No. _____

In the Supreme Court of the United States

CITIZENS FOR CONSTITUTIONAL INTEGRITY AND SOUTHWEST ADVOCATES, INC.,

PETITIONERS

v.

UNITED STATES, ET AL.,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Article 1, Section 7, of the Constitution sets the voting threshold to pass bills at a majority of a quorum. Filibusters, however, prevent the Senate from passing legislation without 60 votes to invoke cloture. *See* Standing Rule of the U.S. Senate XXII.2 (the Cloture Rule). The Congressional Review Act, 5 U.S.C. 801-808, carves out an exception. When an agency issues a legislative rule, that Act's rules allow 51 votes in the Senate to pass a bill declaring the legislative rule without "force or effect." 5 U.S.C. 801(f), 802(d)(1). The Act also bars agencies from issuing a new rule that is "substantially the same" unless Congress passes a new law. 5 U.S.C. 801(b)(2). But that new law to restore the rule requires 60 votes in the Senate to invoke cloture.

The questions presented:

1. Whether the Congressional Review Act, which incorporates the Cloture Rule, 5 U.S.C. 801(b)(2), violates the separation of powers by creating a one-way ratchet that exists solely to erode, undermine, and chip away at Executive Power.

2. Whether the Congressional Review Act's two, unequal voting thresholds, 5 U.S.C. 801(d)(1), 802(b)(2), make it harder for Congress to fix mistakes, therefore merit intermediate scrutiny under equal protection, and ultimately fail the test. *See United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

3. Whether the Senate's two, unequal voting thresholds, together, violate substantive due process by accomplishing the illegitimate objective of manipulating Article I, Section 7, simple-majority voting thresholds.

PARTIES TO THE PROCEEDING

Petitioners Citizens for Constitutional Integrity and Southwest Advocates, Inc., (collectively, Citizens) were the plaintiffs in the district court and the appellants in the court of appeals.

Respondents the United States; the Office of Surface Mining Reclamation and Enforcement; Deb Haaland, in her official capacity as Department of the Interior Secretary; Glenda Owens, in her official capacity as the 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 (collectively, OSMRE); were defendants in the district court and appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioners are nonprofit corporations without stock. No parent or publicly held company owns ten percent or more of either corporation's stock.

RELATED PROCEEDINGS

United States District Court (D. Colo.):

Citizens for Constitutional Integrity v. *United States*, No. 20-cv-3668 (Aug. 30, 2021)

United States Court of Appeals (10th Cir.):

Citizens for Constitutional Integrity v. *United States*, No. 21-1317 (Jan. 10, 2023) (initial panel opinion)

Citizens for Constitutional Integrity v. *United States*, No. 21-1317 (Mar. 9, 2023) (en banc review and panel rehearing denial)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Citizens for Constitutional Integrity and Southwest Advocates, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The initial opinion of the court of appeals is reported at 57 F.4th 750 (10th Cir. 2023). App. 1a-32a. The order of the court of appeals denying the petition for panel rehearing and for rehearing en banc is unreported. App. 41a-42a. The order of the district court is unreported. App. 33a-40a.

STATEMENT OF JURISDICTION

The Tenth Circuit entered judgment on January 10, 2023. It denied a petition for panel rehearing and for rehearing en banc on March 9, 2023. App. 33a-40a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix to this petition reproduces the pertinent constitutional and statutory provisions. App. 42a-50a.

STATEMENT

Through the Congressional Review Act and the Cloture Rule, Congress subverted the Constitution by passing laws using procedures contrary to Article I, Section 7. The Framers intended simple majorities of a quorum to pass bills. *United States* v. *Ballin*, 144 U.S. 1, 6 (1892); James Madison, The Federalist 58 at 377 (Random House ed., 2000). The Congressional

Review Act and the Cloture Rule, however, establish unequal voting thresholds in the Senate. Congress used this system to undermine well-water protections for the Hesperus, Colorado, community. This Court has repeatedly struck down Congress's efforts to deviate from Article I, Section 7. *Clinton* v. *City of New York*, 524 U.S. 417, 435 (1998); *INS* v. *Chadha*, 462 U.S. 919, 954 (1983). The Senate's two voting thresholds violate the separation of powers, equal protection, and substantive due process.

This Court has never considered whether the Senate's 60-vote threshold for passing bills violates the Constitution, but it reviews Congressional rules when necessary. *Yellin* v. *United States*, 374 U.S. 109, 114 (1963) ("It has been long settled, of course, that rules of Congress and its committees are judicially cognizable."). In particular, when a house's rules affect individuals, courts review them for compliance with every "constitutional restraint[]." *Ballin*, 144 U.S. at 5. *See Powell* v. *McCormack*, 395 U.S. 486, 506 (1969); *Kilbourn* v. *Thompson*, 103 U.S. 168, 199 (1881) (recognizing a court's " 'duty * * * to determine * * * whether the powers * * * of the legislature *in the enactment of laws*, have been exercised in conformity to the Constitution." (quotations omitted, emphasis added)). This Court reviews even preliminary rules when they "may determine the final result." *Nixon* v. *Herndon*, 273 U.S. 536, 540 (1927).

Senators filibuster (set up sequential delays) to stop bills from becoming statutes. In his 1805 farewell speech, Vice President Aaron Burr recommended removing the Senate's rarely-used previous question rule. Sarah A. Binder & Steven S. Smith, *Politics or Principle? Filibustering in the United States Senate* 38-39 (1997). A previous question motion allows a majority to force an immediate vote on the previous

question. *Id.* at 35. By doing so in 1806, the Senate inadvertently introduced the possibility of filibusters. *Ibid.* For over a century, nothing could force a vote in the Senate. In 1917, President Woodrow Wilson sought to arm merchant ships against German attacks. *Id.* at 79. The Senate adopted the Cloture Rule in 1917 to ensure he could do so. *Ibid.* Now, generally only the 60-vote-threshold Cloture Rule dislodges bills by forcing a final vote. *See* Valerie Heitshusen & Richard S. Beth, Cong. Research Serv., *Filibusters and Cloture in the Senate* 18 (Apr. 7, 2017) (hereinafter, Filibusters and Cloture).

