APPENDIX A - Court of Appeals Opinion

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 21-1317

CITIZENS FOR CONSTITUTIONAL INTEGRITY; SOUTHWEST ADVOCATES, INC., Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA; THE OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT; DEBRA 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; KATE MACGREGOR, in her official capacity as Acting Assistant Secretary for Land and Minerals Management, Defendants - Appellees.

[Filed: January 10, 2023]

Appeal from the United States District Court for the District of Colorado
D.C. No. 1:20-CV-03668-RM-STV

Before: HOLMES, *Chief Judge*, MURPHY, and HARTZ, *Circuit Judges*.

HARRIS L HARTZ, Circuit Judge.

Plaintiffs Citizens for Constitutional Integrity and Southwest Advocates, Inc. appeal the rejection of their challenges to the constitutionality of the

Congressional Review Act, 5 U.S.C. §§ 801–08 (the CRA or the Act), and Senate Rule XXII, the so- called Cloture Rule, which requires the votes of three-fifths of the Senate to halt debate. We reject their challenges to the CRA and hold that they lack standing to challenge the Cloture Rule.

The CRA was enacted in 1996 to enhance congressional oversight of executive rulemaking. Among other things, it creates an expedited process through which Congress can repeal rules promulgated by federal agencies. Under the Act a rule "shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule." 5 U.S.C. § 801(b)(1). (A joint resolution is effectively the same as a bill except in the context of proposing constitutional amendments.[1]) After it is passed by Congress, a

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[1] "Congress legislates through 'acts' and 'joint resolutions.' Resolutions are recognized in the Constitution, and a joint resolution is a bill within the meaning of the congressional rules and the processes of the Congress. With the exception of joint resolutions proposing amendments to the Constitution, all such resolutions are sent to the President for approval and have the full force of law." *Int'l Bhd. of Elec. Workers v. Wash. Terminal Co.*, 473 F.2d 1156, 1163 (D.C. Cir. 1972); *accord Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1301, 1309 (D.C. Cir. 2004) (per curiam) ("There is no question that [a joint] [r]esolution is a law, enacted in accordance with the bicameralism and presentment requirements of Article I, section 7, clause 3 of the Constitution."); *United States v. Powell*, 761 F.2d 1227, 1235 (8th Cir. 1985) (en banc) ("The fact that the words at the top of the first page of a law are 'a bill' instead of 'a joint resolution' is of significance only for internal congressional purposes. A joint resolution, once signed by the President, is every bit as much of a law as a bill similarly signed."). And "like all other statutes," a joint resolution "is subject to the President's veto." *Nat'l Fed'n of Fed. Emps. v. United States*, 905 F.2d 400, 404 (D.C. Cir. 1990).

joint resolution of disapproval must then go to the President for approval; a presidential veto can be overridden in the manner typical of all legislation. *See id.* § 801(a)(3)(B)(i) (recognizing Congress's authority to override a presidential veto of a joint resolution of disapproval). A rule subjected to a joint resolution of disapproval "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." *Id.* § 801(b)(2). The Act applies only to recently adopted regulations. Congress generally has 60 days from when a final rule is reported to Congress[2] to enact a joint resolution of disapproval. *See id.* § 802(a). But a rule reported to Congress within 60 days of the end of a session of Congress is treated as if it were published on "the 15th session day" (in the Senate) or "the 15th legislative day" (in the House) "after the succeeding session of Congress first convenes," *id.* § 801(d)(1)-(2)(A),[3] thus providing Congress with an

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[2] "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."
5 U.S.C. § 801(a)(1)(A).

[3] Because the 60 days does not include "days either House of Congress is adjourned for more than 3 days during a session of Congress," *id.* § 802(a), the new session may be able to consider regulations promulgated many months before the end of the prior session. *See* Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 Nw. U. L. Rev. 471, 531 (2011) ("[A]ccording to the Congressional Research Service, any final rule submitted to Congress after May 14, 2008, likely

extended opportunity to repeal so-called "midnight regulations" promulgated by an outgoing administration.

Once a proposed CRA resolution is "referred to the committees in each House of Congress with jurisdiction," *id.* § 802(b)(1), the Senate's consideration of the resolution is expedited in several ways. If the committee to which a joint resolution of disapproval has been referred "has not reported such joint resolution (or an identical joint resolution) at the end of 20 calendar days after" the rule's publication, a petition signed by 30 Senators can force the discharge of the resolution from the committee, "and such joint resolution shall be placed on the calendar," *id.* § 802(c); in contrast, for most other legislation, there is "no specific provision in the standing rules of the Senate providing for a definite procedure for the discharge of its committees from further consideration of the matters referred to them." Floyd M. Riddick & Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, S. Doc. No. 101-28, at 802 (Alan S. Frumin ed., rev. ed. 1992). Once a joint resolution of disapproval is reported by (or discharged from) a committee, "it is at any time thereafter in order . . . 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." 5 U.S.C. § 802(d)(1). If the motion to proceed is approved, "the joint resolution shall

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could have been repealed by the new Congress under the CRA.").

remain the unfinished business of the Senate until disposed of." *Id.* Senate debate on a joint resolution of disapproval is "limited to not more than 10 hours," *id.* § 802(d)(2), thereby overriding the Cloture Rule, which provides that the question whether to end debate "shall be decided in the affirmative by three-fifths of the Senators duly chosen and sworn." To date, the CRA has been used to overturn 20 rules, with the "vast majority" of disapprovals coming during the first months of a new presidential administration. Maeve P. Carey & Christopher M. Davis, Cong. Rsch. Serv., R43992, *The Congressional Review Act (CRA): Frequently Asked Questions* 6 (2021), https://sgp.fas.org/crs/misc/R43992.pdf.

