IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 98-9518__

U S WEST, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA

Respondents.

BRIEF OF THE ELECTRONIC PRIVACY INFORMATION CENTER; THE AMERICAN CIVIL LIBERTIES UNION; THE CENTER FOR MEDIA EDUCATION; COMPUTER PROFESSIONALS FOR SOCIAL RESPONSIBILITY; CONSUMER ACTION; CONSUMER FEDERATION OF AMERICA; INTERNATIONAL COMMUNICATIONS ASSOCIATION; JUNKBUSTERS; MEDIA ACCESS PROJECT; PRIVACY RIGHTS CLEARINGHOUSE; PRIVATE CITIZEN, INC.; U.S., COLO. and N.M. PUBLIC INTEREST RESEARCH GROUP; UTILITY CONSUMER ACTION NETWORK; AND 22 LAW PROFESSORS AND PRIVACY SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS' PETITION FOR REHEARING BY THE PANEL AND SUGGESTION FOR REHEARING EN BANC

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*

Electronic Privacy Information Center ("EPIC"), Marc Rotenberg, Executive Director. EPIC has a direct and significant interest in the outcome of this matter. EPIC, a public interest research center in Washington, D.C., was established to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values.

American Civil Liberties Union ("ACLU"), Nadine Strossen, President. The American Civil Liberties Union is the nation's largest civil liberties organization with approximately 300,000 members spread across the United States. In its 80 year history, the ACLU has defended the principles of liberty enshrined in the Bill of Rights to the United States Constitution, including both the rights of Freedom of Speech and Privacy. The privacy rights of ACLU's members will be adversely impacted should the Tenth Circuit's decision in *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), be allowed to stand.

Center for Media Education ("CME"), Jeff Chester, Director. CME is a national non-profit organization that works to ensure electronic commerce consumer protections for children and families. In 1998, CME's effort led to the Congressional passage of the Children's Online Privacy Protection Act.

Colorado PIRG ("CoPIRG"). CoPIRG is a non-profit, non-partisan consumer advocacy organization with 42,500 members around the state of Colorado. We support efforts, both statewide and nationally, to protect the privacy of our members and of consumers generally.

Computer Professionals for Social Responsibility ("CPSR"), Coralee Whitcomb, President. CPSR is a public interest alliance of computer scientists and others concerned about the impact of computer technology on society. CPSR works to influence decisions regarding the development and use of computers because those decisions have far-reaching consequences and reflect basic values and priorities. CPSR has a particular interest in the protection of privacy and has previously participated in regulatory and legislative proceedings in support of privacy protection for telephone customers.

Consumer Action, Ken McEldowney, Executive Director. Consumer Action is an educational and advocacy organization that works on a wide range of consumer and privacy issues impacting low income and limited English speaking consumers. Each year it distributes more than one million multi-lingual materials through a national network of more than 4,500 community based organizations.

Consumer Federation of America ("CFA"). Established in 1968, the CFA represents more than 260 organizations from throughout the nation with a combined membership exceeding 50 million people and works to advance pro-consumer policy on a variety of issues before Congress, the White House, federal and state regulatory agencies, and the courts. In particular, CFA has participated in a number of federal and state regulatory proceedings to protect the privacy of telephone customers.

International Communications Association ("ICA"), Brian R. Moir, Counsel. The ICA is the largest association of telecom end users in the United States. Its more than 500 members are all users (not vendors) of telecommunications services, and collectively they spend in excess of $32 billion per year on telecom/IS expenses. The ICA has worked closely with the residential ratepayer community for well over a decade and a half.

Junkbusters, Jason Catlett, President. Junkbusters operates a popular web site on consumer privacy. Junkbusters President Jason Catlett has a Ph.D. in Computer Science; prior to founding Junkbusters he worked on data mining of call detail records for several years at AT&T Bell Laboratories.

Media Access Project, Andrew Jay Schwartzman, President and CEO. Media Access Project is a non-profit public interest telecommunications law firm founded in 1972. It represents the public's First Amendment right to have affordable access to a vibrant marketplace of issues and ideas via telecommunications services and the electronic mass media.