Because passing bills over the Cloture-Rule voting threshold became so difficult, Congress created exceptions to the supermajority requirement it created. Among those exceptions, the Congressional Review Act allows Congress to remove the "force or effect" of agencies' recently issued legislative rules with only a simple majority vote in the Senate. 5 U.S.C. 801(f), 802(d)(1). The Congressional Review Act specifically requires passage of a new bill to restore that legislative rule, but it allows Senators to filibuster that bill. *See* 5 U.S.C. 801(b)(2). Thus, the Cloture Rule and the Congressional Review Act, together, create a system of unequal voting thresholds.

Using the lower voting threshold, Congress eliminated OSMRE's Stream Protection Rule, 81 Fed. Reg. 93,066 (Dec. 20, 2016). That rule had protected Citizens from the King II Mine, which takes water out of a river near Hesperus and threatens to pollute and dewater wells downgrade. A more thorough analysis under the Stream Protection Rule would have required OSMRE to complete more pre-mining water analyses, and OSMRE may have reached a different decision.

The Senate's two, unequal voting thresholds create three anomalies that violate the Constitution. First, they violate the separation of powers by creating a one-way ratchet that exists solely to erode, undermine, and chip away at Executive Power. The ratchet also allows past congresses to bind future congresses—creating unconstitutional legislative entrenchment. Second, the two, mathematically unequal voting thresholds create a favored class of people (those hurt by recent agency rules), make it harder for democracy to fix any mistakes, and thereby violate equal protection.[1] Third, the system violates substantive due process by manipulating the voting thresholds in Article I, Section 7, of the Constitution. No rationale satisfies all of these three constitutional requirements.

Congress compromised the Constitution's bedrock requirements for democratically passing statutes. It injured Citizens, whose members live near a mine that OSMRE approved under an unconstitutional statute. These fundamental questions of Article I, Section 7, processes merit a writ of certiorari.

I. Legal Background

1. Unless a supermajority of 60 Senators invokes the Cloture Rule, a filibuster almost always prevents a final vote on that bill. This Court and the Congressional Research Service recognize that the Cloture Rule creates "the Senate's normal 60-vote filibuster requirement." *King* v. *Burwell*, 576 U.S. 473, 492 (2015); Filibusters and Cloture 18. If 60 senators vote in favor of cloture, the Cloture Rule requires the

[1] Although the Equal Protection Clause applies only to the states, this Court applies it to the United States through the Fifth Amendment's Due Process Clause. *Adarand Constructors, Inc.* v *Peña*, 515 U.S. 200, 213-18 (1995).

Senate to take a final vote thirty hours later. Filibusters and Cloture 12-13. With narrow exceptions, bills do not pass when the Senate does not invoke cloture. *Id.* at 18. For most bills, the modern "silent filibuster" allows a senator, with "[o]ne phone call," to switch "the threshold on any bill . . . from a majority to a supermajority." Adam Jentleson, Kill Switch 210-11 (2021) (former chief of staff to a Senate majority leader).

The Congressional Review Act allows a simple majority to compel a final vote for making a legislative rule of no force or effect. 5 U.S.C. 802(d). Congress intended the Congressional Review Act to replace the one-house veto this 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); *Chadha*, 462 U.S. at 954. Its procedural rules allow Congress to make a legislative rule ineffectual with only 51 votes in the Senate. 5 U.S.C. 802(d)(1), 802(g) (exercising Congress's rulemaking authority). After Congress vetoes that rule, the Congressional Review Act prohibits the agency from reissuing that rule (a) "in substantially the same form" or (b) as a "new rule that is substantially the same," until Congress passes a new statute over a filibuster. *See* 5 U.S.C. 801(b)(2).

The Senate intended the lower voting threshold to evade the daunting Cloture Rule threshold. 142 Cong. Rec. S2161 (Mar. 15, 1996) (Statement of Sen. Nickles) ("We have expedited procedures in the bill so no one can filibuster, or stop the will of the majority."). When an agency sends the Senate a legislative rule, the Senate can follow the Congressional Review Act's procedures for the next 60 days it is in session; and if Congress adjourns while that clock is running, the

clock starts over. 5 U.S.C. 801(d)(1), 802(e); *see* App. 2a-5a.

The Congressional Review Act and the Cloture Rule, together, create a one-way ratchet that removes and muddies agency delegations. 5 U.S.C. 802(d)(1) (majority), 801(b)(2); Cloture Rule (supermajority). The Congressional Review Act only allows the Senate to use its procedures if it uses specific, sparse statutory language. 5 U.S.C. 802(a). Consequently, Congress can never clarify what qualifies as "substantially the same." See 5 U.S.C. 802(a). And the Act bars federal courts from considering that question. 5 U.S.C. 805; *Montanans for Multiple Use* v. *Barbouletos*, 568 F.3d 225 (D.C. Cir. 2009) (Kavanaugh, J.).[2]

2. When Congressional rules impact individual rights, courts review them for compliance with the Constitution. The Constitution authorizes "Each House [to] determine the Rules of its Proceedings," Article I, Section 5. But when a house's rules affect individuals, courts ensure they comply with every constitutional constraint. *Ballin*, 144 U.S. at 5; *United States* v. *Smith*, 286 U.S. 6, 30-33 (1932) ("As the construction to be given to the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one.").

Article I, Section 7, constrains congressional rules. Whenever congressional action has "the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch," Congress exercises its Article I, Section 7, power. *Chadha*, 462 U.S. at 952. Rescinding agency authority

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[2] Courts can still review the constitutionality of those rules. *See Webster* v. *Doe*, 486 U.S. 592, 603 (1988) ("where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."); App. 8a-12a.

