ORAL ARGUMENT NOT YET SCHEDULED
Nos. 24-1224 (lead), 24-1225

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SPRINT CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,

Respondents.

T-MOBILE USA, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of Final Orders
of the Federal Communications Commission

BRIEF OF CTIA – THE WIRELESS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS SEEKING VACATUR OF THE FCC'S ORDERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amicus curiae* states as follows:

A. Parties and *Amici*

Petitioners in these consolidated cases are T-Mobile USA, Inc. and Sprint Corporation. Respondents are the Federal Communications Commission and the United States of America. CTIA – The Wireless Association® is participating as an *amicus curiae*.

B. Ruling Under Review

Petitioners seek direct review of the FCC's forfeiture orders in *In re Sprint Corp.*, File No. EB-TCD-18-00027700, FCC 24-42, and *In re T-Mobile USA, Inc.*, File No. EB-TCD-18-00027702, FCC 24-43, which were released on April 29, 2024.

C. Related Cases

The following cases are related: *AT&T, Inc. v. FCC*, No. 24-60223 (5th Cir.); and *Verizon Commc'ns, Inc. v. FCC*, No. 24-1733 (2d Cir.).

/s/ Joshua S. Turner
Joshua S. Turner
Counsel of Record for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, CTIA – The Wireless Association® hereby states that it is a trade association that represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st-century connected life. The association's members include wireless providers, device manufacturers, and suppliers, as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment.

CTIA has no parent company, and no publicly held corporation has a 10% or greater ownership interest in CTIA.

Dated: November 27, 2024

/s/ Joshua S. Turner
Joshua S. Turner
Counsel of Record for Amicus Curiae

CIRCUIT RULE 29(d) CERTIFICATE

Amicus curiae CTIA – The Wireless Association® certifies that a separate *amicus* brief is necessary. This brief provides the unique perspective of the broader wireless industry, which is directly impacted by the FCC's unprecedented statutory interpretation. It also offers historical legislative and regulatory context to help the Court assess the proper interpretation of the word "location" in the statutory definition of customer proprietary network information. *Amicus curiae* is not aware of any other *amicus* brief offering this perspective.

/s/ Joshua S. Turner
Joshua S. Turner
Counsel of Record for Amicus Curiae

Dated: November 27, 2024

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GLOSSARY

911 Act	Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286
2007 CPNI Order	*Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 (2007)
2013 CPNI Ruling	*Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Declaratory Ruling, 28 FCC Rcd 9609 (2013)
Broadband Privacy Order	*Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, 31 FCC Rcd. 13911 (2016)
Companies	Petitioners T-Mobile USA, Inc. and Sprint Corp.
CPNI	Customer Proprietary Network Information
CRA	Congressional Review Act
CTIA	CTIA – The Wireless Association®
CTIA Guidelines	CTIA's Best Practices and Guidelines for Location Based Services
DOJ	U.S. Department of Justice
FCC or Commission	Federal Communications Commission
Orders	The forfeiture orders imposed on the Companies in *In re Sprint Corp.*, File No. EB-TCD-18-00027700, FCC 24-42 (released Apr. 29, 2024), and *In re T-Mobile USA, Inc.*, File No. EB-TCD-18-00027702, FCC 24-43 (released Apr. 29, 2024)

INTEREST OF *AMICUS CURIAE*[1]

CTIA – The Wireless Association® ("CTIA") files this brief in support of Petitioners T-Mobile USA, Inc. and Sprint Corporation (the "Companies"). CTIA represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st-century connected life. The association's members include wireless providers, device manufacturers, and suppliers, as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment.

CTIA has an interest in this proceeding because its member companies, including the Companies, are regulated by Respondent Federal Communications Commission ("FCC" or "Commission"), which holds broad regulatory and enforcement power over *amicus*'s members. Accordingly, *amicus* has an interest in the FCC's interpretation of its authorizing statutes, including the agency's efforts to impose civil penalties based on novel statutory interpretations through administrative proceedings rather than Article III courts.

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of the brief. *See* Fed. R. App. P. 29(a)(4)(E).

INTRODUCTION AND SUMMARY

For years, wireless service providers enabled beneficial, legitimate uses of customer location data with their customers' consent. These uses included the provision of emergency assistance, fraud detection, and more. And for years, the FCC was aware of these services, never once suggesting an issue. But after a third party not before this Court misused a location service, the Commission changed its mind and, in the orders under review (the "Orders"), declared the Companies' location-based services unlawful—levying approximately $92.2 million in forfeitures against them, collectively. The Commission's newfound interpretation is patently unlawful and flouts both the text of the statute and decades of the agency's own precedent. If that were not enough, the Commission seeks to apply its surprise interpretation in an administrative-enforcement posture that deprives the Companies of their Seventh Amendment right to a jury trial.