New Mexico PIRG (“NMPIRG”). NMPIRG is a non-profit, nonpartisan, consumer advocacy organization with 4,000 members around the state of New Mexico. NMPIRG has supported efforts, both statewide and nationally, to protect the privacy of its members and of consumers generally.

Privacy Rights Clearinghouse ("PRC"), Beth Givens, President. The PRC is a non-profit consumer information and advocacy program established in 1992, based in San Diego, California. Through its hotline, the PRC documents the nature of consumers' concerns and complaints about privacy and presents its findings to policymakers, consumer advocates, and industry representatives. It advocates for consumers' privacy rights in legislative and regulatory proceedings at the state and federal levels.

Private Citizen, Inc. ("PCI"), Robert Bulmash, President and Founder. PCI was formed in 1988 to protect residents and businesses from the privacy-abusing practices of the direct marketing industry. Today, PCI has 4,000 subscribers/members

across the nation who will be adversely affected should the Tenth Circuit's decision in this case be allowed to stand.

U.S. Public Interest Research Group ("U.S. PIRG"). U.S. PIRG is a non-profit, non-partisan consumer, environmental, and good government advocacy organization that serves as the national lobbying office for state PIRGs. U.S. PIRG and the state PIRGs advocate strong privacy laws on behalf of both their more than 500,000 dues-paying citizen members nationwide and consumers generally. U.S. PIRG and the state PIRGs have published reports on privacy issues and advocated enactment of strong privacy laws at the state and federal level.

Utility Consumer Action Network ("UCAN"), Michael Shames, Director. UCAN is a non-profit consumer advocacy and education organization that has represented nearly 40,000 residential consumers on utility issues for over 15 years. It is based in San Diego, California. UCAN is dedicated to the advancement and protection of consumer rights in the areas of telecommunications and energy issues.

Anita L. Allen-Catellitto, Professor of Law, University of Pennsylvania School of Law. Coauthor, *Privacy Law: Cases and Materials* (West 1999).

James Boyle, Professor of Law, Washington College of Law, American University.

Julie E. Cohen, Associate Professor of Law, Georgetown University Law Center.

Rod Dixon, Visiting Assistant Professor of Law, Rutgers University School of Law – Camden.

Peter L. Fitzgerald, Associate Professor, Stetson University College of Law.

Susan Freiwald, Associate Professor of Law, University of San Francisco School of Law.

Shubha Ghosh, Associate Professor, Georgia State University College of Law.

Evan Hendricks, Publisher of *The Privacy Times.*

Jerry Kang, Professor of Law, UCLA School of Law.

Michael Landau, Professor of Law, Georgia State University College of Law.

Lawrence Lessig, Jack N. & Lillian R. Berkman Professor for Entrepreneurial Legal Studies, Harvard Law School.

Roy M. Mersky, Professor of Law, University of Texas

Malla Pollack, Visiting Associate Professor, Florida State University College of Law.

Joel R. Reidenberg, Professor of Law, Director, Graduate Program Academic Affairs, Fordham University School of Law; co-author, *Data Privacy Law* (Michie 1996).

David A. Rice, Professor of Law, Roger Williams University School of Law.

Michael Rustad, Professor of Law & Director of the High Technology Law Program, Suffolk University Law School.

Pam Samuelson, Professor of Law, Co-Director of the Berkeley Center for Law & Technology Boalt Hall, University of California at Berkeley.

Paul M. Schwartz, Professor of Law, Brooklyn Law School.

Gregory Sergienko, Professor of Law, Western State University.

Robert Ellis Smith, Publisher of *The Privacy Journal;* author, *The Law of Privacy Explained.*

Frank Tuerkheimer, Professor of Law, University of Wisconsin, School of Law.

Jonathan Weinberg, Professor of Law, Wayne State University.