"is clearly legislative in both character and effect." *Id.* at 954 n.16. Thus, when Congress affects agency authority, it is using its Section 7 power. *Id.* Although Section 7 leaves many unspecified procedures for Congress to define using its Section 5 power to define rules, Section 7 defines the voting threshold at a majority of the quorum. "[T]he general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body." *Ballin*, 144 U.S. at 6. The Constitution specifies other supermajority thresholds, but it sets the initial voting threshold for passing statutes at a majority of a quorum. *Ibid.*

The Constitution applies even to preliminary votes if they can determine the final vote. *Nixon*, 273 U.S. at 540. The Cloture Rule determines final votes. *See King*, 576 U.S. at 492. If the Senate only reaches a final vote after a 60-vote preliminary vote, the final majority vote is a formality, and the real decision happens at the Cloture Rule vote. Filibusters and Cloture 18. James Madison cautioned that Congress could "mask under complicated and indirect measures the encroachments which it makes on the coordinate departments." The Federalist No. 48 at 317 (Random House ed., 2000); *Metro. Wash. Airports Auth.* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 277 (1991). *See U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 829 (1995) ("Constitutional rights would be of little value if they could be indirectly denied. The Constitution nullifies sophisticated as well as simple-minded modes of infringing on constitutional protections." (cleaned up)).

3. OSMRE approved the 950.55-acre Modification, to expand the Mine, under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C.

1201-1328. Congress enacted SMCRA to ensure coal mining could "contribute significantly to the Nation's energy requirements" while "minimiz[ing] 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. It created OSMRE and delegated authority to implement SMCRA. 30 U.S.C. 1211(c)(2).

SMCRA regulates coal mining by withholding permits until mining companies commit to complying 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 permits unless the 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). SMCRA also requires permits to use the "best technology currently available" to minimize adverse impacts on fish, wildlife, and related environmental resources. 30 U.S.C. 1265(b)(24), 1266(b)(11).

Starting in 2004, OSMRE spent thirteen years drafting a modern Stream Protection Rule to resolve a stream impact issue that had caused problems since the initial, 1977 regulations. 81 Fed. Reg. at 93,068. OSMRE issued the Stream Protection Rule to "balance" (a) environmental protection, (b) agricultural productivity, and (c) "the Nation's need for coal," while providing "greater regulatory certainty to the mining industry." *Id.* at 93,069. It sought to incorporate thirty years of scientific and technologic developments, legal developments, and real-world experiences. *Id.* at 93,072.

The Stream Protection Rule filled gaps in prior rules, responded to court opinions, and "more completely implement[ed]" SMCRA's statutory directions. *Id.* at 93,069, 93,078. It sought to ensure

mining companies use "advances in science and technology" to minimize ecosystem impacts. *Id.* at 93,069. It required "comprehensive monitoring" to provide timely information on "mining-related changes in water quality and quantity." *Ibid.* It also incorporated advances in surface and groundwater hydrology, surface runoff management, stream restoration, soil science, and revegetation technologies to fulfill SMCRA's requirement that mining companies use "the best technology currently available." *Id.* at 93,069; 30 U.S.C. 1265(b)(24), 1266(b)(11).

4. In early 2017 with 54 Senate votes, Congress used the Congressional Review Act to pass a statute that made the Stream Protection Rule have no further "force or effect." Act of Feb. 16, 2017, Pub. L. No. 115-5, 131 Stat. 10 (the 2017 Statute); 163 Cong. Rec. S632 (Feb. 2, 2017). OSMRE concluded this statute restored the 1983 regulations. Congressional Nullification of the Stream Protection Rule Under the Congressional Review Act, 82 Fed. Reg. 54,924 (Nov. 17, 2017); Stream Protection Rule, 81 Fed. Reg. at 93,070. On its face, the 2017 Statute only vetoed the rule. SMCRA still requires mining permit designs to prevent "material damage to [the] hydrologic balance." 30 U.S.C. 1260(b)(3). It still requires OSMRE to use "the best technology currently available." 30 U.S.C. 1266(b)(9)(B), (b)(11).

II. Procedural Background

The district court granted OSMRE's motion to dismiss and denied Citizens' motion for summary judgment with a terse analysis. The court of appeals analyzed the claims differently, but upheld the decisions.

1. Community members in Hesperus, Colorado, organized Southwest Advocates, Inc., to oppose GCC Energy, Inc.'s King II Mine Modification expansion. The Modification caused voluminous increases in the rate of coal mining. It risks disrupting members' well water as it takes more water from the La Plata River, which affects the wildlife, the ecology, and members' aesthetic appreciation of the area. App. 13a-15a. Even OSMRE's environmental assessment admits that, from existing coal mining, "[a]djacent landowners are reporting coal dust and methane smell in well water."

About a year after Congress passed the 2017 Statute to veto the Stream Protection Rule, OSMRE issued the Mine Approval for the Modification. App. 6a. If OSMRE had complied with the Stream Protection Rule's modern, comprehensive requirements for assessing water quantity and quality, it could have made a different decision.

Citizens' brought three claims. They asserted that the Senate's two-voting-threshold system violated the separation of powers, equal protection, and substantive due process. *See* App. 36a-38a. Among their remedies, they sought to set-aside the Mine Approval and to remand for further consideration after restoring the Stream Protection Rule. Compl. ¶ 12.d ("Remand the King II Mine Modification Approval for reconsideration consistent with the Stream Protection Rule."); *see* 5 U.S.C. 706.

2. The district court dismissed the complaint. App. 38a. It exercised jurisdiction because Citizens claimed a federal agency and federal officers violated federal laws and the Constitution. *See* 28 U.S.C. 1331, 1361.

The district court did not apply this Court's carefully refined tests. It dismissed Citizens' separation-of-powers claim solely because it presented an issue of first impression. App. 38a. It dismissed the

equal protection claim (a) because it could identify no class for unequal treatment, (b) because "it is not irrational for Congress to exercise control over the agencies," and (c) because, regardless of the preliminary vote thresholds, the final votes require only equal, simple majorities. App. 36a-37a. The district court dismissed the substantive due process claim because, it held, the two-voting-threshold structure was "not unreasonable." App. 38a.

3. After asserting jurisdiction over the appeal under 28 U.S.C. 1291, the court of appeals upheld the dismissal. App. 7a.

a. Instead of analyzing Citizens' standing to bring their claim, the court of appeals bifurcated that claim into two challenges. *Compare* App. 12a-20a *with* Compl. ¶ 107 ("On their faces, the [Congressional] Review Act and the Cloture Rule, together, violate separation of powers."). It recognized standing for what it called the "challenge" to the Congressional Review Act, but not for the "challenge" to the Cloture Rule. App. 12a-20a.