Ironically, the Commission's unlawful actions against the Companies will not protect consumer location data from any "ongoing" threat. JA53, JA329 (Simington Dissent). Instead, they will do the opposite. The Commission's unlawful Orders have forced wireless providers out of the location-based services industry, "effectively chok[ing] off one of the only ways that valid and legal users of consent-based location data services had to access location data." *Ibid.* The result is to "push[ ] legitimate users of location data toward unregulated data brokerage"—with

"any of thousands of unregulated apps" from which to choose. *Ibid.* That will "*reduce[ ]* consumer data privacy." *Ibid.* (emphasis added).

This Court should vacate the Orders.

BACKGROUND

The history of Section 222 of the Communications Act shows that the word "location" in the definition of customer proprietary network information ("CPNI") refers to location at the time a call is made. The Commission's prior precedent reinforces the conclusion that this is the best reading of the statute. As explained below, this legislative context belies the novel interpretation that the FCC adopted in the Orders.

A. Congress Adopted Section 222 In The Deregulatory Telecommunications Act, With No Reference to "Location."

Congress passed the Telecommunications Act of 1996 to create a "pro-competitive, de-regulatory national policy framework." S. Rep. No. 104-230, at 113 (1996) (Conf. Rep.) (Joint Statement of Managers). In it, Congress added Section 222 "to balance both competitive and consumer privacy interests with respect to CPNI." H.R. Rep. No. 104-458, at 205 (1996) (Conf. Rep.). The provision reflected Congress's concern that providers with access to sensitive information would "gain a competitive advantage in the unregulated [customer premises equipment] and enhanced services markets." *See Implementation of the Telecomms. Act of 1996*,

Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd. 8061, ¶ 7 (1998).

The Telecommunications Act defined "CPNI" as:

> (A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information.

Pub. L. No. 104-104, § 702, 110 Stat. 56 (1996).

B. In 1999, Congress Added "Location" To The Definition Of CPNI To Facilitate Emergency Response And Regulate Call Location Information.

Congress added the term "location" to the definition of CPNI through the Wireless Communications and Public Safety Act of 1999 ("911 Act"). Pub. L. No. 106-81, 113 Stat. 1286. The 911 Act sought to solve a straightforward problem: public safety answering points (i.e., 911 call centers) could not "locat[e] wireless callers" because they were "mobile," unlike "caller[s]" on "wireline phones" that operated "at a fixed location." S. Rep. No. 106-138, at 2, 7-8 (1999).

The 911 Act thus amended Section 222 to facilitate "the provision of call location information to emergency service personnel." *Ibid*. It required phone companies to "provide information … to providers of emergency services, and providers of emergency support services." 47 U.S.C. § 222(g). It exempted, from

restrictions on the use, disclosure, and access to CPNI, the provision of "call location information concerning the user of a commercial mobile service" in specific emergency situations. *Id*. § 222(d)(4). And it added a new subsection—"Authority to use location information"—to limit the scope of customer approval for the use, disclosure, and access of "call location information" and "automatic crash notification information." *Id.* § 222(f).

Congress accompanied its expanded access to call location information with corresponding privacy protections for this information. Congress recognized that "requir[ing] the provision of call location information to emergency service personnel" made it important to simultaneously "provide[ ] privacy protection for the call location information of users of wireless phones." S. Rep. No. 106-138, at 2, 7 (1999); *see also id.* at 5 (discussing need for privacy protections). It thus, *inter alia*, added "location" to the definition of CPNI to subject call location information to Section 222's privacy protections. *See* 47 U.S.C. § 222(h).

C. The Commission Declined To Offer Its Views On "Location."

For years following the 911 Act, the Commission declined to opine on the amendments to Section 222. It avoided them in its 911 Act proceeding, concluding that the provisions "amend[ing] Section 222" would be "better addressed in [the FCC's] current CPNI and subscriber list information proceedings." *Implementation*

of 911 Act, Fourth Report and Order and Third Notice of Proposed Rulemaking, 15 FCC Rcd. 17079, ¶ 7 (2000).

CTIA then petitioned the Commission in 2000, requesting "a rulemaking proceeding to implement" the 911 Act's changes to Section 222, including the addition of "location" in the definition of CPNI. *See* Petition of CTIA for a Rulemaking to Establish Fair Location Information Practices, WT Docket No. 01-72, at 2 (filed Nov. 22, 2000). The petition also asked the Commission to implement privacy guidance for location information. *Id.* at 8.

The Commission denied CTIA's petition in 2002, finding it unnecessary to "establish[ ] a clear framework for industry to design the services and consumers to predict how their location information will be handled." *Request By CTIA to Commence Rulemaking to Establish Fair Location Info. Pracs.*, Order, 17 FCC Rcd. 14832, ¶ 6 (2002). It concluded that "because of the nascent state of [commercial wireless location-based] services, [the agency did] not wish inadvertently to constrain technology or consumer choices via [FCC] rules."[2] *Id.* at ¶ 7.