One such rule was the Stream Protection Rule, 81 Fed. Reg. 93,066 (Dec. 20, 2016) (the Rule), promulgated by the Department of the Interior's Office of Surface Mining Reclamation and Enforcement (the Office) in the waning days of the Obama Administration. Within a month of the Stream Protection Rule taking effect on January 19, 2017, both Houses of Congress had passed a joint resolution disapproving the Rule, and President Trump had signed the joint resolution into law. *See* 163 Cong. Rec. H859 (daily ed. Feb. 1, 2017) (passing H.J. Res. 38); *id.* at S632 (daily ed. Feb. 2, 2017) (same, by a margin of 54-45, with one Senator not voting); Act of Feb. 16, 2017, Pub. L. No. 115–5, 131 Stat. 10.

The Stream Protection Rule, which the Office issued using authority granted to it by the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 et seq., heightened the requirements for regulatory approval of mining-permit applications. *See* Stream Protection Rule, 81 Fed.

Reg. at 93,068–69 (overview of the Rule's seven major components). According to Plaintiffs, the repeal of the Rule enabled the approval of a 950.55-acre expansion of the King II Coal Mine (the Mine), located in La Plata County, Colorado, and owned by GCC Energy.[4] The Office (jointly with the Bureau of Land Management) released an environmental assessment regarding the projected effects of the Mine's expansion. Relying on that assessment, the Department of the Interior approved the Mine's expansion on March 27, 2018.

On December 15, 2020, Plaintiffs filed suit in the United States District Court for the District of Colorado against the federal government and several high-ranking Department of the Interior officials in their official capacities (collectively, Defendants). They sought (1) a declaration that the CRA and the Cloture Rule are unconstitutional and that the Stream Protection Rule is therefore valid and enforceable; (2) vacation of the approval of the King II Mine permit modification and an injunction against expanded mining activities authorized by

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[4] The federal government has regulatory responsibility for the Mine. Although Colorado has primary authority to regulate "surface coal mining and reclamation operations . . . on non-Federal and non-Indian lands" within its borders, 30 C.F.R. § 906.10, most of the land for both the preexisting Mine and the area added by the expansion is "'split-estate' land[] where the federal government has retained ownership of the subsurface coal (and other minerals), but has disposed of the surface estate. The Ute Mountain Ute (UMU) Tribe owns much of the split-estate surface in this area." Aplts. App., Vol. I at 31. "While the split-estate surface owned by the UMU Tribe is not within a designated Indian Reservation, it does meet the definition of 'Indian Lands' as defined by the [Surface Mining Control and Reclamation Act]," so the Office is "the primary regulator of coal mining operations" for those lands. *Id.*

the modification; and (3) attorney fees. On August 30, 2021, the district court granted Defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. *See Citizens for Const. Integrity v. United States*, No. 20-cv-3668-RM-STV, 2021 WL 4241336, at *1 (D. Colo. Aug. 30, 2021). Plaintiffs timely appealed. We review de novo the district court's grant of the motion to dismiss. *See Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1278 (10th Cir. 2021).

On appeal Plaintiffs assert that the CRA is facially unconstitutional on separation-of-powers, equal-protection, and substantive-due-process grounds, so the joint resolution disapproving the Stream Protection Rule was invalid, the Rule must be reinstated, and the approval of the Mine's expansion must be vacated. We disagree. The procedures instituted by the CRA—which Congress enacted "as an exercise of the rulemaking power of the Senate and House of Representatives, respectively," 5 U.S.C. § 802(g)(1)—are fully compatible with the provisions of the United States Constitution governing how Congress can pass laws; and the CRA survives Plaintiffs' other constitutional challenges. Plaintiffs raise similar challenges with respect to the Cloture Rule, but they lack standing to pursue the matter. Exercising jurisdiction under 28 § 1291, we affirm the dismissal by the district court. Before addressing the merits, we explore our jurisdiction to hear the appeal.

I. JURISDICTION

"To reach the merits of a case, an Article III court must have jurisdiction." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019). We have an "independent obligation" to assure ourselves of

our subject-matter jurisdiction "even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

A. Appellate Jurisdiction

In district court this case was consolidated with a second one under Federal Rule of Civil Procedure 42(a)(2), but this case was appealed separately. We sua sponte asked the parties to "address with particularity in their merits briefs 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, *Citizens for Const. Integrity v. United States*, No. 21-1317 (10th Cir. Sept. 30, 2021). All responded that each case retained its separate identity and that the district court's dismissal of this case was a final decision for purposes of appeal under 28 U.S.C. § 1291, even though the second case remained pending at the time. We agree. The Supreme Court has recently stated that "one of multiple cases consolidated under [Rule 42(a)(2)] retains its independent character, at least to the extent it is appealable and finally resolved, regardless of any ongoing proceedings in the other cases." *Hall v. Hall*, 138 S. Ct. 1118, 1125 (2018). Thus, "when one of several consolidated cases is finally decided, a disappointed litigant is free to seek review of that decision in the court of appeals." *Id.* at 1131. That is what happened here.