Focusing on the Congressional Review Act "challenge," the court of appeals recognized the Mine Approval could injure Southwest Advocates member Julia Dengel by contaminating her well, and the court could redress that injury by setting aside the Mine Approval. App. 14a-16a. It denied standing for the Cloture Rule challenge, however, because, it held, eliminating that rule would not result in Congress passing a new law to restore the Stream Protection Rule. App. 16a-20a. The court of appeals did not explain why setting aside the Mine Approval would not redress both challenges.

Ultimately, the court of appeals addressed a different claim than the one Citizens brought: it addressed whether the 2017 Statute passed by a final

"majority vote of both Houses of Congress," and whether the President signed it. App. 22a. Reformulated as a tautology, it dismissed the remaining stub of Citizens' claim. App. 24a. The court of appeals never reached the substance of Citizens' separation-of-powers claim. It never answered Citizens' arguments that the one-way ratchet creates illegal legislative entrenchment.

b. The court of appeals dismissed Citizens' equal protection claim because, it found, Citizens "cannot coherently describe a class of discriminated-against persons to which they (or, more precisely, their members) belong." App. 26a. Citizens had identified two possible classifications for equal protection violations. The court of appeals ignored one classification and denied the second classification makes distinct categories.

Citizens argued they were harmed because, if the Senate used only 60-vote thresholds, the Stream Protection Rule would still be in place. Thus, the two voting thresholds protected them less. In other words, Citizens argued, the two-voting-threshold system creates two categories: people harmed by recent rules (because they can remove those rules with 51 votes in the Senate) and everyone else who needs 60 votes to remove rules or to pass new authorizations. The court of appeals never addressed that classification.

It addressed Citizens' proposed classification of (1) citizens affected by complex problems, whose resolution requires delegation to agencies, and (2) citizens affected by simple problems, whose resolution Congress can resolve directly. Citizens argued that the first category can lose protections more easily via the Congressional Review Act; the Cloture Rule better protects the second category. The court of appeals found that an individual can belong to both classes at

the same time, with respect to different statutes. App. 27a. Therefore, it held, "there is simply no sensible way of delineating who is within the purported class of those discriminated against by [the Congressional Review Act]." App. 27a-28a. It upheld the dismissal of this claim.

c. Finally, the court of appeals dismissed Citizens' substantive due process claim. Citizens argued that an aim to change Senate voting thresholds does not qualify as a legitimate objective because it aims to manipulate Article I, Section 7, voting thresholds.

The court of appeals found other objectives for setting a lower voting threshold in the Congressional Review Act, like implementing "more efficient congressional oversight of delegations" and "[m]aintaining Congress's primacy in lawmaking—including by overriding agency actions." App. 29a. The court of appeals did not address Citizens' argument that Congress only advanced these goals via the illegitimate objective of manipulating Article I, Section 7, voting thresholds.

Citizens also argued that this Court considers assumptions of agency misfeasance per se unreasonable and requires evidence. This system with a lower voting threshold for disciplining agencies only makes sense if agencies need more disciplining; but Congress provided no evidence of Executive Branch misconduct. The court of appeals interpreted that argument as contending that the presumption of regularity creates "a presumption that congressional measures to overturn agency action must be improperly motivated." App. 30a. It held that, when "Congress sets aside an agency regulation through the CRA, it is not implying that the agency acted in any unlawful or improper manner in promulgating the regulation. It is simply saying that, as a matter of

policy, Congress disapproves of the regulation." App. 31a.

The court of appeals denied without comment Citizens' petition for panel rehearing and rehearing en banc. App. 32a.

REASONS FOR GRANTING THE PETITION

No principle is more fundamental in our democracy than ensuring a legislature passes laws consistent with the People's instructions in our Constitution. The Framers created a democracy by simple majorities in each house. James Madison rejected a supermajority for passing new laws because then, "the fundamental principle of free government would be reversed." The Federalist 58, Page 377. The Senate has long ignored this original intent and required a supermajority for passing most legislation. This Court has never addressed whether the Senate's supermajority voting threshold violates the Constitution. The Congressional Review Act compels review for every because it manipulates both simple-majority and supermajority voting thresholds to affect individual rights and liberties.

The court of appeals ignored fundamental principles that prohibit erosion of Executive Branch power and that prohibit past congresses from binding future congresses. It failed to analyze the categories of individuals that Congress created. It allowed Congress, without an amendment, to change the majority-rule requirements of Article I, Section 7.

Congress put itself in a double-bind. Any goal of eliminating agency authorities more efficiently violates the separation of powers because that objective erodes Executive Power. *Chadha*, 462 U.S. at 944 ("Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic

government."). Without that justification, no rationale satisfies equal protection and substantive due process. Every rationale for the one-way ratchet violates the Constitution in one way or another. On remand, the court can determine an appropriate remedy.

I. Certiorari is needed to protect individual liberties from this separation-of-powers violation, in which the Senate's two voting thresholds create a one-way ratchet that erodes, undermines, and chips away at Executive Power.

The one-way ratchet exists solely to undermine, erode, and chip away at Executive Power, and it thereby violates the separation of powers. This Court's prohibition on legislative entrenchment and requirement of equal opportunity to pass legislation underscores that constitutional violation.

A. The court of appeals ignored the Collins *v.* Yellen *principles for analyzing standing to bring separation-of-powers claims.*

The court of appeals failed to apply this Court's directions for analyzing Citizens' Article III standing to bring their separation-of-powers claim. In 2021, this Court cautioned against measuring standing based on the "provision of law that is challenged." *Collins* v. *Yellen*, 141 S. Ct. 1761, 1779 (2021). The court of appeals did just that. Instead of focusing on the final agency action, *see id.*, it disaggregated Citizens' *claim* into two *challenges* to different Senate Rules: the Cloture Rule and the Congressional Review Act. It recognized standing for only one challenge. Under this Court's precedent and the court of appeals' factual analysis, however, Citizens demonstrated standing for their separation-of-powers claim.