[2] Shortly thereafter, the Commission represented that "[t]he standard for use of wireless location information will be addressed in a separately docketed proceeding." *Implementation of the Telecomms. Act of 1996*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd. 14860, ¶ 7 n.20 (2002). The Commission never opened such a proceeding.

D. The Commission Adopted A "Reasonable Measures" Standard For Handling CPNI And Held That Only Call Location Information Qualifies As CPNI.

Following the 911 Act, the Commission also adopted rules that address how providers must handle CPNI. Section 222(a) provides that "[e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to … customers." 47 U.S.C. § 222(a). In 2007, the Commission purported to "codify" this "statutory requirement." *See Implementation of the Telecomms. Act of 1996*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 6927, ¶¶ 33-34 (2007) ("*2007 CPNI Order*"). Specifically, the Commission imposed a general requirement for providers to take "reasonable measures to discover and protect against" unauthorized disclosures of CPNI. *Id.* at Appendix B; *see* 47 C.F.R. § 64.2010(a). The Commission declined to impose minimum CPNI safeguards on providers, and instead opted for a risk-based and flexible framework that "allow[s] carriers to implement whatever security measures are warranted in light of their technological choices," and "enable[s] market forces to improve carriers' security measures over time." *2007 CPNI Order* ¶ 65.

In 2013, the Commission finally weighed in on how the 911 Act amendments to Section 222 changed the meaning of CPNI. It clarified that "location" in Section 222(h) refers to call location information—holding, in a declaratory ruling, that the

"location of a customer's *use of a telecommunications service* … clearly qualifies as CPNI." *Implementation of the Telecomms. Act of 1996*, Declaratory Ruling, 28 FCC Rcd. 9609, ¶ 22 (2013) (emphasis added) ("*2013 CPNI Ruling*"). And the "use of a telecommunications service," the Commission explained, means a call. The agency found that "data on when and where calls fail" and "the location … a handset experiences a network event, such as a dialed or received telephone call or a dropped call" meet "the statutory definition of CPNI" because they "*reveal call details*." *Id*. ¶ 25 (emphasis added) (cleaned up).

Then, in October 2016, the Commission adopted the *Broadband Privacy Order*, which sought to apply Section 222's requirements to broadband providers following the agency's 2015 decision to classify broadband internet access service as a "telecommunications service" under the Communications Act. *Protecting the Priv. of Customers of Broadband and Other Telecomms. Servs.*, Report and Order, 31 FCC Rcd. 13911, ¶ 1 (2016) ("*Broadband Privacy Order*").

In doing so, the FCC opined that the CPNI definition includes, among other data elements, "geo-location." *Id.* ¶ 53. However, the Commission's discussion of "geo-location" data in the *Broadband Privacy Order* suggested that the agency did not intend this phrase to encompass any and all passively-collected data. Instead, the FCC intended "geo-location" to mean location data collected while the device is in use. *See id.* ¶ 65 ("Providers often need to know where their customers are so that

they can *route communications* to the proper network endpoints.") (emphasis added). Indeed, the Commission asserted that the agency had "already held that geo-location is CPNI," quoting the *2013 CPNI Ruling*, and in particular, the Commission's prior statement that "[t]he *location of a customer's use* of a telecommunications service also clearly qualifies as CPNI." *Id*. ¶ 65 & n.126 (quoting *2013 CPNI Ruling* ¶ 22) (emphasis added).

Just months after the Commission adopted the *Broadband Privacy Order*, Congress exercised its authority under the Congressional Review Act ("CRA"), 5 U.S.C. § 802(a), to vacate the *Broadband Privacy Order* in its entirety and nullify the associated regulatory changes. *See* Pub. L. No. 115-22, 131 Stat. 88 (2017). The CRA provides that an agency may not issue a new rule in the future that "is substantially the same" as the one Congress disapproved. 5 U.S.C. § 801(b)(2). Following Congress's disapproval of the *Broadband Privacy Order*, the Commission reclassified broadband internet access service as an information service, exempt from all of Title II, including Section 222. *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018).

ARGUMENT

I. THE ORDERS MISINTERPRET THE STATUTE.

The Commission errs in finding that the location information at issue in the Orders is CPNI. *First*, the information does not "relate[ ] to the … location … of use of a telecommunications service." *Second*, the information was not "made available to the carrier by the customer solely by virtue of the carrier-customer relationship." *Third*, as the Supreme Court recently made clear, the Commission cannot rescue its atextual readings of the statute with claims of deference.