INTRODUCTION

This is a case of great importance not only to the Respondents, but also to telephone customers across the United States. In *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), this Court, in a split decision, invalidated the FCC's February 26, 1998, Order requiring telecommunications carriers to obtain express customer approval before they can disclose consumer proprietary network information ("CPNI") they collect as a result of providing their services. *See* Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, 63 Fed. Reg. 20,326 (1998) (hereinafter "CPNI Order"). CPNI consists of customer calling records that would not exist but for the private activities of telephone customers. These records, which are not publicly available, include such sensitive and personal information as who an individual calls, when, for how long, and how often. The FCC's CPNI Order adopted an opt-in approach, consistent with congressional intent, that requires carriers to obtain express approval before the company can divulge a customer's CPNI, as opposed to the burdensome opt-out approach, which would have required telephone customers to contact their carrier to prevent the disclosure of their personal calling records. The majority's opinion vacated the FCC's CPNI Order, finding it

inconsistent with protected "speech" interests of the telephone company.

The panel's ruling must be reversed because employing the opt-in approach is consistent with the First Amendment and is the most reasonable fit with the Congress's intent to protect the privacy of telephone subscribers' personal information.

STATEMENT OF THE CASE

Section 702 of the Telecommunications Act of 1996 requires all telecommunications carriers "to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier." Telecommunications Act of 1996 § 702(a), 47 U.S.C. § 222(a) (Supp. III 1997). Specifically, a telecommunications carrier is precluded from disclosing CPNI it receives as a result of providing its service without customer approval, subject to narrow exceptions. *See* Telecommunications Act of 1996 § 702(c)(1), 47 U.S.C. § 222(c)(1) (Supp. III 1997). Pursuant to 47 U.S.C. § 222, on February 26, 1998, the FCC promulgated regulations interpreting the statute. *See* CPNI Order. U.S. West, Inc. then petitioned this Court for a review of the FCC's CPNI Order.

On August 18, 1999, this Court vacated the FCC's order restricting telecommunications companies' use, disclosure of, and access to CPNI, holding that the regulations violated the First Amendment. The majority began by asserting that the CPNI regulations restrict commercial speech, requiring the Court to apply the test established by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), to determine whether the restrictions are permissible. [1] Utilizing *Central Hudson* analysis, the Court concluded that even if "the government has asserted a substantial state interest in protecting people from the disclosure of sensitive and potentially embarrassing personal information," *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1236 (10th Cir. 1999), and assuming that the CPNI Order directly and materially advanced the State's interest, the regulations were impermissible because they were not narrowly tailored. While declining to order the FCC to adopt an opt-out approach, the

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[1] *Central Hudson* relies on a four-part test to determine whether a government restriction on commercial speech violates the First Amendment. To meet the threshold requirement, the speech must concern lawful activity and not be misleading. If the threshold requirement is satisfied, the government may regulate the speech if it can demonstrate "(1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest." *Revo v. Disciplinary Board*, 106 F.3d 929, 932 (10th Cir.), *cert. denied*, 521 U.S. 1121 (1997).

majority discussed the availability of less burdensome alternatives to the opt-in approach and concluded that "[t]he FCC failed to adequately consider the constitutional implications of its CPNI regulations." *Id.* at 1240. The FCC's Petition for Rehearing by the Panel and Suggestion for Rehearing En Banc, filed October 4, 1999, is now pending before the Court.

SUMMARY OF ARGUMENT

The panel's ruling undermines basic tenets of an individual's right to privacy under federal law. Citizens have a legitimate expectation of privacy with respect to sensitive personal information such as who they call on a telephone, and a carrier's right to communicate information about products and services does not include the right to build detailed profiles based on personal information obtained through private telephone calls. In addition, the opt-in approach adopted by the FCC's CPNI Order reflects Congress's express intent in enacting Section 702 of the Telecommunications Act to protect the privacy of telephone customers.

ARGUMENT

I. The majority's decision jeopardizes an individual's right to privacy.

American jurisprudence recognizes a fundamental right to privacy in personal communications, and both the courts and Congress have recognized the paramount interest a citizen has in

protecting her privacy. *See, e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 769 (1993) ("[T]he protection of potential clients' privacy is a substantial state interest."); *Sheets v. Salt Lake County*, 45 F.3d 1383 (10th Cir. 1995). Because the majority opinion in this case fails to recognize that paramount right, it should be reconsidered.

A. Individuals have a significant interest in controlling distribution of their personal information and in preventing others from profiting by its use.