An organization like Southwest Advocates satisfies Article III standing when (1) one member demonstrates individual standing, (2) "the interests at stake are germane to the organization's purpose," and (3) "neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). The court of appeals held that stopping the Mine and protecting the ecosystem are interests germane to Southwest Advocates' purpose, and that neither the claim nor the relief requested requires individual members' participation. App. 13a. That leaves only the individual member's injury.[3]

For an individual member, Article III requires (1) injury in fact, (2) injury "fairly traceable to the challenged action of the defendant," and (3) a likelihood "that a favorable judicial decision will prevent or redress the injury." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 493 (2009). Of course, "'procedural rights' are special: the person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 573 n.7 (1992).

The court of appeals recognized Julia Dengel's injury-in-fact from a substantial risk the Mine would impact "the ecosystem around her home" and her desire to board horses with her well water. App. 15a. It recognized that injury fairly traces to the Mine Approval because Ms. Dengel lives downgrade from the Mine. App. 13a-14a; *see Lujan*, 504 U.S. at 573 n.7

[3] When at least one plaintiff establishes standing, courts rule on the merits. *Bowsher* v. *Synar*, 478 U.S. 714, 721 (1986).

("one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years."). The court of appeals also recognized that, if a court held the 2017 Statute unconstitutional, it could "resurrect[]" the Stream Protection Rule and stop the Modification. App. 15a.

The same analysis demonstrates Citizens' standing for their whole separation-of-powers claim. The court of appeals violated this Court's directions by breaking apart Citizens' separation-of-powers claim into two challenges.

As the masters of their Complaint, Citizens have the power to define the claims they bring. Fed. R. Civ. P. 8; *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 392 n.7 (1987). With that power comes responsibility to "demonstrate standing for each claim [the plaintiff] seeks to press." *Daimlerchrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006); *Allen* v. *Wright*, 468 U.S. 737, 752 (1984) ("the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." (emphases added)). Courts focus on the "statutory and constitutional provision whose protection is invoked." *Int.'l Primate Prot. League* v. *Admin'r of Tulane Ed. Fund*, 500 U.S. 72, 77 (1991) (quotations omitted).

Contrary to the court of appeals' analysis, Citizens do not invoke the Cloture Rule's protection or the Congressional Review Act's protection, but the

separation-of-powers' protection.[4] The Constitution authorizes individuals to bring claims seeking protection from the separation-of-powers. *Collins*, 141 S. Ct. at 1780 ("whenever a separation-of-powers violation occurs, any aggrieved party with standing may file a constitutional challenge."); *Bond* v. *United States*, 564 U.S. 211, 222 (2011). Citizens claim the one-way ratchet violated the separation of powers, and the 2017 Statute violated the Constitution. Compl. ¶ 110 ("The [Congressional] Review Act and the Cloture Rule, together, violate the separation of powers principles in the Constitution by hobbling the Executive Branch.").[5] Indeed, the Congressional Review Act effectively incorporates the Cloture Rule by requiring new legislation to survive a filibuster to restore a legislative rule. *See* 5 U.S.C. 801(b)(1). Therefore, *Collins* recognizes Citizens' standing.

Citizens demonstrated redressability, contrary to the court of appeals' holding. That court recognized Citizens demonstrated injury and traceability to the Mine Approval under both challenges. 13a-17a. It declined to find redressability for the Cloture Rule challenge. *Id.* But setting aside the Mine Approval

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

[5] The Complaint claims the two voting thresholds, together, violate the separation-of-powers:

> On their faces, the [Congressional] Review Act and the Cloture Rule, together, violate separation of powers. They create a one-way ratchet that, over time, erodes and undermines the Executive Branch's authority. . . . The separation of powers prohibits Congress from creating legislative structures that erode or undermine another branch.

Compl. ¶¶ 107-109 (paragraph numbers omitted)).

qualifies as an available remedy for Citizens' separation-of-powers claim. When assessing standing, courts assume plaintiffs' claim succeeds on the merits. *FEC* v. *Ted Cruz for Senate*, 142 S. Ct. 1638, 1647 (2022); *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975). Assuming success, courts find redressability if "a plaintiff personally would benefit in a tangible way from the court's intervention." *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 104 n.5 (1998) (quotations omitted). A decision here that the 2017 Statute violates the separation of powers "could easily lead to the award of at least some of the relief that [Citizens] seek." *Collins*, 141 S. Ct. at 1779. As the court of appeals recognized, a court could set aside the Mine Approval. App. 15a-16a; *see also* 5 U.S.C. 706(2) (requiring courts to "hold unlawful and set aside agency action . . . found to be . . . contrary to constitutional right, power, privilege, or immunity."). That qualifies as redress for Citizens' separation-of-powers claim. *See Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 796, 797, 801 (2021) ("the ability to effectuate a partial remedy satisfies the redressability requirement." (quotations omitted)). According to the court of appeals' factual analysis and this Court's legal direction, Citizens demonstrated standing for their separation-of-powers claim.

B. Every use of the Congressional Review Act takes away Executive Power, and systems like that violate the separation of powers.

Under Congress's one-way ratchet, when it vetoes an exercise of Executive Power with a simple majority in the Senate, it cannot restore that Executive Power without 60 votes. That structure exists only to erode, undermine, and chip away at Executive Power, and it thereby violates the separation of powers.

The separation of powers is a "*structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995). It serves as a "prophylactic device" with "high walls and clear distinctions . . . ." *Id.* "Even when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving* v. *United States*, 517 U.S. 748, 757 (1996). When Congress "undermine[s]," "erode[s]," or "chip[s] away" at the authority of another branch, this Court does "not hesitate[] to strike down [those] provisions of law." *Mistretta* v. *United States*, 488 U.S. 361, 382 (1989); *Stern* v. *Marshall*, 564 U.S. 462, 502-03 (2011); *Chadha*, 462 U.S. at 958. Consequently, this Court does not "overlook" even the "mildest and least repulsive" intrusions because "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Stern*, 564 U.S. at 503 (quotations omitted). "We simply cannot compromise when it comes to our Government's structure." *Seila Law* v. *CFPB*, 140 S. Ct. 2183, 2219 (2020) (Thomas, J., concurring in part).

