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**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ALASKA**

CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiff,

v.

RYAN ZINKE, in his official capacity as Secretary of the Interior, and U.S. DEPARTMENT OF THE INTERIOR,

Defendants.

Case No. 3:17-cv-00091-JWS

**BRIEF OF THE STATES OF WISCONSIN, GEORGIA, ALABAMA, ARIZONA, ARKANSAS, INDIANA, KANSAS, LOUISIANA, MISSOURI, NEBRASKA, NEVADA, OKLAHOMA, SOUTH CAROLINA, TEXAS AND UTAH AS AMICI CURIAE IN SUPPORT OF DEFENDANTS**

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## INTEREST OF *AMICI CURIAE*

*Amici curiae* are the States of Wisconsin, Georgia, Alabama, Arizona, Arkansas, Indiana, Kansas, Louisiana, Missouri, Nebraska, Nevada, Oklahoma, South Carolina, Texas and Utah. *Amici* have a substantial interest in Congress enacting laws that repeal regulations using the Congressional Review Act's expedited procedures ("CRA"). Congressional oversight is an important check on agency actions that unlawfully reach into areas of traditional state authority and impose significant burdens on the States. *See* Patrick A. McLaughlin and Oliver Sherouse, *The Impact of Federal Regulation on the 50 States*, Mercatus Center (2016)[1]; Susan Parnas Frederick, *Federalism: Agencies and Legislation Encroaching on States' Rights*, ANN.2008 AAJ-CLE 903 (July 2008). The CRA is a critical tool that allows States to work with Congress to stop unlawful regulation. It also shifts governmental power from unelected agencies to Congress, the States, and, ultimately, the people.

Congress has used the CRA numerous times over the last six months to eliminate unlawful and burdensome rules, many of which had imposed harms on the States. *See* The White House, *Press Briefing on the Congressional Review Act* (April 5, 2017).[2] If the CRA is declared unlawful, these harmful regulations may well go

[1] http://regdata.org/wp-content/uploads/2016/03/FRASE_web_v2.pdf.

[2] https://www.whitehouse.gov/the-press-office/2017/04/05/press-briefing-congressional-review-act.

back into effect. Thus, the *amici* States have a strong interest in ensuring the validity of congressional resolutions passed via the CRA.

## INTRODUCTION

When the Federal Government wants to enact a law, it must go through a constitutionally prescribed procedure, U.S. Const. Art. I, § 7, cl. 2–3, which is commonly understood, *see* Schoolhouse Rock: I'm Just a Bill (ABC television broadcast Feb. 5, 1977).[3] The procedure has three essential steps: the House of Representatives passes a bill or resolution pursuant to its own operating procedures; the Senate passes it under its own procedures; and then the President signs it. *Id.* That's it.[4] This case involves one species of law; a "joint resolution" enacted under the procedures that Congress provided in the CRA (which, itself, is a law that the House and Senate passed, and the President signed). Under the CRA's procedures, if both the House and the Senate enact a CRA resolution, and the President signs that resolution, the result is a law of the United States, which simply amends the prior law by repealing a regulation and prohibiting the adoption of a "substantially" similar rule in the future. *See* 5 U.S.C. § 801.

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[3] http://abc.go.com/shows/schoolhouse-rock/episode-guide/season-01/24-im-just-a-bill.

[4] There are, of course, other procedures through which a bill or resolution can become a law. For example, if the President vetoes a bill or resolution, that veto can be overcome by a two-thirds majority vote in both the House and Senate. U.S. Const. Art I, § 7, cl. 2–3. Also, if the President fails to sign a bill or resolution within ten days of presentment, in most circumstances that bill or resolution becomes law as if the President had signed it. *Id.* Because the CRA resolution in this case was signed by the President, the *amici* States will not discuss those other procedures.

Plaintiff styles its case as a defense of the separation of powers, but it is Plaintiff's lawsuit—and not the CRA—that assaults both the separation of powers and federalism. The lawsuit attacks the separation of powers because it asks the federal courts to override a law, Public Law 115-20, that was passed by the House and the Senate, and signed by the President, on the theory that Congress must use different (and more cumbersome) operating procedures to enact that law. And the lawsuit attacks federalism because, if Plaintiff prevails, that would immediately imperil numerous CRA resolutions that Congress recently enacted, many of which protect the States from unlawful and/or burdensome regulations.

