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CC: Co-sponsors of S.J. Res. 52 and H.R.J. Res. 129

Dear Leaders Schumer and McConnell, Leaders Pelosi and McCarthy, Speaker Ryan, Sen. Markey, and Rep. Doyle:

We write to clarify increasingly important legal questions regarding the application and effect of the Congressional Review Act (CRA). These questions arise in the context of the CRA Resolutions of Disapproval filed by Senator Ed Markey (D-MA) (S.J. Res. 52) and Rep. Mike Doyle (D-PA) (H.R.J. Res. 129) to overturn the Federal Communications Commission's (FCC) 2017 Restoring Internet Freedom Order (RIFO). In brief, our legal conclusions are as follows:

1. Contrary to what their supporters intend, these resolutions would not restore the net neutrality rules contained in the FCC's 2015 Open Internet Order (OIO), nor would they affect the FCC's reclassification of broadband Internet access services (BIAS) as an information service subject to Title I of the Communications Act of 1934.
2. Instead of "preserving net neutrality," the Markey and Doyle resolutions would actually eliminate the only piece of the 2015 net neutrality rules that remains in

effect: the transparency rule, which the FCC reissued, with slight expansions, in the 2017 RIFO. In fact, the FCC would be barred from ever issuing *any* substantially similar transparency requirements absent congressional authorization to do so. A future Democratic FCC could (and likely would, absent legislation) reverse that conclusion, finding that, as the OIO did, BIAS is a telecommunications service subject to Title II of the Act. But the CRA cannot be used to compel a Republican FCC to subject BIAS to common carrier status — nor to reverse a future Democratic FCC after it restores the Title II status of BIAS.

Accordingly, to finally put neutrality principles on sound legal footing, we urge lawmakers to enact substantive legislation to give the FCC clear authority to enforce those principles.

Why the CRA Cannot Reverse Title II Reclassification

The CRA does not apply to the FCC’s regulatory classification decisions because they are not “rules” subject to the CRA.¹ The CRA follows the distinction drawn in the Administrative Procedure Act between “rules” and “orders.”² This definition requires that a rule have “future effect,”³ meaning both that the rule cannot have *retroactive* effect and also that it must bind the agency in the future as a reading of the statute, rather than merely indicating how the agency intends to apply its discretion as a policy matter. The CRA goes further by expressly stating the CRA does not apply to “any rule of particular applicability.”⁴ Courts have said that “an administrative directive is deemed *not* to be of general applicability” — and, thus, of “particular applicability” and exempt from the CRA — “if ... only a clarification or explanation of existing law or regulations is expressed.”⁵ This means that the declaratory order aspect of the RIFO (*i.e.*, undoing Title II reclassification) is not subject to the CRA, because it did not promulgate a new substantive rule; instead, it reinterpreted the Communications Act in an adjudicatory proceeding, rather than a rulemaking.

Whether a Title I/Title II classification decision is a “rule” or an “order” under the APA has already been resolved by the nation’s second most important court. In *Qwest Services Corp. v. F.C.C.*, a seller of prepaid calling cards challenged the FCC’s declaratory ruling that its

¹ Bennett L. Ross, *Congressional Review Act Cannot Restore Net Neutrality*, Law360 (March 22, 2018), <https://www.law360.com/telecom/articles/1025266>, available at <http://bit.ly/2Ihc9ve>.

² 5 U.S.C. § 551(4).

³ *Id.*

⁴ 5 U.S.C. § 804(3)(A).

⁵ *Herron v. Heckler*, 576 F. Supp. 218, 230 (N.D. Cal. 1983) (citing *Anderson v. Butz*, 550 F.2d 459, 463 (9th Cir. 1977)) (emphasis added).

service was a telecommunications service and that the company was, retroactively, “therefore subject to access charges, Universal Service Fund contributions, and other obligations under the Communications Act.”⁶ The company argued that “the Order announces a rule rather than an adjudicatory order, and thus that it cannot apply retroactively.”⁷ The D.C. Circuit Court of Appeals disagreed, upholding the FCC’s decision as an adjudicatory order. The fact that the FCC had combined that order with a rulemaking (as to when other resellers would be subject to Title II *prospectively* — a clear exercise of the Commission’s policy-making function) was immaterial because agencies have “very broad discretion whether to proceed by way of adjudication or rulemaking.”⁸

It is true that the FCC itself, in its submission of the order to Congress, called the RIFO a “rule,” without distinguishing between the portion of the RIFO that clearly constituted a rulemaking (reissuance, with modifications, of the transparency rule) and the portion that constituted a declaratory order (reclassification).⁹ But this is immaterial: as courts have consistently said, in determining whether an agency action constitutes a “rule,” they “must inquire into the substance and effect of the policy pronouncement,” and “[t]he label attached is not controlling.”¹⁰

The *Qwest* fact pattern closely parallels what the FCC did in the RIFO. In both cases, the FCC issued a single document that was part “rule” and part adjudicatory “order” (classification decision) after seeking notice-and-comment. In fact, the FCC could have made either classification decision through a simple declaratory ruling *without* seeking public comment.¹¹ Choosing to seek public comment anyway does not create additional legal obligations under the CRA. Interpreting the CRA to apply to any agency pronouncement merely because it had been subject to notice and comment would, perversely, discourage agencies from allowing notice and comment unless absolutely required; this would deprive Americans of the opportunity to weigh in on agency decisions that may affect them, their families, or their businesses.