Article II vests "executive Power" in a "President of the United States of America." The Framers assigned the President responsibility to execute federal laws knowing that "no single person could fulfill that responsibility alone . . . ." *Seila Law*, 140 S. Ct. at 2191 (majority op.). Article II, Sections 2, 3, and 4, therefore anticipate departments and executive officers who wield Executive Power. 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).

The legislative branch wields broad power to define agency power and to bind agencies. But Article II limits Article I. "[T]he Framers thought it necessary to secure the authority of the Executive so that he could carry out his unique responsibilities." *Seila Law*, 140 S. Ct. at 2203. They 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). Because of Congress's extensive power, this Court is "sensitive to its responsibility to enforce" the separation of powers when Congress manages agencies because "representatives of the majority in a democratic society, if unconstrained, may" threaten liberty. *Metro. Wash. Airports*, 501 U.S. at 273.

The one-way ratchet violates the separation of powers. Every use takes away Executive Branch power. Passing a statute under the Congressional Review Act takes away Executive Power with a simple majority that Congress cannot restore without 60 votes. Over time, Executive Power shrinks. Because the one-way ratchet structure undermines, erodes, and chips away at Executive Branch power, it violates the separation of powers.[6] The separation of powers compels voiding it.

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[6] It matters not that the President signed the 2017 Statute and acquiesced in the Legislative Branch taking its authority. Branches cannot acquiesce to eroding their own constitutional authority. *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010).

C. The Senate's two voting thresholds violate legislative entrenchment prohibitions by allowing past congresses to require supermajorities in future congresses.

This separation-of-powers violation manifests as unconstitutional legislative entrenchment. The Supreme Court prohibits past legislatures from impeding future legislatures. Chief Justice Marshall recognized, "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 United States* v. *Winstar Corp.*, 518 U.S. 839, 871-73 (1996) (plurality); *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).

When past legislatures seek to bind future legislatures, scholars call that maneuver "legislative entrenchment." "[M]ost scholars share Charles Black's perception that the entrenchment prohibition rests on principles so 'familiar,' 'fundamental,' and 'obvious as rarely to be stated.'" Julian N. Eule, Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity, 1987 Am B. Found. Res. J. 379, 382 (1987) (cited by *Winstar*, 518 U.S. at 872-73); Catherine Fisk & Erwin Chemerinsky, The Filibuster, 49 Stan. L. Rev. 181, 247 (1997); Bruce Ackerman & Akhil Amar et al., An Open Letter to Congressman Gingrich, 104 Yale L. J. 1539 (1995); Paul W. Kahn, Gramm-Rudman and the Capacity of Congress to Control the Future, 13 Hastings Const. L.Q. 185, 231 (1986) ("Legislatures may . . . not try directly to control future legislatures . . . [except by] passage of a constitutional amendment. There should be no statutory short-cuts."); Charles L. Black Jr.,

Amending the Constitution: A Letter to a Congressman, 82 Yale L. J. 189 (1972) (quoted by *Winstar*, 518 U.S. at 873 n.19).

Even Blackstone's Commentaries recognized the prohibition on legislative entrenchment: "the legislature . . . acknowledges no superior upon earth, which the prior legislature must have been, if it's [sic] ordinances could bind the present parliament." 1 W. Blackstone, Commentaries on the Laws of England 90 (1765) (quoted by *Winstar*, 518 U.S. at 872).

Past legislatures need not completely prohibit future legislature action to qualify as legislative entrenchment. Instead, the Constitution ensures "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). Here, 51 does not equal 60. That legislative entrenchment violates the Constitution. *See id.*

The court of appeals held that Congress can use any "internal parliamentary procedure[]" as long as it complies with "bicameralism (approval by both Houses of Congress) and presentment (submission to the President for approval)." App. 22a. That holding starts from a false legal premise and concludes with a logical fallacy.

First, the Senate's Article I, Section 5, power over internal parliamentary procedures do not matter because the one-way ratchet affects people outside the halls of Congress. That power only allows "Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances." *Chadha*, 462 U.S. at 955 n.21. In contrast, when like here, Congress acts with "the purpose and effect of altering the legal rights, duties,

and relations of persons . . . outside the Legislative Branch;" then, Congress uses its legislative power in Article I, Section 7. *Id.* at 952, 953 n.16. *Chadha*, too, addressed delegations to agencies and concluded Congress was using its Section 7 power. 462 U.S. at 958 n.22. Section 7 applies.

Because Section 7 applies, it mandates simple majority thresholds in each house. *Ballin*, 144 U.S. at 6-9; James Madison, The Federalist 58, page 377. Congress lacks authority to use its Section 5 power to subvert Section 7. *Chadha*, 462 U.S. at 955 n.21. Therefore, the Constitution contains constraints other than bicameralism and presentment.

Second, the court of appeals committed the logical fallacy of accident in dismissing this case as a case of first impression. It listed several separation-of-powers violations this Court has identified (like bicameralism and presentment), and it held that, because this Court never ruled on the precise constitutional violation Citizens identified, Citizens had no claim. App. 22a. Although the court of appeals cited the paradigmatic situations, it is "too quick to generalize and in doing so [it runs] afoul of the logical fallacy of accident." *McClendon* v. *City of Albuquerque*, 630 F.3d 1288, 1292 (10th Cir. 2011) (Gorsuch, J.). This Court has already rejected the court of appeals' logical fallacy. *See United States* v. *Munoz-Flores*, 495 U.S. 385, 397 (1990) ("A law passed in violation of the Origination Clause would thus be no more immune from judicial scrutiny because it was passed by both Houses and signed by the President than would be a law passed in violation of the First Amendment.").

The court of appeals failed to apply this Court's Article III standing principles, broke apart a single claim to dismiss it piecemeal, failed to apply

separation-of-powers protections, and relied on logical fallacies. It merits further review.

II. Certiorari is needed to protect individuals from mistakes the Senate may make, but could not fix, because of unequal voting thresholds.

