

United States Senate

WASHINGTON, DC 20510

December 12, 2023

The Honorable Jessica Rosenworcel
Chairwoman
Federal Communications Commission
45 L Street, NE
Washington, DC 20554

Dear Chairwoman Rosenworcel:

It has come to our attention that the Federal Communications Commission (FCC) intends to vote on a Report and Order¹ that would violate Congress' Resolution of Disapproval vitiating the FCC's 2016 Broadband Privacy Order.² Since the FCC has no authority to ignore Congress' exercise of the Congressional Review Act (CRA), we urge you to withdraw the draft Report and Order to avoid resurrecting substantially similar parts of the 2016 Broadband Privacy Order that Congress nullified.

In 2016, the FCC pursued a jurisdictional power grab by issuing legally suspect privacy and data security rules that created asymmetric burdens for the broadband industry.³ Congress responded to the FCC's regulatory overreach by enacting a Resolution of Disapproval overturning the 2016 Privacy Order. According to the CRA, the FCC may not issue a rule "in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued."⁴

The FCC is now seeking to resurrect a portion of the 2016 Broadband Privacy Order pertaining to data security. This is clearly unlawful: the FCC's proposed rules in the Report and Order are clearly "substantially similar" to the nullified 2016 rules. Specifically, the requirements in the Report and Order governing notification to the FCC, law enforcement, and consumers, as well as the recordkeeping requirements with respect to breaches and notifications, are substantially similar to the notification and recordkeeping requirements disapproved by Congress.⁵

The FCC nevertheless claims it may do this because it is adopting only *part* of the 2016 Broadband Privacy Order. This interpretation would eviscerate the CRA: An agency cannot enact substantially similar rules struck down by Congress by doing so in a piecemeal manner. Moreover, the CRA expressly prohibits such approach in giving Congress the authority to nullify any "rule," which the CRA defines as "the whole *or a part* of an agency statement of general or

¹ *FCC Fact Sheet: Data Breach Reporting Requirements, Report and Order* (Nov. 22, 2023), <https://docs.fcc.gov/public/attachments/DOC-398669A1.pdf> (*Draft Order*).

² Joint Resolution, Pub. L. No. 115-22, 131 Stat. 88 (2017).

³ *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, Report and Order, 31 FCC Red. 13,911 (2016) (2016 Privacy Order).

⁴ 5 U.S.C. § 801(b)(2).

⁵ Compare the *Draft Order's* draft Rules to be codified at 47 C.F.R § 64.2011 with 47 C.F.R. §§ 64.2002 and 64.2006 (2016; Repealed).

particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”⁶

As lawmakers with oversight responsibility over the FCC, we have repeatedly identified actions taken under your leadership that exceed legal authority.⁷ In this case, the FCC is defying clear and specific direction not to issue requirements that are substantially similar to parts of a rule disapproved by Congress. We therefore urge the FCC to rescind the draft Report and Order and remove it from the FCC’s December Open Meeting agenda.

Sincerely,



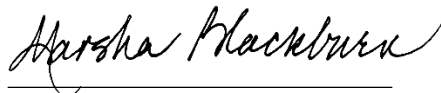
Ted Cruz
United States Senator



John Thune
United States Senator



Mitch McConnell
United States Senator



Marsha Blackburn
United States Senator

⁶ 5 U.S.C. § 804(3) (incorporating the definition of “rule” from the APA, 5 U.S.C. § 551(4)) (emphasis added). *See also* 1 U.S.C. § 1 (“In determining the meaning of any Act of Congress, unless the context indicates otherwise— words importing the singular include and apply to several persons, parties, or things.”).

⁷ *See, e.g.*, Letter from Sen. Cruz et al., to Chairwoman Rosenworcel (Nov. 10, 2023), <https://www.commerce.senate.gov/services/files/25A46EEF-7441-460C-9C23-2C9121A6BBDD>; Letter from Sen. Cruz and Rep. McMorris Rodgers to Commissioner Gomez (Sept. 26, 2023), <https://www.commerce.senate.gov/services/files/8DA42254-FE98-48F7-8F8B-B18319806A3D>; Letter from Sen. Cruz and Rep. McMorris Rodgers to Chairwoman Rosenworcel (Apr. 5, 2023), <https://www.commerce.senate.gov/services/files/8273A871-E975-4C80-AFEE-60D519DC7393>.