The (flawed) logic for subjecting the RIFO’s Title I reclassification decision to the CRA would also mean that a vast array of agency adjudicatory decisions since 1996 were not

⁶ 509 F.3d 531, 533 (D.C. Cir. 2007).

⁷ *Id.* at 535-36.

⁸ *Id.* at 536 (quoting *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1141 (D.C. Cir. 2001)).

⁹ Fed. Comm’n Comm’n, Restoring Internet Freedom, WC-Docket No. 17-108, FCC 17-166, Submission of Federal Rules under the Congressional Review Act (Jan. 30, 2018) [hereinafter *RIF Submission*], available at http://docs.techfreedom.org/RIF_Order_CRA_Submission.pdf.

¹⁰ *Anderson v. Butz*, 550 F.2d 459, 463 (9th Cir. 1977) (citing *Piercy v. Tarr*, 343 F.Supp. 1120, 1128 (N.D.Cal.1972)).

¹¹ 509 F.3d 531 (D.C. Cir. 2007).

recognized as “rules” at the time, and therefore were not submitted to Congress for review under the CRA — as they should have been. This would undermine administrative law in two ways sponsors of the current CRA cannot possibly desire.

First, such “rules” (which, again, are inherently prospective) never went in effect at all for failure to comply with the CRA.¹² Thus, for example, iBasis, the prepaid calling card reseller that sued the FCC in the *Qwest* case could have claimed a refund of all access charges and Universal Service Fund contributions.¹³ Or, if an administrative agency brings an enforcement action based on such such pronouncements, a defendant could argue that it cannot be held liable for violating a “rule” that never properly took effect because it was not submitted to Congress.¹⁴ Even if such pronouncements are not blocked entirely, they may be deemed inadequate as basis for providing fair notice to defendants, and thus any monetary penalties imposed on them may be deemed invalid.¹⁵

Second, once the agency, under current leadership, finally submits the rule to Congress, the rule could be repealed by a CRA resolution of disapproval.¹⁶ This is precisely what happened (for the first time) last week,¹⁷ when the House passed a CRA resolution of disapproval of guidelines issued in 2013 by the Consumer Financial Protection Bureau.¹⁸ Rep. Maxine Waters (D-Calif.), Ranking Member of the House Financial Services Committee, called this “an inappropriate and misguided use of the Congressional Review Act that sets a dangerous precedent.”¹⁹ In fact, the General Accountability Office (GAO) — an independent, non-partisan office — had already concluded that the 2013 guidelines constituted “a general statement of policy and a rule under the CRA” for essentially the inverse of the

¹² 5 U.S.C. § 801(a)(1)(A) (providing, in relevant part, that “[b]efore a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report....”).

¹³ Such reimbursements would have to be requested within one year. See FCC Form 499-Q, instructions, p. 14.

¹⁴ *United States v. Reece*, 2013 U.S. Dist. LEXIS 92372 (W.D. La. 2013) (magistrate considered whether the Drug Enforcement Administration (DEA) failed to comply with the CRA in failing to submit new scheduled drugs to Congress -- defendant convicted on other grounds).

¹⁵ See *TerraCom, Inc.*, 29 F.C.C. Rcd. 13325 (2014) (Statements of Comm’rs Michael O’Rielly and Ajit Pai, dissenting), (questioning the FCC’s subject-matter authority under 47 U.S.C. § 222(a) and the constitutionality of imposing civil penalties absent “fair notice” that such conduct would be considered prohibited by statute), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-173A1.pdf.

¹⁶ Kimberly A. Strassell, *A GOP Regulatory Game Changer: Legal experts say that Congress can overrule Obama regulations going back to 2009*, Wall Street Journal (Jan. 26, 2017), <https://on.wsj.com/2IcA27f>.

¹⁷ See Zachary Warmbrodt, *GOP maneuver could roll back decades of regulations*, POLITICO (April 17, 2018), <https://www.politico.com/story/2018/04/17/congressional-review-act-fallout-485426>.

¹⁸ See Zachary Warmbrodt, *House votes to kill CFPB auto-lending guidelines*, POLITICO (May 8, 2018), <https://www.politico.com/story/2018/05/08/auto-lending-guidelines-consumers-house-521847>.