A. The Information Does Not Relate to the "Location Of Use Of A Telecommunications Service."

The Companies' location data is not CPNI because it does not "relate[ ] to the … location … of use of a telecommunications service subscribed to by any customer of a telecommunications carrier." 47 U.S.C. § 222(h)(1)(A). The reason is simple. The Companies collected location data passively—not when the customer "used" a telecommunications service (i.e., voice calling). JA126 (¶ 12), JA367 (¶ 11); *accord id.* at JA50, JA326 (Carr Dissent) ("The customer did not need to make a call to convey his or her location."). Indeed, "'use' impl[ies] action and implementation," not "passive, passing, or ancillary." *Dubin v. United States*, 599 U.S. 110, 118-19 (2023) (cleaned up). And that understanding makes good sense here because the information must also be "made available to the carrier *by the customer*." 47 U.S.C. § 222(h)(1)(A) (emphasis added). "The customer" must do something; the statute is

not concerned with information in the abstract. Thus, passive background collection—untethered from a customer's use of the telecommunications service—is not related to the "use of" the service.

This use-oriented reading accords with the statutory purpose. As explained, Congress added the "location" provisions to Section 222 in 1999 as part of a larger effort to regulate—and permit the disclosure of—call location information for 911 services. The 911 Act was intended to allow emergency services to "determine the location of *the caller*" using a "wireless phone[ ]." S. Rep. No. 106-138, at 2 (emphasis added). With that new enactment, Congress also wanted to "provide[ ] privacy protection for *the call location information of users* of wireless phones." *Ibid.* (emphasis added).

The resulting statutory structure reflects that purpose. Providers are authorized "to provide *call location information*" in certain circumstances, notwithstanding the general protection of CPNI in Section 222(c)(1). 47 U.S.C. § 222(d)(4) (emphasis added). Congress defined customer approval, for purposes of Section 222(c)(1), to mean "express prior authorization" in the context of "*call location information*," while customer approval can be inferred for other CPNI from a failure to opt out. *Id.* § 222(f) (emphasis added). And to ensure privacy provisions for call location information, Congress added "location" to the definition of CPNI—i.e., information that relates to the "location … of use of a telecommunications

service"—with the "use" being a call. *Id.* § 222(h)(1)(A). The Commission previously affirmed this "straightforward" reading of the statute, opining that the "definition" reached "the location of the device *at the time of the calls*." *2013 CPNI Ruling* ¶ 22 (emphasis added).

The Commission flouts the text, structure, and purpose by applying "the rule of the last antecedent." JA10-11 (¶ 24), JA296 (¶ 25) (quotation omitted). That is, the Commission says that the phrase "of use" in Section 222 modifies only the last word in the clause—"amount." On that reading, the FCC holds that CPNI includes information that relates to the location of a telecommunications service, not the location *of use* of a telecommunications service.

But "the rule of the last antecedent is context dependent," *Facebook, Inc. v. Duguid*, 592 U.S. 395, 404 (2021), and the Commission simply ignores the relevant context here—i.e., Congress's intention to collect and provide corresponding protections for "call location information," 47 U.S.C. § 222(f)(1), which is generated through "use of a telecommunications service," *id.* § 222(h)(1)(A); *accord 2013 CPNI Ruling* ¶ 22 ("The *location of a customer's use of a telecommunications service* also clearly qualifies as CPNI.") (emphasis added).

The Commission's reading also would make a mess of the statute. Without the "of use" modifier, CPNI would include the "location of a telecommunications service." But a "telecommunications service" is "the offering of

telecommunications for a fee directly to the public." 47 U.S.C. § 153(53). On the Commission's reading then, Section 222 would protect information related to the "location of the offering"—presumably a retail storefront. But that would neither cover the data at issue in the Orders, nor would it be rational. By contrast, the "location of use of a telecommunications service" covers call location information, consistent with statutory context.

The Commission runs into the same problem with the other enumerated information categories. For example, "quantity of a telecommunications service" would refer to the quantity of an "offering"—a phrase without clear meaning. But "quantity of use of a telecommunications service" refers to the number of calls made using the service—a natural corollary to "amount of use," which refers to the amount of time spent using the service. "Destination" of an "offering" is a mystery. "Destination of use" of the service refers to numbers called when using the service. Thus, "of use" must modify the entire list for it to make any sense.

The Orders' counterexample only confirms this reading. The Commission claims that if "of use" modified the other phrases in the list, "it would lead to apparently anomalous results" because "it is not clear what 'technical configuration of use' would mean." JA11 (¶ 24), JA296 (¶ 25). But it is clear what it would mean: the technical aspects that facilitate "use" of the service, such as data about when a customer uses roaming services. *See also* Pets. Br. 48. By contrast, the

Commission's preferred reading—"technical configuration of a telecommunications service"—would refer to the technical configuration of only the underlying "offering." But that cannot be right because abstract data about the offering—untethered from customer use—is not "made available" by "the customer." 47 U.S.C. § 222(h)(1)(A). Indeed, information about the underlying "offering" is by definition made available to the public, and thus information about it cannot be CPNI.