Citizens received a mathematically lower level of protection from Congress than the mining company, GCC, and the Senate's two-voting thresholds violate equal protection. Congress rescinded Citizens' protection with just 54 votes in the Senate, but now Citizens need 60 votes to restore it. *See* 163 Cong. Rec. S632 (daily ed. Feb. 2, 2017). Mathematics proves that inequality. *See Louisville Gas Co.* v. *Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting) (recognizing courts competently enforce "mathematical or logical" lines) (quoted approvingly by *Buckley* v. *Valeo*, 424 U.S. 1, 83 n.111 (1976)). When Congress vetoes a legislative rule under the Congressional Review Act with a simple majority in the Senate, it cannot restore that rule without 60 votes. Because Congress cannot fix errors as easily as it can make them, rational basis does not apply; intermediate scrutiny applies. The Senate's two voting thresholds fail intermediate scrutiny.

A. Congress created a class for special treatment, so equal protection applies.

With the Congressional Review Act, Congress created a special class for special treatment, and equal protection applies. "[M]ost legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer* v. *Evans*, 517 U.S. 620, 631 (1996). A Fourteenth-Amendment Framer described the relevant principle here: "the law which

operates upon one man shall operate equally upon all. . . . Whatever means of redress is afforded to one shall be afforded to all." Cong. Globe, 39th Cong., 1st Sess. 2459 (May 8, 1866) (Rep. Stevens). From any perspective, Citizens have unequal means of redress compared to GCC.

Congress intended to benefit small businesses, and effectively benefited anyone harmed by recent regulations. Congress made it easier to veto those regulations. It passed the Congressional Review Act as Subtitle E within Title II, the Small Business Regulatory Enforcement Fairness Act of 1996, 110 Stat. 847, 857, 868 (Mar. 29, 1996). It found:

- "small businesses bear a disproportionate share of regulatory costs and burdens," and
- "fundamental changes . . . are needed in the regulatory and enforcement culture of Federal agencies to make agencies more responsive to small business . . . ."

Id. § 202(2) and (3). To remedy these perceived ills, Congress sought to benefit small businesses by eliminating agency rules with a lower, simple-majority vote in the Senate. *See* 5 U.S.C. 802(d)(1).

Congress thus created a favored class for unequal treatment. It does not matter that Congress was only trying to help a class. 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). Equal protection applies when, like here for small businesses, "a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction." *See N.Y. Transit Auth.* v. *Beazer*, 440 U.S. 568, 587-88 (1979).

B. Intermediate scrutiny applies because, if Congress makes a mistake with a simple-majority vote in the Senate, it takes 60 votes to fix that mistake.

Normally, courts would apply the rational basis test to legislation that treats differently small businesses or people harmed by recent legislative rules. But this Court defers to Congress under the rational basis test only because it assumes that, if Congress errs, the democratic process will fix the error. *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979). With the one-way ratchet, Congress made fixing errors harder. If Congress, by a simple-majority vote in the Senate, renders a legislative rule without force or effect, and if it then realizes it made a mistake, it needs 60 votes in the Senate to fix the mistake. The premise no longer holds, and that compels heightened scrutiny. *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").

In the famous footnote 4 of *Carolene Products*, this Court suggested heightened scrutiny for situations like this. "[L]egislation 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 . . . ." 304 U.S. at 153 n.4. Here, because Congress restricted the political process and made repealing errors more difficult, equal protection compels intermediate scrutiny. *See ibid.*

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 will accomplish that objective. *United States* v. *Virginia*,

518 U.S. 515, 524, 531 (1996) (quotations omitted). Congress provided no "exceedingly persuasive justification" for the Senate's two voting thresholds. The one-way ratchet fails intermediate scrutiny and violates equal protection. *See id.*

III. Certiorari is needed to protect Article I, Section 7's requirement for majority rule from the Congressional Review Act's manipulation.

Setting up a two-voting-threshold system in the Senate does not qualify as a legitimate governmental objective. Allowing it here would let Congress set lower voting thresholds for statutes it likes and higher voting thresholds for statutes it does not like. The Famers strictly precluded that possibility. In addition to bicameralism and presentment, the text of Article I, Section 7, sets the voting threshold at a simple majority. *Ballin*, 144 U.S. at 6. "The explicit prescription for legislative action contained in Art. I cannot be amended by legislation." *Chadha*, 462 U.S. at 958 n.23. Because substantive due process requires a *legitimate* objective, the Senate's two-voting-threshold system violates due process.

Due process protects individuals against "arbitrary action[s] of government" exercising "power without any reasonable justification in the service of a legitimate governmental objective." *Cnty. of Sacramento* v. *Lewis*, 523 U.S. 833, 845-46 (1998) (cleaned up). Statutes pass the rational basis test only if the legislature could have based the statute on (1) rational assumptions, (2) a legitimate government objective, and (3) a rational means of achieving that objective. *See Washington* v. *Glucksberg*, 521 U.S. 702, 728 (1997); *Vance*, 440 U.S. at 111. The Senate's two-

voting threshold system fails the rational basis test because it accomplishes an illegitimate objective.

The Constitution prohibits Congress from creating two voting thresholds. Article I, Section 7, sets the voting threshold at a simple majority. If Congress wants to create "a new procedure" for passing laws using its legislative power, the Constitution requires it to do so "not by legislation but through the amendment procedures set forth in Article V of the Constitution." *Clinton*, 524 U.S. at 449. Whether a court could imagine other legitimate objectives for two voting thresholds does not matter. Article I, Section 7, still prohibits Congress from setting different voting thresholds. *See id.*

The Constitution's seven supermajority-vote exceptions demonstrate that Article I, Section 7, sets the voting threshold at a simple majority. *See Chadha*, 462 U.S. at 955 n.21. 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. II, § 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. 137, 174 (1803) (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. This Court does not apply the *expressio unius* canon if it appears as a "result of inadvertence or accident." *Ford* v. *United States*, 273 U.S. 593, 612 (1927) (quotations omitted). The Framers did not leave simple majorities to pass statutes by inadvertence. "The procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself." *Clinton*, 524 U.S. at 439. That section specifically sets the two-thirds-vote for overriding vetoes, and that demonstrates the Framers expected simple majorities to act in all other situations.

Finally, interpreting the Constitution to allow different voting thresholds in the Senate undermines the Vice President's sole lawmaking authority to vote in the Senate precisely when the members "be equally divided." Art. I, § 3. Thus the text of the Constitution, interpreted with basic canons of statutory construction, demonstrates that Article I, Section 7, sets the voting threshold at a majority of the quorum.