¹⁹ *Id.*

reasons outlined above (as to why the RIFO is *not* a rule).²⁰ Therefore, concluded the GAO, the guidelines should have been submitted to Congress for review under the CRA. Since the Obama-era CFPB failed to do so, the CRA's shot clock for review did not start until the CFPB, under current leadership, finally submitted the rule for Congressional review.

It is true that the CRA was intended to be broad, but this is *not* what Congress meant. In the sole legislative history of the bill, the bill's sponsors "admonish[ed] the agencies that the APA's broad definition of 'rule' was adopted by the authors of this legislation to discourage circumvention of the requirements of [the CRA]," specifically including "guidance documents and the like" not considered to be "rules" under the APA.²¹ This dimension of "broadness" does not affect the line between rules and orders explicitly drawn by the statute.²² Indeed, as one CRA legal scholar has noted, "Congress arguably would usurp the role of an Article III court if it were to use the CRA to overturn an agency adjudication."²³

Republicans' use of the CRA in that case (with the support of Sen. Joe Manchin (D-WV)), to reverse the FCC's 2016 broadband privacy order, and more generally, however correct as an interpretation of the CRA, had infuriated the rest of the Democratic caucus. But if Democrats intend to take revenge on Republicans through passing the RIFO CRA, they are shooting themselves in the foot. The CFPB CRA represents the outer boundary of the CRA because it represented the broadest possible interpretation of "rule" while maintaining the distinction between a "rule" and an adjudicatory "order." Expanding the CRA's scope even further, to erase that distinction, would effectively destroy the administrative state: almost

²⁰ U.S. Gov't Accountability Off., B-329129, Bureau of Consumer Financial Protection: Applicability of the Congressional Review Act to Bulletin on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act at 1 (2017) (letter to Sen. Patrick Toomey from G.A.O. General Counsel Thomas Armstrong) available at <https://www.gao.gov/assets/690/688763.pdf>.

²¹ 142 Cong. Rec. S3,683 (daily ed. Apr. 18, 1996) (statement of Sen. Nickles, Reid, and Stevens) available at <https://www.gpo.gov/fdsys/pkg/CREC-1996-04-18/html/CREC-1996-04-18-pt1-PgS3683.htm>. See generally *Rulemakers Must Follow the Rules, Too: Oversight of Agency Compliance with the Congressional Review Act: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Todd Gaziano, Executive Director, D.C. Center - Pacific Legal Found.) [hereinafter *Gaziano Testimony*], available at <http://bit.ly/2IblzIF>.

²² 5 U.S.C. § 804(3)(A) ("The term 'rule' has the meaning given such term in section 551"); see also 5 U.S.C. § 551(4) (defining "rule") & 551(6) (defining "order").

²³ Bennett, *supra* note 1 (citing Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 Harv. J.L. & Pub. Pol'y, 137, 196 (2018) available at harvard-jlpp.com/wp-content/uploads/2018/01/Larkin_FINAL.pdf). Larkin argues that the CRA's distinction between rules and orders was intended to avoid the constitutional problem that led the Supreme Court to strike down the line-item veto in *Chadha*:

When used to overturn an agency adjudication, the legislative veto could also be criticized as an effort by Congress to play the role of an Article III court. The constitutionality of that practice finally reached the Supreme Court in 1983, and, unfortunately for Congress, the legislative veto did not survive.

Id. (citing *INS v. Chadha*, 462 U.S. 919 (1983)).

any agency pronouncement since 1996 could now be subject to reversal by Congress under the CRA — or might be declared invalid in court, for not having been submitted to Congress for review.

Ultimately, we believe the courts would stop this misuse of the CRA by reinstating the CRA’s distinction between “rules” and “order.” But it could take courts years to clarify the meaning of the statute — particularly because the reviewability of actions taken under the CRA is itself arguably unclear. The CRA provides that “No determination, finding, action, or omission under this chapter shall be subject to judicial review.”²⁴ We believe this refers exclusively to the mechanics of Congressional decision-making under the CRA, and that a court could nonetheless block agency interpretations of the CRA that go beyond the scope of the law,²⁵ but this question has yet to be litigated.

Republicans intent on rolling back the last 22 years of administrative law might well embrace the interpretation of what constitutes a “rule” under the CRA that Congressional Democrats are currently advancing to repeal the RIFO. If so, Congressional Democrats will doubtless — and rightly — protest that the CRA is being abused. But they will have no one to blame but themselves for opening this Pandora’s Box — and consumers will suffer as administrative law is thrown into chaos for years, with every administrative agency’s ability to protect consumers called into question.