## ARGUMENT

### I. A Congressional Review Act Resolution—Which Has Been Passed By Both Houses Of Congress And Signed By The President—Is Simply A Law Of The United States

A. A bill or resolution becomes a law of the United States through the requirements of bicameralism and presentment. *See generally I.N.S. v. Chadha*, 462 U.S. 919, 951–52 (1983). Thus, "[e]very Bill which shall have passed the House of Representatives and the Senate . . . become[s] a Law" of the United States when, as relevant here, it has been "sign[ed]" by the "President of the United States." U.S. Const. Art I, § 7, cl. 2. Similarly, a "Resolution" becomes a law of the United States

upon "the Concurrence of the Senate and House of Representatives" and "approv[al]" by the President. U.S. Const. Art I, § 7, cl. 3.[5]

In deciding whether a "Bill" or "Resolution" has, in fact, passed each House of Congress, "[e]ach House may determine the Rules of its Proceedings." U.S. Const. Art. I, § 5, cl. 2. "[T]he Constitution textually commits the question of legislative procedural rules to Congress." *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1171–72 (9th Cir. 2007); *accord United States v. Ballin*, 144 U.S. 1, 5 (1892). So, for example, in *Consejo*, the plaintiff argued that Congress violated its right to due process by failing "to comply with its own procedural rules in adopting" the law at issue in the case. 482 F.3d at 1171. The Ninth Circuit held that this argument raised "a non-justiciable political question beyond [the court's] power

[5] If an act of Congress is enacted through bicameralism and presentment, it becomes a law regardless of whether Congress follows the procedures in Article I, Section 7, clause 2 for "Bills," or Article I, Section 7, clause 3, for joint "Resolutions." "There is," after all, "little practical difference between a bill and a joint resolution and the two forms are often used interchangeably." How Our Laws Are Made, H.R. Doc. No. 108-93, 108th Cong., 1st Sess., 7 (2003), https://www.senate.gov/reference/resources/pdf/howourlawsaremade.pdf; Jefferson's Manual and Rules of the U.S. House of Representatives § 397, p. 202 (2011) *available at* https://www.gpo.gov/fdsys/pkg/CDOC-111hdoc157/pdf/CDOC-111hdoc157.pdf; IV Hind's Precedents of the House of Representatives § 3375 (1907), *available at* https://www.gpo.gov/fdsys/pkg/GPO-HPREC-HINDS-V4/pdf/GPO-HPREC-HINDS-V4.pdf. "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." *United States v. Powell*, 761 F.2d 1227, 1235 (8th Cir. 1985); *accord Watts v. United States*, 161 F.2d 511, 513 (5th Cir. 1947) ("A joint resolution of the House and Senate, when approved by the President, has the effect of law."); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 598 (S.D.N.Y 2002) ("no relevant constitutional difference between a bill and a joint resolution"), *rev'd sub nom. on other grounds*, *Rumsfeld v. Padilla*, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 542 U.S. 426 (2004).

to review," as the Constitution squarely places the power to create legislative procedural rules in the Legislative branch. *Id.* at 1171–72.

Finally, a law of the land validly repeals or amends any prior law with which it is "irreconcilable," in complete compliance with the separation of powers. *See, e.g.*, *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936). So, for example, Congress can amend, suspend, or alter a previously enacted "Bill" through a joint "Resolution." *See, e.g.*, *U.S. ex rel. Levey v. Stockslager*, 129 U.S. 470 (1889); *see also Ann Arbor R. Co. v. United States*, 281 U.S. 658, 666 (1930).

B. A resolution adopted by both Houses of Congress under the CRA's procedures, and then signed by the President, is an exercise of Congress' authority to amend its prior laws. Such a resolution is procedurally and substantively valid.

The CRA provides an expedited procedure by which Congress can enact a law, in one particular category—when Congress disapproves of a recent agency rule. As relevant here, the CRA requires agencies to submit their rules to Congress for review, along with a "concise general statement relating to the rule" and the rule's proposed effective date. 5 U.S.C. § 801(a)(1)(A)(ii). Once each House receives a rule from an agency for review, each House must submit the rule to each standing committee with jurisdiction over the law under which the rule was issued. *Id.* § 801(a)(1)(C). After an agency submits a rule to Congress, the Houses have 60 days to decide whether to disapprove of the rule. *See id.* § 802(a). If the Houses choose to disapprove of the rule, they will do so via a joint resolution. *See id.* To expedite this process in the