B. Statutory Jurisdiction

Although not mentioned by the parties, there is also a potential restriction on our statutory jurisdiction to hear this case. The CRA contains a jurisdiction-stripping provision: "No determination,

finding, action, or omission under this chapter shall be subject to judicial review." 5 U.S.C. § 805. "'Under this chapter' refers to duties the CRA imposes on various actors, whether those duties take the form of determinations, findings, actions, or omissions." *Kan. Nat. Res. Coal. v. U.S. Dep't of Interior*, 971 F.3d 1222, 1235 (10th Cir. 2020) (court lacks jurisdiction to determine whether agency rule is invalid because agency failed to submit the rule to Congress as required by the CRA). The joint resolution disapproving the Stream Protection Rule was an "action under this chapter" within the meaning of § 805, because the CRA's special procedures facilitated its passage through Congress. Hence, § 805, read literally, deprives this court of jurisdiction here. *See Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 561 (9th Cir. 2019) (jurisdiction-stripping provision of CRA "[o]n its face . . . bars judicial review of all challenges to actions under the CRA").

Nevertheless, the federal courts are reluctant to cede their power to enforce the Constitution absent an unambiguous congressional command. "[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988); *accord Cmty. Action of Laramie Cnty., Inc. v. Bowen*, 866 F.2d 347, 352–53 (10th Cir. 1989) ("[J]udicial review of colorable constitutional claims remains available unless Congress has made its intent to preclude review crystal clear."). The Supreme Court requires "this heightened showing in part to avoid the serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional

claim." *Webster*, 486 U.S. at 603 (internal quotation marks omitted).

Section 805 does not meet this clear-statement requirement. It is not enough just to bar judicial review in general, as the Supreme Court has repeatedly ruled when holding that such a general bar does not preclude the courts from entertaining constitutional challenges. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 516-17 (2003) (immigration statute providing that "[n]o court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole" did not bar habeas corpus action challenging the constitutionality of legislation requiring plaintiff's detention without bail); *INS v. St. Cyr*, 533 U.S. 289, 314 (2001) (neither the Antiterrorism and Effective Death Penalty Act of 1996 nor the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 deprived federal courts of jurisdiction over an alien's application for habeas relief under 28 U.S.C. § 2241; the absence of "another judicial forum" for such claims, "coupled with the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law, strongly counsel[ed] against adopting a construction that would raise serious constitutional questions"), *superseded by statute in part as recognized by Nasrallah v. Barr*, 140 S. Ct. 1683, 1690 (2020) (in the REAL ID Act of 2005, Congress "responded to" *St. Cyr* and "clarified that final orders of removal may not be reviewed in district courts, even via habeas corpus, and may be reviewed only in the courts of appeals"); *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 678-

81, 681 n.12 (1986) (statute providing that "[n]o action against the United States, the Secretary [of Health and Human Services], or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter" did not bar statutory or constitutional challenges to regulations promulgated by the Secretary; this "disposition avoid[ed] the serious constitutional question that would arise" if the Court had held that there was no "judicial forum for constitutional claims arising under Part B of the Medicare program" (internal quotation marks omitted)); *Johnson v. Robison*, 415 U.S. 361, 365 n.5, 366- 74 (1974) (statute providing that the decisions of the Administrator of Veterans Affairs "on any question of law or fact under any law . . . providing benefits for veterans . . . shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise" did not bar constitutional challenges brought by conscientious objector); *cf. Webster*, 486 U.S. at 594, 599-605 (statute providing that the CIA director "may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States" barred Administrative Procedure Act challenges to individual employee discharges, but did not bar constitutional due-process, equal-protection, and privacy claims).

We agree with the Ninth Circuit that because § 805 "does not include any explicit language barring judicial review of constitutional claims" relating to the CRA, "we presume that Congress did

not intend to bar such review." *Ctr. for Biological Diversity*, 946 F.3d at 561; *see Kan. Nat. Res. Coal.*, 971 F.3d at 1237 (citing *Center for Biological Diversity* with approval on this point). Plaintiffs exclusively bring constitutional claims, so we have statutory jurisdiction to hear this case.

C. Standing

Under Article III, § 2 of the Constitution the federal courts have jurisdiction only over cases and controversies. "One element of the case-or-controversy requirement is that [plaintiffs], based on their complaint, must establish that they have standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). "[T]he irreducible constitutional minimum of standing contains three elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (internal quotation marks omitted). "Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (brackets, ellipses, and internal quotation marks omitted). "Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotation marks omitted). "Where, as here, a case is at the pleading stage, the plaintiff must clearly allege facts demonstrating each element" of standing. *Spokeo v. Robins*, 578 U.S. 330, 338 (2016) (ellipsis and internal quotation marks omitted).

An organization has standing to sue on behalf of its members if "(a) [at least one of] its members would otherwise have standing to sue in [her] own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Diné Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 840 (10th Cir. 2019) (internal quotation marks omitted); *see also Utah Ass'n of Cntys. v. Bush*, 455 F.3d 1094, 1099 (10th Cir. 2006) (one member with standing is sufficient). If one appellant has standing, we need not worry about the standing of another appellant raising the same issues and seeking the same relief. *See Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 439 (2017); *Rumsfeld v. Forum for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 52 n.2 (2006). We first address standing to challenge the CRA.

1. Standing to Challenge the CRA

In our view, Southwest Advocates may bring its challenge to the constitutionality of the CRA. With respect to the requirements of organizational standing, "the second and third conditions are unquestionably satisfied here" because "protecting the environment is a core purpose of [Southwest Advocates] and the relief it seeks does not require the participation of individual members." *Utah Physicians for a Healthy Env't v. Diesel Power Gear, LLC*, 21 F.4th 1229, 1241 (10th Cir. 2021). Therefore, we need decide only whether a member of the organization has standing in her own right. We conclude that member Julia Dengel has standing.