The Commission's reliance on "initiate" is also misplaced. The Commission says the statute allows the use of CPNI without customer consent to "initiate" services, *id.* § 222(d)(1), and initiation "ordinarily occur[s] before the service is in 'use,'" JA11 (¶ 24), JA296-97 (¶ 25). But customers provide carriers with information about their "type of use" when they initiate their service by selecting the service plan they purchase and then will use. And they provide carriers with information about the "location of use" when they initiate service for a landline. Thus, initiation-based usage accords with the statute.

Finally, even if the Commission were correct that "of use" does not modify "location," the statute would still not reach passively-collected device-location information. As explained, "location of a telecommunications service" makes little grammatical sense. But there are strong indications that "location of a telecommunications service" would not mean "location of a device that can use a

telecommunications service," as it must for the Commission's novel interpretation to prevail. For one, if Congress intended to protect the location of such a device, it could have used one of the defined statutory terms that refer to devices: "mobile station," 47 U.S.C. § 153(34), or "customer premises equipment," *id.* § 153(16). But Congress instead added "location" to a statutory definition that is anchored to the "telecommunications service" and information "made available … by the customer." These terms plainly presuppose a call because that is when the "customer" interacts with the "service" and thereby "makes available" location information to the carrier. And, as explained, that reading is supported by the broader context of the 1999 statute, which was concerned exclusively with call location information. Thus, even if the rule of the last antecedent applies, the Commission still misinterprets the statute.

B. The Information Was Not Made Available "Solely By Virtue Of The Customer-Carrier Relationship."

Regardless of whether the location information at issue "relates to the … location … of use of a telecommunications service," the Orders' reading of the statute is independently wrong for another reason. The Companies' location data was not "made available to the carrier by the customer *solely* by virtue of the carrier-customer relationship," 47 U.S.C. § 222(h)(1)(A) (emphasis added), and thus the data fails to satisfy the other half of the statutory definition.

The text is dispositive. Start with the word "solely." It means "being the only one." *Solely*, Merriam-Webster's Dictionary 1118 (10th ed. 1994). Next "by virtue of," which means "by reason of." *By virtue of*, Webster's Third New International Dictionary 307 (1993). And finally "carrier-customer relationship." The word "carrier" refers back to an earlier term in the phrase: "telecommunications carrier," which is "any provider of telecommunications services" but "*only* to the extent that it is engaged in providing telecommunications services." 47 U.S.C. § 153(51) (emphasis added). So, taken together, information is CPNI when it is made available for only one reason: the provision of a telecommunications service. If the information was made available for a different reason or for multiple reasons, then it flunks the "solely" requirement.

The location data at issue in the Orders fails to satisfy the "solely" clause. That is because the location data could be associated with with data sessions for information services (i.e. data plans), in addition to telecommunications services (i.e. voice plans). *See* JA13 (¶ 31), JA299 (¶ 32); *see* Pets. Br. 52 ("that information supported *both* data and voice services"). And because these services are "mutually exclusive," *Mozilla Corp. v. FCC*, 940 F.3d 1, 19 (D.C. Cir. 2019), the information-service offerings are not also telecommunications-service offerings. Even for customers who purchased a bundled service, location data could be "made available" to the Companies "by virtue of" both the "carrier-customer relationship" *and* the

information-service-provider-customer relationship. Each relationship would be independently sufficient for the Companies to obtain the data. JA51, JA327 (Carr Dissent) ("The carrier could have obtained the customer's location … even in the absence of a voice plan."). Thus, the location data was not provided to the Companies "solely" because of the customer-carrier relationship.

Prior Commission precedent is in accordance with that reading of the text. The Commission previously held "that information that is not received by a carrier in connection with its provision of telecommunications service can be used by the carrier without customer approval." *Implementation of the Telecomms. Act of 1996*, Order on Reconsideration, 144 FCC Rcd. 14409, ¶ 158 (1999). Thus, the agency explained, "customer information derived from information services … may be used, even if the [customer's] telephone bill covers charges for such information services." *Ibid.*

The Orders have no answer to the plain meaning of the statute *that the Commission previously endorsed*. They instead repeatedly insist that the Companies had *a* customer-carrier relationship. JA13-14 (¶¶ 29-31), JA298-300 (¶¶ 30-32). True enough, for those customers purchasing a telecommunications service like cellular voice calling. But that was not the providers' only relationship with those customers. They *also* sold them information services. Those information services *also* made available the location data. So it does not matter that the Companies had,

with some customers, a "carrier-customer relationship" that allowed them "to obtain the location data at issue here," JA13 (¶ 30), JA299 (¶ 31), because that is not the "sole[ ]" relationship that allowed them to obtain the data, 47 U.S.C. § 222(h)(1)(A). The Commission cannot read "solely" out of the statute.