In *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir. 1994), this Court recognized that an invasion of privacy is most pernicious when "it is by those whose purpose it is to use the information for pecuniary gain." *Id.* at 1511, 1514 (applying *Central Hudson* analysis to uphold a Colorado statute prohibiting public access to criminal justice records "'for the purpose of soliciting business for pecuniary gain'") (quoting Colo. Rev. Stat. § 24-72-305.5 (1992)). This is exactly the purpose for which U S West would like to use CPNI –- to target consumers it believes might be interested in purchasing more of its services. The fact that some CPNI, such as a consumer's name and address, may be publicly available is irrelevant, because "[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." *Department of Defense v. Federal Labor Relations Auth.*,

510 U.S. 487, 500-02 (1994) (finding that unions could not use FOIA to obtain the home addresses of federal employees represented by unions).

Additionally, the protections afforded by the regulations go well beyond concerns with the use or disclosure of publicly available information. The regulations and the underlying statute also protect even more sensitive data about telephone numbers the customer called or from which the customer received a call and the length of the call. As Justice Stewart wrote:

> Most private telephone subscribers may have their own numbers listed in a publicly distributed directory, but I doubt there are any who would be happy to have broadcast to the world a list of the local or long distance numbers they have called. This is not because such a list might in some sense be incriminating, but because it easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life.

Smith v. Maryland, 442 U.S. 735, 748 (1979) (Stewart, J., dissenting).

It is notable that Congress recognized the importance of a citizen's privacy interest by enacting other statutes preventing disclosure of precisely the same information to the public at large. For example, Congress has enacted an elaborate statutory scheme to protect the privacy of telephone communications, *see* 18 U.S.C. §§ 2510-2522 (1994 & Supp. III 1997), and specifically

prohibited the use of pen registers without a court order.[2] *See* 18 U.S.C. § 3121 (1994). Thus, the Congress has determined that people have a legitimate expectation of privacy with respect to the phone numbers they dial and has decided that this information is so sensitive that it has developed an entire statutory scheme governing law enforcement's ability to collect such data. Similar rules have been established to protect the privacy of cable subscriber records, *see* 47 U.S.C. § 551 (1994), video rental records, *see* 18 U.S.C. § 2710 (1994), credit reports, *see* Fair Credit Reporting Act, 15 U.S.C. § 1681 (1994), and medical records, *see* 42 U.S.C. § 290dd-2(a)(1994). *See generally* Marc Rotenberg, *The Privacy Law Sourcebook 1999: United States Law, International Law, and Recent Developments* 1-173 (1999). The panel's decision fails to accord the proper degree of weight to this valid expectation of privacy.

Further, the FCC CPNI rule not only protects the privacy interests of telephone customers, but also preserves important values recognized in the First Amendment context, which is the right of telephone customers to decide, freely and without unnecessary burden, when they wish to disclose personal information to others. *See generally Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182 (1999); *McIntyre*

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[2] A pen register is a device used to record the numbers dialed

v. Ohio Elections Comm'n, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). The ability of individuals to keep private the records of their personal communications also implicates the constitutional interest in not chilling communications between free individuals through the fear of private surveillance. *See NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *see also Smith v. Maryland*, 442 U.S. 735, 751 (1979) (Marshall, J., dissenting).

B. The FCC's Order does not restrict U S West's right to communicate with its customers.

In its opinion, the majority relies on cases including *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), *Martin v. City of Struthers*, 319 U.S. 141 (1943), and *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), to support the proposition that the government cannot restrict the speech of either a speaker or his audience. However, each of these cases turns on the method of communication and not the use of personal information acquired from business customers. The FCC's Order does not prevent U S West from advertising its services to its customers per *Virginia Pharmacy* or pamphleteering per *Struthers* or using direct mail per *Florida Bar*. But none of these cases involves a service provider using confidential information to target a particular

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out on a telephone line. *See* 18 U.S.C. § 3127(3) (1994).

audience. In *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), for example, the Court upheld certain targeted solicitations by lawyers; however, the attorneys were able to obtain information about their intended audience from public records.

