Nos. 24-3133, 24-3206, 24-3252

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OHIO TELECOM ASSOCIATION

Petitioner,

HAMILTON RELAY, INC.,

Intervenor.

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,

Respondents.

On Petitions For Review Of An Order Of The
Federal Communications Commission, Agency No. 23-111

BRIEF OF TECHFREEDOM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING EN BANC

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Sixth Circuit Case Nos.: 24-3133, 24-3206, 24-3252
Case Name: Ohio Telecom Ass'n, et al. v. FCC, et al.
Name of Counsel: John Anderson Jung

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Disclosed and certified to this 6th day of October 2025.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

TechFreedom is a nonprofit, nonpartisan think tank dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible. TechFreedom is committed to protecting data privacy while ensuring that the administrative state acts within the proper bounds of its authority. *See* TechFreedom Motion for Leave to File Amicus Brief, No. 24-3133 (6th Cir., Oct. 6, 2025).

INTRODUCTION & SUMMARY OF ARGUMENT

In 2016, the FCC adopted the omnibus Broadband Privacy Order. *Protecting Priv. of Customers of Broadband & Other Telecomms. Servs.*, 31 FCC Rcd 13911 (2016) (2016 Order). The 2016 Order contained fifty-seven distinct rules governing how telecommunications carriers manage consumer data. *Id.* at 14080-14086 (Appendix A). The 2016 Order included the 2016 Data Breach Notification Rule, which required

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

telecommunications carriers to maintain records and report data breaches directly to the FCC. *Id.* at 14085-86 (§ 64.2006).

In 2017, Congress used the Congressional Review Act (CRA) to pass a joint resolution "providing for congressional disapproval" of the 2016 Order and declaring that "such rule shall have no force or effect." Pub. L. No. 115-22, 131 Stat. 88 (2017). The President signed the resolution, and the FCC rescinded the 2016 Order. Op. 7. The joint resolution prohibits the FCC from reissuing the rule "in substantially the same form" or issuing a "new rule that is substantially the same[.]" 5 U.S.C. § 801(b)(2).

Despite the joint resolution, the FCC published the Data Breach Reporting Requirements Rule in early 2024. 89 Fed. Reg. 9968 (Feb. 12, 2024) (2024 Order). This purportedly new rule is substantially the same — indeed, functionally identical — to the 2016 Data Breach Notification Rule. To justify reissuing substantially the same rule, the FCC tortures the text of the CRA, arguing that the law "does not prohibit the Commission from revising its breach notification rules in ways that are similar to, or even the same as, some of the revisions that were adopted in the 2016 Privacy Order, unless the revisions adopted are the same, in

substance, as the 2016 Privacy Order *as a whole*." *Id.* at 9993 (emphasis added).

In a split decision, the panel upheld the FCC's interpretation of the CRA. In doing so, the panel resolved a question of exceptional importance, mistakenly holding that courts must compare revised rules to entire agency orders to determine whether they are substantially the same. Op. 34. The ruling allows agencies to "circumvent the CRA[,]" and thus congressional will, by reissuing rules piecemeal. Dissent 40, 41. The case strikes at "the heart of the CRA" and warrants the full Court's attention. *Id.* at 40.

ARGUMENT

I. The Panel's Congressional Review Act Holding Would Allow Agencies to Flout Congressional Disapproval by Reissuing Rules Piecemeal.

In 2017, Congress passed a CRA joint resolution nullifying the 2016 Order. 131 Stat. 88 (2017). The joint resolution stated: "Congress disapproves the rule submitted by the Federal Communications Commission relating to 'Protecting the Privacy of Customers of Broadband and Other Telecommunications Services' (81 Fed. Reg. 87274) (December 2, 2016), and such rule shall have no force or effect." *Id.*

Under the CRA, when "Congress enacts a joint resolution of disapproval," and the Presidents signs the resolution, the disapproved rule "shall not take effect (or continue) . . . [.]" Op. 30 (citing 5 U.S.C. § 801(b)(1)). "A rule that does not take effect (or does not continue) . . . 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" absent specific authorizing legislation. 5 U.S.C. § 801(b)(2). A joint resolution deprives the disapproved rule of "any force or effect" and "validly amend[s]" the agency's statutory authority by prohibiting the issuance of rules that are substantially the same. *See Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 562 (9th Cir. 2019).

The majority opinion opens by acknowledging that "when Congress disapproved the 2016 Order, it nullified every constituent rule contained therein . . . [and] limited the FCC's statutory authority going forward by proscribing it from promulgating a new rule 'substantially the same' as the rejected rule." Op. 33-34. The majority continues: "[T]o determine whether a new rule is 'substantially the same' as a prior rule, the CRA makes clear that the prior rule should be construed as the rule identified in the disapproval resolution." *Id.* at 34.