Senate, in particular, the CRA includes detailed provisions for how consideration of a CRA resolution is to take place in that House. *See id.* § 802(b)–(e). Once one House passes a joint resolution, the resolution is then voted upon in the other House without referral to committee. *Id.* § 802(f). A joint resolution that has been passed by both Houses is then presented to the President. *See id.* § 801(a)(3)(B); 142 Cong. Rec. S3683 (April 18, 1996). If, as relevant here, the President signs this resolution into law, the relevant rule is nullified and the agency is prohibited from adopting a "substantially" similar rule in the future, unless Congress "specifically authorize[s]" such a rule by law. 5 U.S.C. § 801(b), (f).

The CRA's expedited procedures are lawful and cannot be called into question in a federal court. That is because the CRA's procedures fall squarely within the textually committed authority of "[e]ach House" to "determine the Rules of its Proceedings." U.S. Const. Art. I, § 5, cl. 2. The CRA specifically provides that its procedures are "an exercise of the rulemaking power of the Senate and House of Representatives," and are "deemed a part of the rules of each House." 5 U.S.C. § 802(g). Thus, any challenge to the CRA's procedures would be a non-justiciable political question. *See Consejo*, 482 F.3d at 1171–72.

As a matter of substance, too, the CRA is lawful. The end result of both Houses of Congress adopting a CRA resolution, and the President signing that resolution, is a valid change in the law. When both Houses of Congress adopt a CRA resolution, and the President signs that resolution, this amends the law that Congress previously

adopted (and pursuant to which the agency had purported to act in issuing the disputed rule). After all, bicameralism and presentment have been satisfied. This new law declares that the disapproved rule "shall have no force or effect," 5 U.S.C. § 802(a), and prohibits the agency from passing any new rule "that is substantially the same" as the disapproved rule, *id.* § 801(b)(2). This is a valid exercise of Congress' authority to amend prior laws, and therefore comports with the separation of powers. *See Posadas*, 296 U.S. at 503; *Stockslager*, 129 US at 475; *Ann Arbor*, 281 U.S. at 666.

## II. Congress Has Recently Adopted, And The President Has Recently Signed, Several Congressional Review Act Resolutions That Protect The States' Sovereign Interests

Many federal rules impose significant harms on the States, and often do so illegally. *See* McLaughlin and Sherouse, *supra*; Frederick, *supra*. The CRA provides an efficient procedure that Congress can use to stop this federal overreach, quickly blocking regulations without requiring States to engage in costly and time-consuming litigation. Without the CRA's mechanisms, it could take Congress or the courts months or even years to stop illegal and harmful rules. The CRA also provides a tool for the States to work with the people's elected representatives in Congress to halt unlawful regulation and to shift governmental power back to elected officials and away from unelected agencies.

Congress has recently used the CRA to disapprove of several burdensome and/or unlawful rules that harmed the States. Below is a sampling of some important examples:

1. The Alaska National Wildlife Refuges Rule. The rule at issue in this case, 81 Fed. Reg. 52,247 (Aug. 5, 2016), displaced Alaska's traditional authority to regulate hunting within its borders. Alaska was forced to bring a lawsuit to try to block this rule. *See* Compl., *Alaska v. Zinke*, No. 17-cv-00013 (D. Alaska Jan. 13, 2017), ECF No. 1. Congress' adoption of a CRA resolution, Pub. L. 115-20, protected Alaska's sovereign rights and allowed it to dismiss its challenge to the rule, *see* Am. Compl., *Alaska v. Zinke*, No. 17-cv-00013 (D. Alaska June 13, 2017), ECF No. 60 (removing challenge to Department of the Interior's Refuges Rule).

2. The Department of the Interior's Stream Protection Rule. This rule imposed onerous requirements on coal mines located near streams. 81 Fed. Reg. 93,066 (Dec. 20, 2016). This rule was unlawful in multiple respects and triggered a lawsuit by 13 States. *See* Compl., *Ohio v. U.S. Dep't of Interior*, No. 17-cv-00108 (D.D.C. Jan. 17, 2017), ECF No. 1. Congress eliminated this rule using the CRA, Pub. L. 115-5, allowing dismissal of the lawsuit, *see* Notice of Voluntary Dismissal, *Ohio v. U.S. Dep't of Interior*, No. 17-cv-00108 (D.D.C. May 1, 2017), ECF No. 28.