All the FCC's CPNI Order prohibits is U S West's nonconsensual use of confidential consumer information, generated by customers in the course of their private activities, to advertise products and services. The effect of the majority's decision is to require essentially captive subscribers to forfeit truly personal information to whatever purpose U S West thinks may provide a commercial benefit. This is an exploitative business practice clothed in the garb of the commercial speech doctrine.

II. The FCC's CPNI Order need not implicate First Amendment concerns.

Many state and federal laws limit the disclosure of personal information by private entities without implicating the First Amendment. For example, the Fair Credit Reporting Act provides that a credit agency can only release a consumer's credit report under certain conditions and criminalizes unauthorized disclosures by employees of the consumer reporting agency. *See* Fair Credit Reporting Act, 15 U.S.C. § 1681r (Supp. III 1997); *see also* Video Privacy Protection Act of 1988, 18

U.S.C. § 2710 (1994) (prohibiting disclosure of a consumer's video rental records).

In addition, the Supreme Court has held unequivocally that a commercial entity that is not a news publication cannot claim full First Amendment protection for the information it includes in a credit report. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985). Such speech receives lesser protection because it is "solely in the individual interest of the speaker and its specific business audience." *Id.* As a commercial entity that desires to use private information it has obtained from its customers for pecuniary gain, U S West is entitled to, at most, limited First Amendment protection.

If the Court is prepared to allow a commercial entity to claim a First Amendment interest in the commercial use of private information obtained from its customers, it will call into question virtually every law in the United States that seeks to protect the privacy of consumers. As telephone companies, Internet service providers, and other communications firms acquire ever more detailed information from customers in the course of offering routine communication services, the Court’s ruling could effectively prevent the adoption of legislative safeguards that would preserve the reasonable

expectation of privacy in private communications and personal activities that telephone customers currently enjoy.

V. If the FCC's CPNI Order does implicate First Amendment concerns, then it is consistent with the Supreme Court's holding in *Central Hudson*.

In its decision, the panel first determined that the speech at issue was commercial speech and then relied on the test in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), to analyze whether the restrictions at issue violated the First Amendment. Amici believe that U S West's First Amendment claims are weakened by the circumstances under which customers provide information with the reasonable expectation that it will be kept private and also (as to technically generated call information) because customers have no choice as to its collection, since the information is generated automatically. The question of whether limiting U S West's ability to disclose the records of private telephone calls for various marketing activities impermissibly burdens commercial speech rights raises issues that go beyond any Supreme Court holdings in the realm of commercial speech; however, this issue need not be resolved here because, even using the *Central Hudson* analysis, the majority's invalidation of the opt-in approach is untenable.

A. The speech at issue concerns lawful activity and is not misleading.

Assuming the CPNI Order implicates First Amendment concerns, there is no question that the information involved is truthful and nonmisleading.

B. The government has a substantial state interest in protecting the privacy of telephone consumers.

Although the majority "ha[d] some doubts about whether this [privacy] interest, as presented, rises to the level of 'substantial,'" *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1235 (10th Cir. 1999), it "assume[d] for the sake of this appeal that the government has asserted a substantial state interest in protecting people from the disclosure of sensitive and potentially embarrassing personal information." *Id.* at 1236. For the reasons discussed in Section I.A. *supra*, there is no question that protecting consumers' privacy is a substantial state interest. The panel also found that while the privacy harm addressed by 47 U.S.C. § 222 might be a substantial state interest, the goal of promoting competition was not. *See U.S. West*, 182 F.3d at 1236. However, whether promoting competition is a substantial state interest is irrelevant in light of the fact that protecting consumer privacy undoubtedly is.

C. The CPNI Order, while no more extensive than necessary to serve the state's substantial interest, need not be the least restrictive means of doing so.

The crux of the panel's ruling in this case rested on the final prong of the *Central Hudson* test: whether the CPNI regulations were narrowly tailored, "mean[ing] that the government's speech restriction must signify a 'carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition.'" *Id.* at 1238 (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993)) (internal quotation marks omitted). The Court determined that "the FCC's failure to adequately consider an obvious and substantially less restrictive alternative, an opt-out strategy, indicates that it did not narrowly tailor the CPNI regulations." *Id.* at 1238-39.