No CRA Vote Should Occur without a GAO Legal Opinion

For all these reasons, we urge you to reconsider your plans to vote on the CRA resolutions introduced by Sen. Markey and Rep. Doyle. You need not take our legal interpretations for granted. We urge you to ask the General Accountability Office for an independent, public legal analysis of whether RIFO’s reclassification of broadband constitutes a “rule” or an “order” under the CRA — just as Republicans asked the GAO for a legal opinion on whether the CFPB guideline constituted a “rule” prior to moving forward their CRA resolution.

If not, the CRA is inapplicable, and both the Markey and Doyle resolutions should simply be withdrawn. But if the answer is yes, that will be the legal opinion that launched a thousand CRA resolutions of disapproval — something Democrats could regret until they manage to repeal or amend the CRA. Either way, you have ample time to obtain such an opinion: the

²⁴ 5 U.S.C. § 805.

²⁵ See generally Gaziano Testimony at 20-21 (citing *Southern Ind. Gas*, 2002 WL 31427523, at *6 (Section 805 only precludes challenges to congressional action taken under the CRA); *United States v. Reece*, 956 F. Supp. 2d 736, 743 (W.D. La. 2013) (holding that Section 805 does not preclude a criminal defendant from seeking to dismiss an indictment for the Drug Enforcement Agency’s alleged failure to comply with the CRA); see also Larkin, *supra* note 22 at 228-29.

CRA procedure applicable to Sen. Markey's timely resolution is valid for sixty session days from the order's publication in the Federal Register on Feb. 22, 2018.²⁶ With the current calendar, this end of this period is June 12.²⁷ There is no deadline for the House to vote (at least, not before the end of this Congress). Thus, there is no excuse for rushing through a vote on the basis of a legal theory that has already been rejected by the D.C. Circuit in a directly analogous situation.²⁸

Enacting the CRA would, if our legal analysis is correct, not merely fail to protect net neutrality principles; it would actually *prevent* the FCC from requiring broadband providers to disclose their network management practices. Such transparency is the bedrock of net neutrality. Congress simply cannot risk jeopardizing the FCC's ability to maintain and enforce a transparency rule.

Only Codification of Net Neutrality Can Resolve this Debate

In the meantime, we urge you to take advantage of this opportunity: There will never be a better time to force the issue of passing substantive legislation to codify net neutrality principles. Democrats have not offered such legislation since 2011,²⁹ but Republicans have twice proposed legislation since then.³⁰ Yet in 2010, it was a Democratic FCC Chairman, Julius Genachowski, and a Democratic House Energy & Commerce Chairman, Henry Waxman, who tried, but failed, to bring Republicans to the table to negotiate a legislative resolution to this fight. We urge you to pick up where they left off.

Please do not make the same mistake Republicans made in 2010: delaying legislation until after the midterm elections. We need to resolve this issue today. Failure to do so will result in the regulatory status of broadband oscillating from Title I in Republican administrations

²⁶ 5 U.S.C. § 802(a) (providing special procedure for resolutions of disapproval introduced within 60 session days of the rule's submission to Congress or publication in the Federal Register, whichever is later).

²⁷ The RIFO was reported to Congress on Jan. 30, 2018, then published in the Federal Register on Feb. 22, 2018. See RIF Submission; Restoring Internet Freedom, 83 Fed. Reg. 7,852 (Feb. 22, 2018). Counting Congressional recesses and pro forma sessions since Feb. 22, we and other news outlets calculate that the deadline for special CRA procedures is currently June 12. See Bill Chappell, FCC Plans Net Neutrality Rollback For June 11; Senate Democrats Plan A Key Challenge, NPR (May 10, 2018), <https://n.pr/2Ie76fl>.

²⁸ See *Quest supra* note 8.

²⁹ Internet Freedom, Broadband Promotion, and Consumer Protection Act of 2011, S. 74, 112th Cong. (2011), available at <https://www.congress.gov/bill/112th-congress/senate-bill/74>.

³⁰ See *e.g.*, Open Internet Preservation Act, H.R. 4682, 115th Cong. (2017) (sponsored by Rep. Marsha Blackburn TN-07); Open Internet Preservation Act, S. 2510, 115th Cong. (2018) (sponsored by Sen. John Kennedy, LA., companion bill to H.R. 4682); Staff of S. Comm. on Science, Commerce, and Transp., 114th Cong., Discussion Draft: A Bill to Amend the 1934 Communications Act to Ensure Internet Openness (2015) (supported by Sen. John Thune and Rep. Fred Upton) available at <http://bit.ly/2rHfTPN>. See also Internet Freedom Preservation Act, S. 2917, 109th Cong. (2006) (passed by Republican-controlled Congress).

to Title II in Democratic administrations. This uncertainty will be the worst-case scenario for broadband investment. Ultimately, it will hurt the constituencies Democrats should care about most: those Americans living in communities where the business case for broadband deployment is hardest to close.

We stand ready and willing to assist you in crafting legislation to codify net neutrality principles once and for all.

Respectfully,

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