Thus, the majority concludes, "we must compare the 2024 Order to the *entire* 2016 Order and determine whether they are substantially the same." *Id.* (emphasis added); *see also* Dissent 40 ("[The majority] asserts that, instead of focusing on the similarities between the specific breach-reporting rules, we should instead compare the entirety of the FCC's 2016 and 2024 orders, which included the breach-reporting rules and many other discrete rules."). To support its interpretation, the majority argues that "[i]f Congress intended to prohibit an agency from issuing a new rule that is substantially the same as any part of a prior rule nullified by a disapproval resolution, it could have said so." Op. 34.

Congress did, in fact, say so. As the majority notes, the CRA incorporates the Administrative Procedure Act's definition of "rule": "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." Op. 30, 32 (citing 5 U.S.C. §§ 551(4), 804(3)). "[A] rule can constitute either the 'whole' *or 'a part'* of an agency statement, depending on the applicable context." Op. 32 (emphasis added); Dissent 41. The majority fails to identify any conclusive context indicating that,

here, Congress intended to prohibit reissuance of only one part of the 2016 order.

Rather than grapple with the relevant context, the majority shifts the burden of proof to Congress, arguing that, to prohibit reissuance of a specific part of a prior rule, Congress must "pass[] resolutions with specific language." Op. 34. The majority's interpretation of the CRA, however, prevents Congress from prohibiting the issuance of new rules that are substantially the same as disapproved rules — no matter what language the legislature uses. The dissent explains:

> The majority's exclusive focus on the entire order would allow administrative agencies to easily circumvent Congress's disapproval. For instance, if the FCC issued an order adopting four discrete rules (Rules A, B, C, and D) and Congress disapproved it, then, under the majority's logic, the FCC could skirt the disapproval by readopting Rules A and B in one order and Rules C and D in another. Neither of those new orders, under the majority's interpretation of the CRA, would be "substantially the same" as the one that Congress disapproved. That interpretation, rather than giving effect to congressional intent, merely encourages creative ways to flaunt it.

Dissent 41-42. The majority's interpretation allows agencies to "skirt" Congressional disapproval by reissuing rules piecemeal. *Id.* at 41. Since enacting the CRA, Congress has passed thirty-six joint resolutions disapproving of rules. *FAQs on the Congressional Review Act*, GAO,

https://www.gao.gov/legal/congressional-review-act/faqs-on-the-congressional-review-act (last visited Oct. 6, 2025). By subdividing disapproved rules and issuing the subparts in separate orders, agencies can "easily circumvent" every one of these resolutions. Dissent 41. For example, the majority's interpretation of the CRA would allow the Department of the Interior to resurrect the Refuges Rule, which Congress rejected in 2017.

II. The Panel's Congressional Review Act Holding Opens the Door to Reissuing Disapproved Rules like the Refuges Rule.

Alaska allows hunters to hunt big game predators within the state, including "black bears, brown bears, and wolves." *Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 558 (9th Cir. 2019) (citing Alaska Admin. Code tit. 5, §§ 92.110, 92.115, 92.124 (2019)). In 2016, however, the U.S. Fish & Wildlife Service, a bureau within the Department of the Interior, enacted a rule banning "certain methods of hunting bears and wolves" on national wildlife refuges in Alaska. *Id.* (citing Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska, 81 Fed. Reg. 52248-01, 52252 (Aug. 5, 2016) (the "Refuges Rule") (codified at 50 C.F.R. §

36.32(b), repealed by 82 Fed. Reg. 52009-01 (Nov. 9, 2017)). "The Rule effectively prevented" Alaska from authorizing big game predator hunting on federal land within the state. *Id.*

Subpart B of the Refuges Rule governed "Subsistence Uses[.]" Section 36.13 allowed "federally qualified subsistence users" to catch and keep fish "for subsistence uses on Alaska National Wildlife Refuges" in compliance with federal law. Refuges Rule at 52272 (§ 36.13 Subsistence fishing.). Likewise, Section 36.14 allowed "[f]ederally qualified subsistence users" to "hunt and trap wildlife for subsistence uses on Alaska National Wildlife Refuges . . . ." *Id.* (§ 36.14 Subsistence hunting and trapping.).

In contrast, Subpart D governed "Non-Subsistence Uses[.]" Section 36.32(b) prohibited "[p]redator control" (defined as "the intention to reduce the population of predators for the benefit of prey species") on National Wildlife Refuges in Alaska "unless it is determined necessary to meet refuge purposes, is consistent with Federal laws and policy, and is based on sound science in response to a conservation concern." *Id.* (§ 36.32(b)). Section 36.32(v) went a step further, prohibiting specific "methods and means for take of wildlife" like "[u]sing snares, nets, or

traps to take any species of bear" and "[t]aking wolves and coyotes from May 1 through August 9[.]" *Id.* (§ 36.32(v)). Taken together, Subpart B and Subpart D authorized certain forms of subsistence fishing and hunting, while banning most non-subsistence hunting of big game predator species.