The majority's holding is incorrect for two reasons. First, subsequent to its decision in *Central Hudson*, the Supreme Court ruled in *Board of Trustees v. Fox*, 492 U.S. 469 (1989), that the least restrictive means test does not apply to commercial speech. Second, there is adequate evidence that the FCC did carefully calculate the costs and benefits associated with both the opt-in and opt-out approaches. The FCC's CPNI regulations were preceded by 121 paragraphs giving a synopsis of the order. *See* CPNI Order at 20,327-20,338. Thirty of those paragraphs were devoted to discussing "'Approval' Under Section

222(c)(1)." *Id.* at 20,329-20,332. Specifically, in paragraph forty-five, the FCC states that it "reject[s] U S WEST's argument that an express approval requirement under section 222(c)(1) would impermissibly infringe upon a carrier's First Amendment rights" and provides numerous reasons why. *Id.* at 20,330. It is clear from reading the CPNI Order that the FCC did not casually or arbitrarily select the opt-in over the opt-out approach as though it were flipping a coin; instead, the FCC read 47 U.S.C. § 222, solicited and studied comments from any interested party, and carefully chose the option it believed best represented the intent of Congress. Moreover, the alternative opt-out approach that was rejected by the FCC would have placed an unreasonable burden on telephone customers to take additional steps to protect information that is, by all expectation, confidential.

Indeed, this Court does not need to rely solely on the judgment of the FCC to determine that the third prong of the *Central Hudson* test has been satisfied. There is substantial independent evidence that the opt-in approach is the most reasonable and effective method for protecting sensitive private information. Opt-out is simply not a sensible means to protect the privacy of commercial data because "the majority of the general public is still unaware of the exact nature of marketing uses and the availability of opt-out choices. The industry

itself recommends the use of only vague notices that do not offer meaningful disclosure of practices." Paul M. Schwartz & Joel R. Reidenberg, *Data Privacy Law: A Study of United States Data Protection* 329-30 (1996) (footnote omitted). "Many consumers are unaware of personal information collection and marketing practices. They are misinformed about the scope of existing privacy law, and generally believe there are far more safeguards than actually exist." *Privacy Rights Clearinghouse Second Annual Report* 21 (1995), *cited in* Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 Stan. L. Rev. 1193, 1253 n.255 (1998).

VI. The FCC properly interpreted the intent of the Congress by choosing the most effective means for protecting the privacy interests of consumers.

When Congress enacted section 702 of the Telecommunications Act of 1996, its primary concern was protecting the privacy interests of consumers. Congress did not intend to impede the carrier's ability to communicate with its current or potential customers but rather to insist that confidential information remain protected.

A. Congressional intent makes clear that § 222 applies to the rights of customers, not carriers.

47 U.S.C. § 222(c)(1) requires a telecommunications carrier to obtain a customer's approval before it can use, disclose, or

allow access to that customer's CPNI. *See* Telecommunications Act of 1996 § 702(c)(1), 47 U.S.C. § 222(c)(1) (Supp. III 1997). In its report on the legislation that was eventually enacted as the Telecommunications Act of 1996, the House Commerce Committee explains that the purpose of the protections contained in this section are to balance "the need for customers to be sure that personal information that carriers may collect is not misused" against the customer's interest in ensuring "that when they are dealing with their carrier concerning their telecommunications services, the carrier's employees will have available all relevant information about their service." H.R. Rep. No. 104-204, pt. 1, at 90 (1995).

U S West's argument that it has a First Amendment right to disclose CPNI is compromised by the fact that customers provide this information with the reasonable expectation that it will be kept confidential and that customers have no choice regarding their carrier's collection of this data. The Tenth Circuit, as well as the Supreme Court, have held that if the state possesses extremely personal information about an individual, that individual has a legitimate expectation of privacy with respect to that material, and the government can only disclose it in certain narrow circumstances. *See Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir. 1995); *see also Whalen v. Roe*, 429 U.S. 589, 599 & n.24 (1977). To be able to disclose such

information, (1) the party asserting the right must have a legitimate expectation of privacy, (2) disclosure must serve a compelling state interest, and (3) disclosure must be made in the least intrusive manner. *See Flanagan v. Munger*, 890 F.2d 1557, 1570 (10th Cir. 1989); *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432, 435 (10th Cir. 1981).