Ms. Dengel submitted a declaration to the court, which we may properly consider in determining

jurisdictional facts. *See Baker v. USD 229 Blue Valley*, 979 F.3d 866, 872 (10th Cir. 2020). According to the declaration she lives on 45 acres of land south of Hesperus, Colorado, not far from the Mine. She takes daily walks through her neighborhood, during which she encounters many different species of plants and animals. She fears that an expanded Mine "will divert more water from the La Plata River," thereby reducing the amount of wildlife "living near [her] or migrating through." Aplts. App., Vol. II at 176. Ms. Dengel has a well on her property whose water derives from a coal seam and currently is consumable only by the horses that she boards. She worries that expanding the Mine would cause "contaminants" to seep "into the source of [her] well water," thereby making the water undrinkable even by horses— with the consequence that "boarding or owning horses on [her] own land [would become] untenable." *Id.*

First, the harms that concern Ms. Dengel constitute bona fide injuries in fact. The Supreme Court and this court have repeatedly "held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) (internal quotation marks omitted); *see also, e.g.*, *Rocky Mountain Peace & Just. Ctr. v. U.S. Fish & Wildlife Serv.*, 40 F.4th 1133, 1152 (10th Cir. 2022); *Utah Physicians*, 21 F.4th at 1241; *Diné Citizens*, 923 F.3d at 841; *WildEarth Guardians v. U.S. BLM*, 870 F.3d 1222, 1231 (10th Cir. 2017). "[O]nce an interest has been identified as a 'judicially cognizable interest' in one case, it is such an interest

in other cases as well (although there may be other grounds for granting standing in one case but not the other)." *In re Special Grand Jury 89-02*, 450 F.3d 1159, 1172 (10th Cir. 2006). At this stage of the litigation, the declaration sufficiently establishes a "substantial risk" that allowing the Mine's expansion to proceed will threaten the ecosystem around her home and preclude Ms. Dengel from boarding horses on her property. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (internal quotation marks omitted).

Second, the asserted injuries can be traced to Defendants because they approved the source of her concerns, the Mine's expansion. It does not matter that "the environmental and health injuries claimed by [Ms. Dengel] are not directly related to the constitutional attack on the [CRA]." *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 78 (1978). What matters is that, but for the CRA, Ms. Dengel's injuries would not befall her. *See WildEarth Guardians*, 870 F.3d at 1232 ("[T]he legal theory and the standing injury need not be linked as long as redressability is met.").

Third, Ms. Dengel has satisfactorily alleged that her injuries would "likely be redressed by a favorable decision." *Clinton v. City of New York*, 524 U.S. 417, 435 (1998). If we were to hold that the CRA is unconstitutional, the joint resolution disapproving the Stream Protection Rule would be rendered invalid, and the resulting resurrection of the Stream Protection Rule would stop GCC Energy from operating the portion of the Mine located on the 950.55 acres added by the challenged permit. *Cf. INS v. Chadha*, 462 U.S. 919, 936 (1983) ("If the veto provision violates the Constitution, and is severable, the deportation order against Chadha will

be cancelled. Chadha therefore has standing to challenge the order of the Executive mandated by the House veto.").

2. Standing to Challenge the Cloture Rule

On the other hand, both Plaintiffs lack standing to challenge the constitutionality of the Cloture Rule. Southwest Advocates lacks standing because it has not adequately alleged how the environmental harm of which it complains would be redressed by a ruling that the Cloture Rule is unconstitutional. Even if the Cloture Rule is unconstitutional, a decision to that effect would not reinstate the Stream Protection Rule because the Cloture Rule was not invoked in the CRA process that disapproved the Stream Protection Rule. The joint resolution of disapproval passed notwithstanding the Cloture Rule, not because of it. *See In re Fin. Oversight & Mgmt. Bd. for P.R.*, 995 F.3d 18, 22 (1st Cir. 2021) ("The problem with the plaintiffs' contention is that none of the relief that they seek would prevent any of the laws that they contend caused them pecuniary harm from continuing to have full force and effect.").

Southwest Advocates suggests that invalidation of the Cloture Rule could redress its harm because without the Cloture Rule it might be able to obtain legislation reinstating the Stream Protection Rule and revoking the permit for the expanded Mine. But that possibility is too speculative. It is not enough that a favorable ruling on a claim might just happen to redress harm. The Supreme Court has long made it clear that "it must be *likely*, as opposed to merely *speculative*, that the injury will be redressed by a favorable decision," *Lujan*, 504 U.S. at 561 (internal quotation marks omitted; emphasis added), and