C. Deference Cannot Save The Commission's Interpretation.

The Commission may no longer salvage atextual statutory readings with judicial deference, nor claim the power to reverse course on a prior interpretation of the statute for policy reasons. The Supreme Court "overruled" *Chevron*, so this Court "must exercise … independent judgment in deciding whether an agency has acted within its statutory authority." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). In exercising that judgment, the Court must give the statute its "single, best meaning … fixed at the time of enactment." *Id.* at 2266 (quotations omitted).

The Commission's reading is also not entitled to respect under *Skidmore*. *See id.* at 2259. For one, the Commission's interpretation of Section 222 was not "issued contemporaneously with the enactment of the statute," nor is it "consistent[ ] with earlier … pronouncements." *Ibid.* To the contrary, its interpretation—issued decades after the statute's enactment—is a sharp departure from years of precedent, as set forth above. And the interpretation does not depend upon "specialized experience." *Ibid.* The parties agree on the underlying technical facts, and the

Commission's interpretations turn on canons of construction and lay dictionary definitions. *See, e.g.*, JA10-11 (¶ 24), JA296 (¶ 25) (invoking "rule of the last antecedent"); JA11 (¶ 25, n.97), JA297 (¶ 26, n.99) (citing dictionaries). These interpretive tools are the standard fare of judicial interpretation, not factual analysis. Thus, the Commission's reasoning has no special "power to persuade." *Loper Bright*, 144 S. Ct. at 2259.

II. THE ORDERS VIOLATE FAIR NOTICE.

The Fifth Amendment provides, in part, that "[n]o person shall … be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Thus, the Government must "give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). And a failure to provide fair notice warrants reversal of "the agency's finding of liability and the related fine." *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1330 (D.C. Cir. 1995).

Here, the language of Section 222 failed to "give [the Companies] fair warning of the conduct it prohibits or requires." *See Gates & Fox Co., Inc. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). Even if the best reading of the statute is the one articulated for the first time in the Orders, that reading is far from clear. The statute is at the very least ambiguous—and the years of Commission precedent set forth above gave the Companies no reason to think the statute applied to all passively-collected location information. In fact, the Commission's precedent was

fully consistent with the Companies' reading of the statute. Moreover, the Commission failed to provide fair notice to the Companies that their data-security measures would violate 47 C.F.R. § 64.2010(a).

A. Section 222 Did Not Afford the Companies Fair Notice That CPNI Includes Passively-Collected Location Information.

The language of Section 222 did not provide the Companies with fair notice that passively-collected location information fell within the definition of CPNI. As explained above, two significant textual hurdles point the other way: (i) the "of use" modifier, and (ii) the phrase "solely by virtue of the carrier-customer relationship." *See supra*; *cf. Loper Bright*, 144 S. Ct. at 2285 (Gorsuch, J., concurring) (explaining that "textualism serves as an essential guardian of the due process promise of fair notice"). The structure and purpose of the statute are in accord, reflecting Congress's intent to provide privacy protections for call location information in the 911 Act. *See supra*.

But even if, after applying the tools of statutory construction, this Court determines that the "single, best meaning … fixed at the time of enactment," *Loper Bright*, 144 S. Ct. at 2266 (quotations omitted), is that the statute does apply to all passively-collected data, that conclusion could come only after resolving significant ambiguity in the statutory language. Because "a person of ordinary intelligence" would not have had "fair notice" of that statutory import, *Fox*, 567 U.S. at 253, applying the FCC's construction for the first time in an enforcement posture would

offend "[t]raditional concepts of due process incorporated into administrative law," *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

Moreover, the FCC did nothing to resolve this ambiguity in favor of its current reading of the statute prior to launching this enforcement proceeding. To the contrary, the FCC precedent discussed in detail above *confirmed* the Companies' straightforward textual reading, rather than refuting it. For example, in 2013, the Commission declared that Section 222(h) covered the "*location of a customer's use* of a telecommunications service" because that "use"—e.g., "a dialed or received telephone call or a dropped call"—"reveal[s] call details." *2013 CPNI Ruling* ¶¶ 22, 25 (quotations and alterations omitted). In other words, the Commission endorsed the exact interpretation of Section 222(h) that it now says is so wrong that it warrants millions in penalties. That kind of "baffling and inconsistent" interpretation is a textbook fair-notice violation. *See, e.g.*, *Satellite Broad. Co.* 824 F.2d at 2, 4.

Following Congress's rejection of the *Broadband Privacy Order*, providers had even more reason to believe that Section 222 did not apply beyond call location information. The *Broadband Privacy Order* is the sole instance where the Commission even arguably sought to extend the definition of CPNI to a broader category of device-location information,[3] and Congress rejected it. And while the

[3] However, as explained above, it is not even clear that was the Commission's intention because the *Broadband Privacy Order* claimed its interpretation of Section

CRA prevents the FCC from issuing a new rule that is "substantially the same" as the *Broadband Privacy Order*, 5 U.S.C. § 801(b)(2), the Commission could have issued a decision clarifying that the FCC nevertheless believed CPNI includes passively-collected geo-location data. The agency declined to do so.