This Court's precedent has held that directly. *Ballin*, 144 U.S. at 6. Finally, James Madison directly rejected a supermajority for passing new laws in *the Federalist 58*. Page 377.

This Court has expressed no patience with Congress's efforts to alter the Article I process by statute. Days after Congress passed the Congressional Review Act, it passed the Line-Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (Apr. 9, 1996). The Line Item Veto Act allowed the President to sign a bill into law and later to "cancel" three

categories of spending provisions. *Id.* § 2(a), § 1021(a). This Court rejected that Section 7 rewrite. *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.

Here, to replace the one-house vetoes, Congress again evaded Article I, Section 7, by amending its rules. But "[t]he explicit prescription for legislative action contained in Art. I cannot be amended by legislation." *Chadha*, 462 U.S. at 958 n.23. Manipulating Article I, Section 7, does not qualify as a legitimate objective, so this system violates the rational basis test.

IV. This case merits review because it makes statutory delegations ambiguous and leads to absurd consequences.

The Senate's two-voting-threshold paralyzes agencies with unclear authorities and no judicial review, and it leads to absurd mechanisms.

1. The one-way ratchet makes the United States less effective and less accountable. The Framers "allocate[ed] specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable." *Loving*, 517 U.S. at 757. The one-way ratchet, however, causes a chilling effect that "undermine[s] the authority and independence" of the Executive Branch. *Mistretta*, 488 U.S. at 382. Agencies rationally fear implementing rules to the full extent of their Executive Power because Congress could never redelegate it. That fear causes agencies to shrink from their assignments.

Those chilling consequences undermine the grand design of the Constitution. The Framers intended the separation-of-powers structure to protect the energy in the Executive Branch. They "deemed an energetic executive essential to the protection of the community against foreign attacks, the steady administration of the laws, the protection of property, and the security of liberty." *Seila Law*, 140 S. Ct. at 2203 (quotations omitted). Alexander Hamilton contended that "[e]nergy in the Executive is a leading character in the definition of good government." *The Federalist 70*, at 447. He recognized 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 undermines the Framers' design.

2. The Congressional Review Act leaves agencies with unclear responsibilities. The 2017 Statute did not amend SMCRA. "[T]his Court requires Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." *See Sackett v. EPA*, Slip Op. 23 (2023) (quotations and alteration omitted). A Congressional Review Act statute that makes a regulation have no "force or effect" contains nothing "exceedingly clear." *See* 5 U.S.C. 801(f), 802(a). Instead, "a simple and unelaborated 'No!' withdraws from agencies a range of substantive authority that cannot be determined without subsequent litigation." Daniel Cohen & Peter L. Strauss, Congressional Review of Agency Regulations, 49 Admin. L. Rev. 95, 104 (1997). But the Congressional Review Act also bars judicial review of non-constitutional claims. 5 U.S.C. 805; App. 9a. That leaves ambiguous directions

from Congress: do something and do *not* do that something.

In particular, SMCRA still requires OSMRE to use the "best technology currently available" to regulate coal mining and, "to the extent possible . . . minimize disturbances and adverse impacts." 30 U.S.C. 1265(b)(10), (24). The Stream Protection Rule identified the best technologies and methods for minimizing disturbances as much as possible. But the 2017 Statute effectively prohibits OSMRE from using that best technology and from using every possible method to minimize disturbances. When considering how to determine the baseline ecological conditions, OSMRE concluded that an index of biological integrity (IBI) provided the best technology for "multimetric bioassessment protocols to assess the baseline ecological function of perennial, intermittent, and ephemeral streams." 81 Fed. Reg. 93,087-93,087. Between SMCRA and the 2017 Statute, Congress now directs *using* IBI, and *not using* IBI.

This system leaves the government unaccountable. Our system of government requires "clear assignment of power," so citizens can "know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance." *Loving*, 517 U.S. at 758. When OSMRE does something or does nothing here, no one can know who to blame.

Congress used the Congressional Review Act to muddy agency delegations nineteen other times—all but one within the past six years. Jody Freeman & Matthew C. Stephenson, Untapped Potential of the Congressional Review Act, 59 Harvard J. on Legis. 279, 286-87 n.33 (2022). The sole example from 2000 demonstrates the paralytic effect on the Executive Branch. After Congress vetoed the Office of Safety and Health's (OSHA) Ergonomics Rule, OSHA never

reissued a new rule. Eric Dude, The Conflicting Mandate: Agency Paralysis through the Congressional Review Act Resubmit Provision, 30 Colo. Nat. Res. Energy & Envtl. L. Rev. 115, 123-125 (2019). The sheer uncertainty of the agencies' remaining authority erodes Executive Power. Declining review here would leave not only OSMRE in the lurch, but agencies implementing those nineteen other rules.

3. Finally, two Harvard Law School professors recently explained a ludicrous, but technically feasible application of the Congressional Review Act using a double-negative. Freeman & Stephenson, Untapped Potential of the Congressional Review Act, 59 Harvard J. on Legis. at 281. They explain how the party in power can resolve a statutory ambiguity in its favor. It can direct the agency to issue a rule enforcing the *opposite* interpretation. *Id.* at 288-290. Then, Congress can use the Congressional Review Act to disapprove of that disliked interpretation, and thus approve the preferred interpretation. *Ibid.* The article puts this theory in the context of the FCC's net-neutrality rule, which prohibited internet service providers from taking money to prioritize internet traffic. *Ibid.* If the President wanted net-neutrality, the FCC could issue a rule holding it lacks statutory authority to require net-neutrality. Then, Congress could pass a statute under the Congressional Review Act vetoing the rule. That statute carries the same force as a statute affirmatively granting the FCC that authority. *Ibid.* This absurd mechanism illustrates a legislative process that the Framers never intended and would never have approved.

Whenever Congress has created new workarounds for the straightforward requirements in Article I, Section 7, this Court has reinforced the Constitution's

directions for passing statutes. This new, convoluted process merits this Court's review.

CONCLUSION

This case merits a writ of certiorari.

Respectfully submitted.

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