that to establish standing "pleadings must be something more than an ingenious academic exercise in the conceivable," *Warth v. Seldin*, 422 U.S. 490, 509 (1975) (internal quotation marks omitted). Where, as here, the "causal relation between [the] injury and [the] challenged action depends upon the decision of an independent third party [such as Congress]," a plaintiff must plausibly allege "at the least that [the] third part[y] will *likely* react in predictable ways." *California v. Texas*, 141 S. Ct. 2104, 2117 (2021) (internal quotation marks omitted; emphasis added); *accord US Magnesium, LLC v. U.S. EPA*, 690 F.3d 1157, 1166 (10th Cir. 2012) ("In a case like this, in which relief for the [plaintiff] depends on actions by a third party not before the court, the [plaintiff] must demonstrate that a favorable decision would create a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." (internal quotation marks omitted)); *cf. Skaggs v. Carle*, 110 F.3d 831, 836 (D.C. Cir. 1997) ("At most the [members of the House of Representatives challenging House Rule XXI(5)(c), which required a supermajority to approve certain tax increases] have shown that [the Rule] could, under conceivable circumstances, help to keep a majority from having its way—perhaps, for example, because a simple majority in favor of an income tax increase might not be prepared, for its own political reasons, to override the preference of the House leadership against suspending or waiving the Rule in a particular instance. But that prospect appears to be, if not purely hypothetical, neither actual nor imminent."). Plaintiffs have not alleged facts establishing that elimination of the Cloture Rule would significantly increase the likelihood that

opponents of the Mine could garner the necessary majority in the Senate (to say nothing of a majority in the House and the support of the President) to halt the operation of the expanded Mine.

As for Citizens for Constitutional Integrity, it lacks standing to challenge the Cloture Rule because it has not alleged a judicially cognizable injury in fact. The group describes itself as "a nonprofit organization that develops and advocates for legislation, regulations, and government programs." Compl. ¶ 22. Its members are "citizens holding governments accountable to their constitutions," and it "watches for actions that contravene our bedrock, fundamental principles, circumstances, and motivations that drove the Founding Fathers and the people in drafting and adopting the Constitution." *Id.* Citizens for Constitutional Integrity is thus a quintessential "concerned bystander[]" seeking "vindication of [its members'] value interests." *Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013) (internal quotation marks omitted) (rejecting standing of opponents of same-sex marriage). But "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74. "The Constitution leaves" such grievances "for resolution through the political process." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998).

Plaintiffs argue that a claim relating to "[t]he separation of powers requires no evidence of harm because it is a '*structural safeguard* rather than a

remedy to be applied only when specific harm, or risk of specific harm, can be identified.'" Aplts. Reply Br. at 17 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995)). But standing was not at issue in *Plaut*. In that case Congress had passed a law requiring the reinstatement of federal securities actions that had been dismissed as untimely. *See Plaut*, 514 U.S. at 214-15. The Supreme Court held that the law violated the separation of powers because it "retroactively command[ed] the federal courts to reopen final judgments." *Id.* at 219. In stating that no "specific harm" or "risk of specific harm" was required to sustain a separation-of-powers argument, *id.* at 239, the *Plaut* Court merely sought to clarify that the general rule adopted by the Court—that Congress cannot set aside final judgments of the judiciary—applies regardless of whether one can identify a specific and immediate risk of harm to the separation of powers in a particular case. This categorical rule was justified as "a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Id.* at 239. The opinion was addressing the elements of a separation-of-powers claim, not who can bring such a claim; it says absolutely nothing about easing the requirements of standing for separation-of-powers claims. Indeed, just two years later the Court indicated that standing would be examined more strictly when such claims are raised. It stated that its "standing inquiry has been *especially* rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines*, 521 U.S. at 819- 20

(emphasis added); *accord Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

Because neither Plaintiff has standing to challenge the Cloture Rule, we do not reach the merits of Plaintiffs' arguments that relate solely to the Cloture Rule.

II. MERITS

Having satisfied ourselves of our jurisdiction to review Plaintiffs' constitutional challenges to the CRA, we now turn to the merits of those challenges. Plaintiffs argue that on its face the CRA "violate[s] the separation of powers, equal protection, and due process." Aplts. Br. at 69. None of these arguments has merit.

A. Separation of Powers

Plaintiffs contend that the CRA and the Cloture Rule combine to "create a one- way ratchet," *id.* at 23, that "inexorably undermines, erodes, and chips away at Article II Executive Power," *id.* at 24-25, and therefore "violates the separation of powers," *id.* at 25. They reason that "[i]f 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." *Id.* at 29-30. They lament that the use of the CRA to disapprove the Stream Protection Rule "gutted [the Office's] current rulemaking authority," *id.* at 33, and they contend that the resulting "chilling effect" will compel the Office and other agencies to "rationally decline to implement some rules" for fear of Congress disapproving those rules," *id.* at 34. They assert that "[r]eductions in agency authorities reduce Executive Power," *id.* at 36, and

that "[a]lthough 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," *id.* at 37 (internal quotation marks omitted). In their view the CRA, and the joint resolutions of disapproval passed through it, create such an impairment.

We are not persuaded. Plaintiffs' argument is based on the false premise that Congress impermissibly treads on executive authority when it passes laws overriding or overruling agency rules or interpretations, or when it limits the scope of past statutory delegations. A joint resolution adopted under the CRA is authorized by the same provisions of the Constitution that authorize all legislation. *See Int'l Bhd. of Elec. Workers*, 473 F.2d at 1163 ("Resolutions are recognized in the Constitution, and a joint resolution is a bill within the meaning of the congressional rules and the processes of the Congress."). If Congress disagrees with an agency rule, then Congress may pass a law overriding it; such a course of events is not a usurpation of *executive* power but instead a legitimate exercise of *legislative* power. Plaintiffs concede that Congress "[u]ndoubtedly . . . could reduce Executive Power one statute at a time." Aplts. Br. at 37. It makes no difference what internal parliamentary procedures Congress adopts in doing so, so long as Congress complies with the fundamental constitutional requirements of bicameralism (approval by both Houses of Congress) and presentment (submission to the President for approval). *See* U.S. Const. art. I, § 7. "Our task is simply to hold the Congress within the limits of the power given it by the Constitution, not to pass

judgment on matters of legislative practice." *Powell*, 761 F.2d at 1235.