Although a telecommunications carrier is not the state, applying the *Denver Policemen's* test is instructive. A customer has a legitimate expectation of privacy with respect to CPNI because this data is not publicly accessible. In addition, there is no compelling state interest in promoting CPNI disclosure that could not be served in a less intrusive manner through the opt-in, rather than the opt-out, approach. In either case, the carrier can only reveal CPNI with the customer's consent, and the opt-in approach is least intrusive to the consumer.

B. Congressional intent makes clear that "approval of a customer" requires an opt-in approach.

Section 222(c)(1)'s requirement that a carrier seek a customer's "approval" before disclosing her CPNI demonstrates that the FCC's adoption of an opt-in approach is in line with congressional intent. When the FCC contemplated its order, it primarily considered two options: opt-in and opt-out. Under an opt-in approach, consumers must give the carrier express

approval before the company can divulge their CPNI, which, as the FCC explained, "will minimize any unwanted or unknowing disclosure" of the information. CPNI Order at 20,329. With an opt-out approach, by contrast, customers would receive a notice to sign and return to prevent the carrier from disclosing their CPNI. As the FCC explained, the danger of the opt-out approach is that "because customers may not read their CPNI notices, there is no assurance that any implied consent would be truly informed." *Id.*

Black's Law Dictionary defines "approval" as "[t]he act of confirming, ratifying, assenting, sanctioning, or consenting to some act or thing done by another. 'Approval' implies knowledge and exercise of discretion after knowledge." Black's Law Dictionary 102 (6th ed. 1990); *see also* Webster's II New College Dictionary 56 (1995) (defining "approve" as "[t]o confirm or agree to officially"). The opt-out approach fails to satisfy this definition of "approval" because under the opt-out approach the customer is not confirming or ratifying anything. Under the opt-out approach, consumers may not possess the knowledge that they must affirmatively act to prevent carrier distribution of their CPNI. If they do not have this knowledge, then they cannot exercise discretion regarding it.

The real question before this Court is what the default position should be for consumers who are unaware of their

telecommunications carrier's CPNI policies and whether those customers' privacy rights should be protected. With opt-in, the default is that the customer's personal information cannot be disclosed. Under opt-out, the default is that the carrier is free to disclose this sensitive information.[3] A customer has a reasonable expectation that his personal information will be kept private. This expectation is upset under the opt-out approach, pursuant to which the carrier can sell this data without consulting with the customer. Use of the word "approval" indicates that the default position should favor the uninformed consumer; i.e., if a customer does not sanction the disclosure of his CPNI, then his CPNI should remain confidential. Because "approval" requires an affirmative action by an informed consumer, only the opt-in approach endorsed by the FCC in its CPNI Order satisfies congressional intent. It is the most reasonable fit between Congress's ends and the means chosen to reach those ends.

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[3] Although under the opt-out approach the consumer would receive some type of notice or form from his telecommunications carrier explaining what CPNI is and how the carrier would like to use it and instructing the individual to sign and return the form to preclude the carrier's use of this data, the fact is that many consumers will fail to read such an instrument or will misplace it or forget to return it to the company. Thus, there is the danger that a number of customers who do not want their CPNI revealed will fail to contact their carrier to opt-out because they are either negligent or uninformed.

CONCLUSION

The Court should grant Respondents' Petition for Rehearing by the Panel and Suggestion for Rehearing En Banc.

Respectfully submitted,

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October 22, 1999

CERTIFICATE OF SERVICE

I hereby certify that on October ___, 1999, I caused a true and correct copy of this Motion of the Electronic Privacy Information Center, American Civil Liberties Union, et al. for Leave to Participate as *Amici Curiae* and the attached Brief of the Electronic Privacy Information Center, American Civil Liberties Union, et al. as *Amici Curiae* in Support of Respondents' Petition for Rehearing by the Panel and Suggestion for Rehearing En Banc to be served by first-class mail, postage prepaid, on the following counsel of record:

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