The Commission's primary response to the Companies' fair-notice argument is that they should have expected the unexpected. In the agency's view, because the FCC never "set out a comprehensive list of data elements that pertain to a telecommunications service and satisfy the definition of CPNI," parties could not "reasonably have assumed that the fact a given scenario had not been expressly addressed by Commission rules and precedent meant it fell outside the scope of CPNI." JA16 (¶ 37), JA301 (¶ 37). To explain this argument is to reject it. *The Government* must give the public "full notice of its interpretation" and may not impose punishment when its rules are "ambiguous." *Satellite Broad. Co.* 824 F.2d at 3-4. The FCC's argument would reverse this burden and would turn "the practice of administrative law" into little more than a game of "Russian Roulette." *Id.* at 4.

The Commission's final defense is a tautology. It states that "implicit in section 222 is a rebuttable presumption that information that fits the definition of CPNI contained in section 222([h])(1) is in fact CPNI." JA16 (¶ 37), JA301-02

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222 was consistent with the *2013 CPNI Ruling*, which expressly tied Section 222(h) to call location information. *See supra*.

(¶ 37) (cleaned up). But that "presumption" amounts to nothing more than assuming the agency's conclusion.

B. The Commission Failed to Afford the Companies Fair Notice That Their Security Measures Violated Agency Rules.

The Commission also did not provide the Companies fair notice that their measures were not "reasonable" enough to protect CPNI, in violation of 47 C.F.R. § 64.2010(a). Indeed, the agency never required any specific CPNI security measures and instead advised providers to "implement whatever security measures are warranted" and "reasonable" "in light of the threat posed … and the sensitivity of the customer information at issue." *2007 CPNI Order* ¶¶ 63-65.

To satisfy these obligations, the Companies did implement safeguards, including industry-leading protocols. They followed CTIA's Best Practices and Guidelines for Location Based Services ("CTIA Guidelines"), "required aggregators to obtain a customer's express consent before disclosing the customer's location information," and "required maintenance of customer-consent records." Pets. Br. 14-15. They also "required that users be allowed to revoke consent and report abuse." *Id.* at 15. Additionally, the Companies reviewed aggregator use cases before providing location data access to an aggregator. *Id.* at 15. Both Companies also had the contractual right to audit and suspend or terminate companies for non-compliance. *Id.* at 15-16. And they rapidly and systematically improved their

safeguards when necessary, in stark contrast to the agency's inaction on location data. *Id.* at 19-21.

Although the Commission now claims that the CTIA Guidelines were inapplicable to the Companies' use cases because "they do not offer guidance to carriers on how to assure that location-based service providers comply with a contractual obligation to access location information," JA20 (¶ 47), JA306 (¶ 48), this argument discounts the numerous other safeguards that the Companies implemented for location-based service providers. And while the Commission takes issue with the Companies' contractual provisions for a host of reasons, including that the Companies were unable to compel third parties to cooperate, the Commission never put them on notice that the flexible, risk-based security measures adopted in the *2007 CPNI Order* included prescriptive contractual requirements. The Commission can hardly fault the Companies for not understanding that its measures would be insufficient when the sum total of the agency's guidance was to implement "whatever security measures are warranted" and "reasonable."

Ultimately, both this Court and the Supreme Court have recognized that federal agencies are "obliged to 'provide regulated parties fair warning of the conduct [a regulation] prohibits or requires.'" *Comcast Cable Commc'ns v. FCC*, 717 F.3d 982, 1006 (D.C. Cir. 2013) (Edwards, J., concurring) (quoting *Christopher*

v. SmithKline Beecham Corp., 567 U.S. 142, 156 (2012)). Because the Commission failed to do so here, this Court should vacate the Orders.

III. THE ORDERS VIOLATE THE SEVENTH AMENDMENT.

The Seventh Amendment provides that "the right of trial by jury shall be preserved" in "Suits at common law, where the value in controversy shall exceed twenty dollars." U.S. Const. amend. VII.

In *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), the Supreme Court applied the Seventh Amendment in an administrative-enforcement context. The Court held that a party was entitled to a jury trial when the SEC sought "civil penalties against him for securities fraud." *Id.* at 2127. It explained that the SEC's remedy—"civil penalties"—triggered the Seventh Amendment because it was "a type of remedy at common law that could only be enforced in courts of law." *Id.* at 2128-30. Although the remedy was "all but dispositive," the Court also held that "the close relationship between federal securities fraud and common law fraud confirm[ed] that th[e] action [wa]s 'legal in nature.'" *Id.* at 2129-31. And the Court held that the "public rights exception" to the Seventh Amendment did not apply because the SEC sought a "punitive remedy" and targeted "the same basic conduct as common law fraud." *Id.* at 2135-36.