To be sure, the Supreme Court has held that several novel policymaking procedures adopted by Congress were unconstitutional as violations of the proper separation of powers. For example, the Line Item Veto Act enabled the President to partially repeal Acts of Congress unilaterally, contrary to the requirements of bicameralism and presentment in the enactment of legislation. *See Clinton*, 524 U.S. at 436-49. The Immigration and Nationality Act unconstitutionally provided that one House of Congress could override an Attorney General's nondeportation decision. *See Chadha*, 462 U.S. at 945-59. And another statute unconstitutionally subjected decisions of a regional airport authority to a veto power held by nine members of Congress. *See Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265-77 (1991). Nor may Congress directly interfere with an exclusive power of the President, such as the removal of the Comptroller General, *see Bowsher v. Synar*, 478 U.S. 714, 721-27 (1986), or the recognition of foreign nations and governments, *see Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 10-32 (2015) (statute could not require the Secretary of State, upon request, to record on the passport of a citizen born in Jerusalem that the place of birth was Israel).

But the CRA contravenes none of these separation-of-powers prohibitions. At oral argument Plaintiffs' counsel conceded—correctly—that every CRA resolution, including the one used to disapprove the Stream Protection Rule, is enacted by a majority vote of both Houses of Congress and signed by the President, thus complying with the

"single, finely wrought and exhaustively considered, procedure," *Chadha*, 462 U.S. at 951, of "bicameral passage followed by presentment to the President," *id.* at 954-55.[5] And regulation of surface coal mining is not one of "[t]he Executive's exclusive power[s]," *Zivotofsky*, 576 U.S. at 30, but instead is a creature of Congress's "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," U.S. Const. art. IV, § 3, cl. 2, and its "Power . . . To regulate Commerce . . . among the several States, and with the Indian Tribes," U.S. Const. art. I, § 8, cl. 3.

As stated by the Supreme Court, "an agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Later limitation or withdrawal of statutory grants "by duly enacted legislation in an area where Congress has previously delegated managerial authority is not an unconstitutional encroachment on the prerogatives of the Executive; it is merely to reclaim the formerly delegated authority." *Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1162 (10th Cir. 2004) (emphasis omitted); *see Chadha*, 462 U.S. at 955 ("Congress must abide by its delegation of authority *until that delegation is legislatively altered or revoked*." (emphasis added)). The opposite is also true. If Congress wants the Office to reinstate the Stream Protection Rule, it can simply pass a law saying so. *See* 5 U.S.C. § 801(b)(2) (the CRA's

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[5] Plaintiffs also charge that the CRA "does not satisfy Article I, Section 7, because it allows no pocket-veto of [CRA] statutes." Aplts. Reply Br. at 4. But Plaintiffs have waived this argument because they did not raise it until their reply brief. *See White v. Chafin*, 862 F.3d 1065, 1067 (10th Cir. 2017).

prohibition of agencies issuing new rules that are "substantially the same" as previously disapproved rules does not apply if "the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule"). The CRA raises no separation-of-powers concerns.

B. Equal Protection

We must also reject Plaintiffs' claim that the CRA denies equal protection.[6] A fundamental tenet of equal-protection analysis is that a cognizable claim must identify a class of persons disadvantaged by the government action. In other words, government action challenged on equal-protection grounds must "affect some groups of citizens differently than others." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 601 (2008) (internal quotation marks omitted) (but recognizing that in the context of certain types of government decision-making the "group" may be a class of one); *see also Ross v. Moffitt*, 417 U.S. 600, 609 (1974) (equal protection "emphasizes disparity in treatment by [the government] between classes of individuals whose situations are arguably indistinguishable"); *Missouri v. Lewis*, 101 U.S. (11 Otto) 22, 31 (1879) ("[The Equal Protection Clause] means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same

[6] 6 Although by its express language the Fourteenth Amendment's Equal Protection Clause applies to States rather than the federal government, the Supreme Court has long understood the Fifth Amendment's Due Process Clause to include an equal-protection component. *See*, *e.g.*, *United States v. Windsor*, 570 U.S. 744, 774 (2013); *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954).

place and under like circumstances."); *Dalton v. Reynolds*, 2 F.4th 1300, 1308 (10th Cir. 2022) ("To assert a viable equal protection claim, a plaintiff must first make a threshold showing that she was treated differently from others who were similarly situated to her." (brackets and internal quotation marks omitted)); *Christy v. Hodel*, 857 F.2d 1324, 1331 (9th Cir. 1988) ("In order to subject a law to any form of review under the equal protection guarantee, one must be able to demonstrate that the law classifies persons in some manner." (brackets and internal quotation marks omitted)).