Lastly, Section 36.42 in Subpart D authorized a federal "Refuge Manager [to] close an area or restrict an activity in an Alaska National Wildlife Refuge on an emergency, temporary, or permanent basis . . . ." *Id.* at 52273 (§ 36.42 Public participation and closure procedures.). For example, Refuge Managers could close or restrict areas "to the use of aircraft, snowmachines, motorboats, or nonmotorized surface transportation, or taking of fish and wildlife" by following specific procedures. *Id.* (§ 36.42(e)).

The Refuges Rule, however, was short-lived: In 2017, Congress passed, and the President signed, a joint resolution nullifying the Rule. *Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 559 (9th Cir. 2019) (citing Pub. L. No. 115-20, 131 Stat. 86 (2017)). The joint resolution stated: "Congress disapproves the rule submitted by the Department of the Interior relating to 'Non-Subsistence Take of Wildlife, and Public

Participation and Closure Procedures, on National Wildlife Refuges in Alaska' (81 Fed. Reg. 52247 (August 5, 2016)), and such rule shall have no force or effect." Pub. L. No. 115-20, 131 Stat. 86 (2017). The Department of the Interior subsequently rescinded the rule. *Bernhardt*, 946 F.3d at 559 (citing Effectuating Congressional Nullification of the Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska Under the Congressional Review Act, 82 Fed. Reg. 52009-01, 52009 (Nov. 9, 2017)).

Under the majority's interpretation of the CRA, the Department of the Interior could easily reissue the Refuges Rule despite the joint resolution by simply readopting Subpart B and Subpart D as separate rules. "[T]he rule identified in the disapproval resolution" was the "entire" Refuges Rule. Op. 34. The joint resolution did not address the Subparts separately: Thus, under the majority's interpretation, Interior could readopt Subpart B and Subpart D as separate rules without violating the CRA's prohibition against reissuing "a new rule that is substantially the same as" the rejected Rule. 5 U.S.C. § 801(b)(2). For good measure, Interior could break Subpart D into two rules, issuing separate rules on Subsistence Uses (Rule A), Non-Subsistence Uses (Rule

B), and Closure Procedures (Rule C) — "readopting Rules A and B in one order and Rule[] C . . . in another." Dissent 41. Alternatively, Interior could issue a separate order for each of the three rules. The agency could slice and dice the Refuges Rule in any number of ways. Either way, the majority would hold that the new rules are not "substantially the same as" the original disapproved of by Congress. 5 U.S.C. § 801(b)(2).

Whether courts must focus on "the part" or "the whole" of a disapproved rule when evaluating whether a new rule is "substantially the same" goes to "the heart of the CRA . . . [.]" Dissent 40. "To put the question another way: At what level of generality do we evaluate whether 'the rule' is being 'reissued in substantially the same form'?" *Id.* Focusing on "the whole" of a rule, like the majority, allows agencies to circumvent congressional disapproval by reissuing rules piecemeal in separate orders. This interpretation would practically "read[] the CRA out of the United States Code altogether." Dissenting Statement of Commissioner Brendan Carr at 1 (Dec. 13, 2023), http://bit.ly/4mNnXbl; *see also* Dissenting Statement of Commissioner Simington at 1 (Dec. 13, 2023), https://bit.ly/4bPBxWI (warning that this "wooden reading" would make the CRA "a nullity").

"[T]he effect of congressional disapproval of [a] rule is also disapproval of its parts"; therefore, "by disapproving the whole 2016 order, Congress disapproved of each of its constituent parts." Dissent 41. Holding otherwise "'render[s] what Congress has plainly done'—here, disapproving rules—'devoid of reason and effect.'" *Id.* (quoting *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217–18 (2002)).

The CRA "was designed to give Congress an expedited procedure to review and disapprove federal regulations." Op. 30 (quoting *Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 556 (9th Cir. 2019)). The legislature crafted the statute to balance "the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws . . . reclaiming for Congress some of its policy making authority." 142 Cong. Rec. 6926 (1996) (statement of Rep. Hyde). To the contrary, the panel's CRA holding "render[s] [congressional] disapproval meaningless and [] shift[s] legislative power from Congress to an administrative agency." Dissent 42 (comparing the panel's holding to *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 411–13 (2024)).

CONCLUSION

This Court should grant Petitioner's petition for rehearing en banc.

October 6, 2024

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October 6, 2025

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October 6, 2025