Jarkesy controls these cases. The FCC's forfeitures are "designed to be punitive." *Id.* at 2130. They consider the "gravity of the violation," "the degree of

culpability," and "any history of prior offenses"—considerations which confirm a punitive purpose. 47 U.S.C. § 503(b)(2)(E). Further, Congress expressly designated FCC forfeitures as a "penalty" in the statute. *Id.* § 503(b)(1). And just like the SEC, the FCC "is not obligated to return any money to victims." *Jarkesy*, 144 S. Ct. at 2130. Thus, like the civil penalties in *Jarkesy*, the forfeitures here are "designed to punish and deter," and that "conclusion effectively decides that this suit implicates the Seventh Amendment right." *Ibid.*

Although the nature of the remedy is dispositive, the Commission's proceedings are also analogous to a common-law negligence claim. *Compare* Restatement (Third) of Torts § 3 (Am. L. Inst., June 2024 Update) ("A person acts negligently if the person does not exercise reasonable care under all the circumstances."), *with* JA17 (¶ 41) (holding T-Mobile "fail[ed] to take reasonable measures"); JA303 (¶ 41) (same). And because the FCC seeks a punitive remedy that targets the same basic conduct as common-law negligence, the public-rights exception does not apply. *Jarkesy*, 144 S. Ct. at 2135-36.

The Commission incorrectly argues that there is no Seventh Amendment problem because "[the Companies are] entitled to a trial *de novo*" under Section 504(a) of the Communications Act "before [they] can be required to pay the forfeiture." JA40 (¶ 97), JA316 (¶ 74). The Commission is wrong on two fronts.

First, the Companies are not "entitled" to a trial. Rather, parties are subject to a trial only when the Government brings a "suit for the recovery of a forfeiture." 47 U.S.C. § 504(a). The United States, however, does not always bring recovery suits and sometimes takes many months to initiate them. In the illegal robocalling context, for example, the FCC has referred nine failures to pay forfeitures to the Department of Justice ("DOJ") for collection since 2017. *Report to Congress on Robocalls and Transmission of Misleading or Inaccurate Caller Identification Information*, FCC, at 6-7 (Dec. 27, 2023). The DOJ has sued to collect just one of those forfeitures. *See* Press Release, Federal Court Enters $9.9M Penalty and Injunction Against Man Found to Have Caused Thousands of Unlawful Spoofed Robocalls, DOJ (Mar. 22, 2024), https://tinyurl.com/2vf2hfvu. And it appears to have allowed five of the eight referrals to become time-barred under the five-year statute of limitations. *See* 28 U.S.C. § 2462.

Thus, a party may have to wait *years* for its day in court (if it ever comes). And, in the meantime, the party must continue operations with the threat of liability hanging over it. This pending liability can affect parties' ability to access credit and close transactions, among other business impediments. And the party has no way to end the legal uncertainty until (and if) the Government chooses to prosecute or allows the limitations period to expire. A constitutional right that exists at the sole discretion of federal prosecutors is no right at all.

Second, the trial to which the Companies might have been subjected could potentially come at the cost of judicial review. Some courts have held that a defendant in a "trial" under section 504(a) cannot raise "legal challenges" to the agency's authority. *See, e.g.*, *United States v. Stevens*, 691 F.3d 620, 622-23 (5th Cir. 2012). Thus, depending on where the Government initiates collection, the district court may be bound to "adhere to the FCC's interpretation of the Act, no matter how wrong the FCC's interpretation might be." *See PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 588 U.S. 1, 11 (2019) (Kavanaugh, J., concurring). Thus, in order to protect their statutorily-conferred right to "*de novo* judicial review," *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2459 n.9 (2024), the Companies were forced to pay the fine and forfeit their Seventh Amendment right to a jury trial, *AT&T Corp. v. FCC*, 323 F.3d 1081, 1085 (D.C. Cir. 2003); *see* Pets. Br. 35-36. That is unconstitutional, because it conditions the Companies' access to judicial review "on the surrender of a constitutional right." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013).

At bottom, the FCC cannot use a "trial" that may never take place and may not be truly *de novo* to remedy its Seventh Amendment violation.

CONCLUSION

In light of the foregoing, this Court should vacate the Orders.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,451 words.

This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in proportionally spaced 14-point Times New Roman font using Microsoft Word.

Additionally, this brief complies with D.C. Circuit Rule 32(b)(1) because when electronically filed in PDF format, the document was generated from the original word-processing file and is fully text searchable.

Dated: November 27, 2024

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CERTIFICATE OF SERVICE

I certify that on November 27, 2024, I caused the foregoing to be served upon all counsel of record via the Clerk of Court's CM/ECF notification system.

Dated: November 27, 2024

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