For typical equal-protection claims, it is obvious what the characteristic at issue is, because the challenged law facially discriminates on the basis of some discernible trait. *See, e.g.*, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 487-88 (1954) (race); *United States v. Virginia*, 518 U.S. 515, 520 (1996) (sex); *Graham v. Richardson*, 403 U.S. 365, 371 (1971) (citizenship). "When a distinction between groups of persons appears on the face of a state law or action, an intent to discriminate is presumed and no further examination of the legislative purpose is required." *Dalton*, 2 F.4th at 1308 (internal quotation marks omitted). The only questions are (1) what degree of judicial scrutiny applies to a distinction based on this trait, and (2) whether the classification at issue withstands such scrutiny. *See Price-Cornelison v. Brooks*, 524 F.3d 1103, 1109-10 (10th Cir. 2008). In other cases the challenged government action does not explicitly or overtly treat the plaintiffs differently based on a particular characteristic. But we may deduce the existence of the requisite discriminatory intent by examining surrounding circumstances. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*,

429 U.S. 252, 266-68 (1977) (evidence suggesting that an "invidious discriminatory purpose was a motivating factor" behind an official action or policy may include disparate impact, historical background, departures from normal procedures, and contemporary statements by policymakers).

The problem for Plaintiffs is that they cannot coherently describe a class of discriminated-against persons to which they (or, more precisely, their members) belong. They declare that "[t]he 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)." Aplts. Br. at 43. As they put it, "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." *Id.* (brackets and internal quotation marks omitted). Plaintiffs contend that this grouping includes people protected by regulations such as the Stream Protection Rule. The second category, they say, "includes citizens who face less-complex issues that Congress can solve directly by statute without delegating to an agency." *Id.* at 44. Proffered examples of "simpler problems" are "immigration, minimum-wage, and campaign finance laws, which have perennially failed to gain enough votes to invoke the Cloture Rule." *Id.* at 43-44. Plaintiffs maintain that these classifications "are the type of unusual discriminations or indiscriminate imposition of inequalities that the Supreme Court

rejects." *Id.* at 44 (internal quotation marks omitted).

Despite this rhetoric, we fail to see how to identify a specific person as being discriminated against by the CRA. The problems with making such an identification are manifold. To begin with, given the pervasiveness of federal regulation, one would be hard-pressed to distinguish between activities that can be directly regulated by Congress and those that require some delegation to government agencies. And the fact that one is impacted by such regulation does not determine whether that person would be helped or harmed by the possibility of congressional review under the CRA. Any regulation—any law—will create winners and losers. And the general subject matter of the regulation itself will not tell us who benefits and who is harmed. An environmentalist may be happy with one environmental regulation and distressed by another. The "class of persons" discriminated against by the CRA will vary depending on what particular regulation is up for consideration by Congress; after all, the CRA could have an impact on any regulation promulgated by a federal agency. There will always be a multitude of regulations that could be affected by consideration under the CRA, and one person could simultaneously be in the discriminated-against class with respect to some regulations (regulations that the person wishes to protect against congressional review) and be in the discriminated-in-favor-of class with respect to others. In light of the neutrality of CRA procedures with respect to the content of regulations, there is simply no sensible way of delineating who is within the purported class of those discriminated against by that statute. And because Plaintiffs have failed

"to demonstrate that the law classifies persons in some manner," we cannot "subject [the CRA] to *any* form of review under the equal protection guarantee" of the Fifth Amendment's Due Process Clause. *Christy*, 857 F.2d at 1331 (internal quotation marks omitted; emphasis added).

C. Substantive Due Process

Finally, Plaintiffs contend that the CRA violates their right to substantive due process. They essentially concede that because the CRA does not implicate a fundamental right, rational-basis review applies to this claim. Such a "highly deferential" standard of review, *Maehr v. U.S. Dep't of State*, 5 F.4th 1100, 1122 (10th Cir. 2021) (internal quotation marks omitted), is particularly appropriate given that the bailiwick of the CRA is the internal rulemaking of Congress, and each House of Congress has express constitutional authority to "determine the Rules of its Proceedings," U.S. Const. art. I, § 5, cl. 2. A law will be sustained under this tier of scrutiny if it is "rationally related to a legitimate governmental purpose." *Hodel v. Indiana*, 452 U.S. 314, 331 (1981); *accord Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002). A party challenging a law under rational-basis review must "negative every conceivable basis which might support it." *FCC v. Beach Commc'ns*, 508 U.S. 307, 315 (1993) (internal quotation marks omitted). Our assessment is limited to whether "it might be thought that the particular legislative measure was a rational way" to address the perceived "evil at hand." *Scarlett v. Air Methods Corp.*, 922 F.3d 1053, 1070 (10th Cir. 2019) (internal quotation marks omitted). Thus, "a legislative choice . . . may be based on rational

speculation unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 315. "Where there are plausible reasons for Congress' action, our inquiry is at an end." *Id.* at 313-14 (internal quotation marks omitted). "[I]t is entirely irrelevant for constitutional purposes" whether the putative rational basis "actually motivated the legislature." *Id.* at 315.

There are several plausible reasons for the Senate to have different procedures for enacting ordinary legislation versus repealing agency-formulated rules. For one, expedited procedures for the latter may enable more efficient congressional oversight of delegations to executive branch agencies, by allowing Congress to swiftly countermand agency actions that it perceives as unwise, unfounded, or otherwise unwanted. Maintaining Congress's primacy in lawmaking—including by overriding agency actions via duly enacted legislation—is a legitimate governmental purpose. Eliminating self-imposed roadblocks to the passage of legislation through an oft- unwieldy body, as the CRA does, is rationally related to this end. Other rational bases might include control of "midnight regulations" by lame-duck administrations, *cf.* Carey & Davis, *supra*, at 6 & n.28, and increasing oversight of rulemaking by independent agencies, *cf. id.* at 4-5. Any one of these rationales suffices individually. Plaintiffs claim that in enacting the CRA, "Congress irrationally presumed pervasive agency misconduct," and therefore the CRA fails rational-basis review. Aplts. Br. at 54. They appear to contend that the presumption of regularity of actions by government agencies, *see Nat'l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 174 (2004) ("The 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." (internal quotation marks omitted)), creates a presumption that congressional measures to overturn agency action must be improperly motivated. And they claim that support for the proposition that there was improper motivation can be found in the statements of several members of Congress.