3. The Social Security Administration's rule banning gun possession by certain recipients. This rule prohibited law-abiding Americans from possessing firearms when the Social Security Administration determined that they needed help managing their finances. 81 Fed. Reg. 91,702 (Dec. 19, 2016). As 13 States explained in a letter to congressional leaders, the rule violated both Second Amendment rights and basic

notions of due process. Congress heeded the States' warnings and acted promptly to eliminate this rule under the CRA. *See* Pub. L. 115-8.

4. The Department of Education's rule relating to accountability and state plans. This rule placed onerous school testing, reporting, and planning requirements on States that received certain federal funds. 81 Fed. Reg. 86,076 (Nov. 29, 2016). States on both sides of the political aisle submitted comments protesting the rule for unlawfully expanding federal reach into the States' education policies. *See, e.g.*, Comments of Wisconsin Department of Public Instruction, ED-2016-OESE-0032-14216 (July 28, 2016); Comments of South Carolina Department of Education, ED-2016-OESE-0032-19858 (Aug. 2, 2016); Comments of Vermont State Board of Education, 1, ED-2016-OESE-0032-19544 (Aug. 2, 2016); Comments of Colorado Department of Education, ED-2016-OESE-0032-19819 (Aug. 2, 2016). In response, Congress nullified this unlawful, expansive rule under the CRA. *See* Pub. L. 115-13.

5. The Department of Education's rule relating to teacher preparation issues. This rule mandated that States, in order to receive certain federal funds, alter their systems for identifying, reporting, and addressing the performance of their teacher-preparation programs for postsecondary education. 81 Fed. Reg. 75,494 (Oct. 31, 2016). This rule drew sharp criticism from States across the political spectrum. *See, e.g.*, Comments of the Board of Regents for the University of Georgia, 3, ED-2014-OPE-0057-4890 (May 1, 2016); Comments of California Commission on Teacher Credentialing, 1, ED-2014-OPE-0057-2613 (Feb. 2, 2015); Comments of Minnesota

State Colleges and Universities, 2, ED-2014-OPE-0057-3784 (Feb. 2, 2015). Congress eliminated this rule by invoking the CRA. *See* Pub. L. 115-14.

6. The Department of Health and Human Services' rule relating to the selection of "subrecipients" of Title X funding. This rule limited States' ability to control the redistribution of Title X funding according to their own priorities. 81 Fed. Reg. 91,852, 91,860 (Dec. 19, 2016). Although the comment period for this rule was unusually short, seven States submitted a letter explaining that the rule was too costly and raised significant federalism concerns by forcing States to fund abortion providers. Comments of Arkansas, Arizona, South Carolina, Louisiana, Oklahoma, Texas and Nebraska, 2–6, HHS-OS-2016-0014-14249 (Oct. 7, 2016). Congress promptly addressed these concerns by eliminating this rule under the CRA. *See* Pub. L. 115-23.

* * *

In all, the CRA is a lawful procedural tool, which, as recent experience has demonstrated, allows Congress to expeditiously eliminate illegal and/or harmful rules, while working with the States.

**CONCLUSION**

This Court should dismiss Plaintiff's complaint.

Dated: July 3, 2017

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 3rd day of July, 2017, I filed the foregoing Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to Ann E. Prezyna, Michael B. Baylous, Claire Loebs Davis, Collette L. Adkins, Emily S. Jeffers, and Howard M. Crystal, Counsel for Plaintiff Center for Biological Diversity; Stephen Pezzi, Counsel for Defendants Ryan Zinke and Department of the Interior; Richard L. Pomeroy, Counsel for Defendant Ryan Zinke; James S. Burling, Jonathan Calvin Wood, Oliver James Dunford, Todd F. Gaziano, and Zacharia D. Olson, Counsel for Proposed Intervenors Pacific Legal Foundation, Big Game Forever, Alaska Outdoor Council, Kurt Whitehead, and Joe Letarte; Brent R. Cole, Counsel for Proposed Intervenors Safari Club International and National Rifle Association of America; Douglas S. Burdin, Counsel for Proposed Intervenor Safari Club International; Michael Thomas Jean, Counsel for Proposed Intervenor National Rifle Association; and Cheryl R. Brooking and Jessica Moats Alloway, Counsel for Proposed Intervenor State of Alaska Department of Law.

Dated: July 3, 2017

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