwater and surface water. Two months later, the rule was invalidated when the House and Senate passed, and the President signed, a joint resolution disapproving it. Fifty-four senators voted in favor of the joint resolution.

In 2018, the Department of the Interior approved a mining plan modification for GCC Energy, LLC's King II Mine. In its assessment of the modification plan, the Department did not apply the invalidated stream protection rule. Plaintiffs contend that had it done so, the modification, which injures their members, would not have been approved. Prompted by the modification approval, Plaintiffs brought this lawsuit asserting that the CRA violates equal protection, substantive due process, and the separation of powers.

III. ANALYSIS

In assessing the constitutionality of the CRA, the Court begins with the presumption that it is valid. *See INS v. Chadha*, 462 U.S. 919, 944 (1983). The Court's role is not to consider the

wisdom or utility of the statute. *See id.* at 944-45. Rather, the Court must determine whether "the demands of the Constitution" are satisfied. *Id.* at 945.

The Constitution provides that each House of Congress "may determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. The Constitution also provides that no law can take effect unless the legislation passes both Houses and is presented to the President. U.S. Const. art. I, § 7, cls. 2, 3. Plaintiffs concede, as they must, that the CRA satisfies the bicameral and presentment requirements set forth in Article I, § 7. (*See* ECF No. 40 at 5.) They argue instead that the CRA violates the Fifth Amendment and separation-of-powers principles.

A. Equal Protection

Plaintiffs first argue that the CRA violates the Equal Protection Clause because it creates two, unequal voting thresholds and thereby creates two classes of citizens: (1) citizens protected by statutes that delegate authority to agencies and (2) citizens protected by statutes directly. (*Id.* at 11.) According to Plaintiffs, "[t]he first category includes citizens facing problems for which Congress delegated statutory authorities to agencies," and "[t]he second category includes citizens who face less-complex issues that Congress can solve directly by statute without delegating to an agency." (ECF No. 14 at 45-46.) Plaintiffs further argue that such classification is not rationally related to a legitimate government interest. Defendants argue that the procedures set forth in the CRA comply with the constitutional requirements for legislative action and do not violate equal protection principles. The Court agrees with Defendants.

First, the Court rejects Plaintiffs' framing of the issue insofar as they presuppose citizens may reasonably be placed into the proffered categories and that such categories may be clearly delineated. On some level, all citizens may be considered "protected" by both types of statute.

The CRA certainly makes no mention of these categories, and the Court finds there is no principled basis for such categorization. The CRA simply allows the Senate to operate differently in different scenarios—when federal agencies propose new rules and when its own members propose new laws. But in either event, no legislation passes without a simple majority in each House and presentment to the President as required by the Constitution. The Court discerns no equal protection problem in such an arrangement.

Second, even assuming the citizenry could be categorized along the lines Plaintiffs suggest, the Court finds it is not irrational for Congress to exercise control over the agencies Congress itself created in the manner contemplated by the CRA. Congress has merely legislated a way to have the final say with respect to when new rules—promulgated by the agencies to which Congress itself delegated authority to act in the first place—will become law. The fact that Congress and the President used the CRA's procedure to invalidate a rule that Plaintiffs happen to favor does not render the procedure itself irrational.

B. Substantive Due Process

Plaintiffs also argue that the CRA violates the Substantive Due Process Clause because adopting a different voting threshold to repeal agency rules from the higher threshold normally required to enact legislation advances no legitimate or compelling government objective. However, the Court finds it is not unreasonable for Congress to exercise oversight of federal agencies by means of the CRA.

C. Separation of Powers

Finally, Plaintiffs argue that the CRA violates the separation of powers because Congress can rescind delegations of authority to federal agencies more easily than they can redelegate such

authority, thereby eroding the authority of the Executive Branch. Again, the Court is not persuaded by Plaintiffs' framing of the issue. Federal agencies' authority originates from Congress; it follows that Congress may proscribe that authority. *See CBD*, 946 F.3d at 562 ("When Congress enacts legislation that directs an agency to issue a particular rule, Congress has amended the law." (quotation omitted)). Plaintiffs have not identified, and the Court is not aware of, any legal authority for the proposition that a validly enacted joint resolution disapproving of an agency rule violates separation-of-powers principles.

IV. CONCLUSION

Accordingly, Defendants' Motion to Dismiss (ECF No. 33) is GRANTED, Plaintiffs' Motion for Summary Judgment (ECF No. 26) is DENIED AS MOOT, and Interested Party GCC Energy, LLC's Motion to Intervene is DENIED WITHOUT PREJUDICE. Pursuant to this Court's May 4, 2021 Order (ECF No. 50), Defendants in Civil Action No. 21-cv-00923-RM shall Answer or otherwise respond to the Complaint in that case on or before September 13, 2021.

DATED this 30th day of August, 2021.

BY THE COURT:

RAYMOND P. MOORE
United States District Judge