Plaintiffs' argument is fatally flawed in several respects. First, the statements of a few legislators concerning their motives for voting for legislation is a reed too thin to support invalidation of a statute. As Chief Justice Warren wrote in *United States v. O'Brien*, 391 U.S. 367, 384 (1968), the Court will not "void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." And such invalidation is likely to be futile. As the Chief Justice said, "We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *Id.*

Plaintiffs' argument is also flawed because the presumption of regularity is inapplicable in this context. The presumption of regularity is an evidentiary hurdle for litigants seeking to challenge an agency's administration of legislative commands; it says nothing about the propriety of revising those legislative commands. 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. Indeed, if the regulation had been improperly promulgated, it could be set aside through litigation. If any presumption is to apply in evaluating the legitimacy of the CRA, it should be that the statute was enacted to address "undesirable" (in the eyes of Congress) regulation that was not subject to judicial correction.

The third flaw in Plaintiffs' argument is also dispositive. In challenging the CRA because of the alleged motive in enacting it, Plaintiffs are simply asking us not to apply rational-basis review, where actual motive is not to be considered. The reviewing court is only to assess whether there is a conceivable proper reason for the legislation, and "it is entirely irrelevant for constitutional purposes whether the conceived reason" for doing so "actually motivated the legislature." *Beach Commc'ns*, 508 U.S. at 315. The burden on those challenging the legislation is, as we have already said, to "negative every conceivable basis which might support it." *Id.* It is not enough to come up with some improper purpose. There is no substance to Plaintiffs' substantive-due-process challenge.

III. CONCLUSION

"The [C]onstitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these

limitations all matters of method are open to the determination of [each] house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just." *United States v. Ballin*, 144 U.S. 1, 5 (1892); *accord NLRB v. Noel Canning*, 573 U.S. 513, 551 (2014) (reaffirming *Ballin*).

Plaintiffs object to Congress's adoption of the CRA and the Senate's use of the Cloture Rule. They clearly believe "that some other way would be better, more accurate, or even more just." *Ballin*, 144 U.S. at 5. But that is not for them—or us—to decide. The prerogative to change the Senate's rules of debate belongs to the Senate alone.

We AFFIRM the district court's order.

APPENDIX B – District Court Order

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. 1:20-CV-3668-RM-STV

CITIZENS FOR CONSTITUTIONAL INTEGRITY; SOUTHWEST ADVOCATES, INC., Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA; THE OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT; DEBRA 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; KATE MACGREGOR, in her official capacity as Acting Assistant Secretary for Land and Minerals Management, Defendants - Appellees.

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

APPENDIX C – Court of Appeals' Order Denying the Petition for Panel Rehearing and Rehearing En Banc

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 21-1317

CITIZENS FOR CONSTITUTIONAL INTEGRITY; SOUTHWEST ADVOCATES, INC., Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA; THE OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT; DEBRA 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; KATE MACGREGOR, in her official capacity as Acting Assistant Secretary for Land and Minerals Management, Defendants - Appellees.

[Filed: March 9, 2023]

Appeal from the United States District Court
for the District of Colorado
D.C. No. 1:20-CV-3668-RM-STV

Before: HOLMES, *Chief Judge*, MURPHY, and HARTZ, *Circuit Judges*.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge

in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX D - CONSTITUTIONAL AND STATUTORY PROVISIONS

1. U.S. Const. Art. I, § 3, Cl. 4 provides:

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

2. U.S. Const. Art. I, § 3, Cl. 6 provides:

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

3. U.S. Const. Art. I, § 5, Cl. 2 provides:

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

4. U.S. Const. Art. I, § 7, Cls. 2 and 3 provide:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names

of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

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

5. U.S. Const. Art. II, § 1, Cl. 1 provides:

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows * * *

6. U.S. Const. Art. II, § 2, Cl. 1 provides:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons

for Offences against the United States, except in Cases of Impeachment.

7. U.S. Const. Art. II, § 2, Cl. 2 provides:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

8. U.S. Const. Art. II, § 3 provides:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

9. U.S. Const. Art. II, § 4 provides:

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

10. U.S. Const. Art. V provides:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

11. The U.S. Const. Amend. XIV, § 3 provides:

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

12. The U.S. Const. amend. XXV, § 4 provides:

Whenever the Vice President and a majority of either the principal officers of the executive departments or

of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives has written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

13. Senate Rule XXII.2 provides:

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, 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.

14. 5 U.S.C. 801(b) provides:

(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.

15. 5 U.S.C. 802(a) provides:

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).

16. 5 U.S.C. 802(d)(1) provides:

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.

17. 5 U.S.C. 801(f) provides:

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.

18. 5 U.S.C. 802(a) provides:

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).

19. 5 U.S.C. 802(d)(1) provides:

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.

20. 5 U.S.C. 802(g) provides:

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.

21. 5 U.S.C. 805 provides:

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

22. The Act of Feb. 16, 2017, Pub. L. No. 115-5, 131 Stat. 10 (the 2017 Statute) provides:

Joint Resolution

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.