

No. 99-

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IN THE  
**Supreme Court of the United States**

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COMPETITION POLICY  
INSTITUTE,

*Petitioner,*

v.

U S WEST, INC.,

*Respondent.*

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On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Tenth Circuit

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**PETITION FOR WRIT OF CERTIORARI**

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February 28, 2000

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## QUESTIONS PRESENTED

1. Whether rules promulgated by the Federal Communications Commission (“FCC”) requiring local telephone companies to obtain affirmative customer consent before using or disclosing customer proprietary network information (“CPNI”) restrict protected speech under the First Amendment.

2. Whether the court of appeals improperly rejected the governmental interest in protecting customers’ privacy interests in their CPNI, given the specific congressional mandate for protecting the privacy of such data in Section 222 of the Communications Act of 1934, as amended, 47 U.S.C. § 222.

3. Whether *Chevron* deference is owed to administrative agencies on review of agency orders where the underlying statute presents a potential constitutional question.

## **LIST OF PARTIES AND AFFILIATES**

Pursuant to Supreme Court Rule 29.6, Petitioner states as follows:

The Competition Policy Institute (“CPI”) is an independent, non-profit organization that advocates state and federal policies to promote competition in telecommunications and energy services in ways that benefit consumers. CPI is advised by a board of consumer representatives from around the country and receives financial grants primarily from new entrants in the market for local telephone service. CPI has no parent companies, subsidiaries, or affiliates.

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**PETITION FOR WRIT OF CERTIORARI**

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The Competition Policy Institute (“CPI”) submits this petition for review of the judgment of the United States Court of Appeals for the Tenth Circuit.

**OPINIONS BELOW**

The initial order of the Tenth Circuit vacating the CPNI rules of the FCC issued August 18, 1999 in *U S West v. FCC*, 182 F.3d 1224 (10<sup>th</sup> Cir. 1999) (reprinted at Pet. App. 1a-54a). The court of appeals’ order denying CPI’s petition for rehearing was issued on November 30, 1999 and is reprinted at Pet. App. 90a-92a.

## JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 (1).

## STATUTORY PROVISIONS INVOLVED

The text of the First Amendment to the Constitution of the United States of America appears at Pet. App. 93a. The relevant portions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, appear at Pet. App. 94a-102a.

## STATEMENT OF THE CASE

This case requires Court review in order to clarify the proper role of the federal courts of appeal in assessing rules promulgated by an administrative agency in accordance with its plenary jurisdiction granted by congressional statute. The court of appeals has misapplied the First Amendment to agency action that does not restrict speech. Further, the court has confused an Administrative Procedure Act challenge to agency rules with a *sub silentio* constitutional attack on a valid congressional statute, thereby obliterating Congress's judgment that personal privacy in today's "information age" requires that so-called Customer Proprietary Network Information ("CPNI") should not be used or disclosed without a person's approval. The court of appeals' decision raises core issues of separation of powers among the legislative, executive and judicial branches of the government and will have far-reaching consequences for judicial review of federal agency decisions. The court of appeals' judgment represents such a serious departure from the settled judicial role in administrative review that

certiorari is warranted as an exercise of this Court’s supervisory powers.

**Section 222 — “Privacy of Customer Information”**

The Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* (West Supp. 1998) (the “1996 Act”), is a sweeping legislative effort by Congress to create a “new model” of telecommunications regulation, H.R. Conf. Rep. No. 104-458, 104<sup>th</sup> Cong., 2d Sess. at 121, with the express purpose of “shift[ing] monopoly markets to competition as quickly as possible,” H.R. Rep. No. 104-204, 104<sup>th</sup> Cong., 2d Sess. at 89. Included in the 1996 Act is Section 222, which enacts statutory restrictions on the use of CPNI — data regarding a customer’s account and usage — by telecommunications carriers. 47 U.S.C. § 222 (Pet. App. at 95a-98a). Section 222 restricts both the disclosure of CPNI to third parties, *id.* § 222(c)(2) (Pet. App. at 95a), as well as the manner in which a carrier may use CPNI for provision and marketing of its own services, *id.* § 222(c)(1), (d) (Pet. App. at 96a). As with other provisions of the 1996 Act, the FCC is authorized to promulgate rules implementing Section 222 that further define and regulate use and disclosure of CPNI. 47 U.S.C. § 154(i) (Pet. App. at 94a). *See AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 730 (1999).

Section 222 provides that “every telecommunications carrier has a duty to protect the confidentiality of proprietary information of . . . customers.” 47 U.S.C. § 222(a) (Pet. App. at 95a). In the 1996 Act, Congress established specific guidelines for permissible use of CPNI.<sup>1</sup> *Id.* § 222(c)(1)–(3)

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<sup>1</sup> The Act defines CPNI as “information that relates to the quantity, technical configuration, type, destination and amount of use  
*footnote continued on nextpage*

(Pet. App. at 95a-96a). A telephone company may “use, disclose or permit access to individually identifiable [CPNI]” only in providing “the telecommunications service from which such information is derived” or “services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.” 47 U.S.C. § 222(c)(1) (Pet. App. at 95a). Most importantly, Section 222 provides that telephone companies must obtain customer “approval” prior to using CPNI for any purposes other than those expressly permitted. *Id.* § 222(c)(1), (c)(2), (d)(3) (Pet. App. at 95a-96a).

This framework — restricting use and disclosure of CPNI on an intra-service, or same-service, basis — represents Congress’s resolution of the competing interests involved in CPNI. Congress sought to balance carriers’ ability to compete in new services with customers’ rights to prevent disclosure of sensitive information. As the House Conference Report makes clear, “the new section 222 strives to balance both competitive and consumer privacy interests with respect to CPNI.” H.R. Conf. Rep. No. 104-458, 104<sup>th</sup> Cong., 2d Sess. at 205.

### ***Agency Implementation of Section 222***

Though Section 222 is a recent addition to the Communications Act, the FCC has regulated the use and disclosure of CPNI since prior to the divestiture of AT&T.<sup>2</sup> With the

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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.” 47 U.S.C. § 222(f)(1) (Pet. App. at 97a).

<sup>2</sup> In a series of decisions commonly referred to as *Computer II*, *Computer III*, *GTE ONA* and the *Bell Operating Company CPE Relief*  
*footnote continued on nextpage*

passage of the 1996 Act, the FCC began a separate investigation of Congress's mandates in Section 222 in response to industry requests for guidance on the new provision. On May 17, 1996, the FCC released a *Notice of Proposed Rulemaking* requesting comment on which entities are bound by Section 222 and what constitutes customer "approval" for the use and disclosure of CPNI. After releasing an initial order and a request for additional public comment, the FCC issued its *Second Report and Order and Further Notice of Proposed Rulemaking* on February 26, 1998. *Implementation of the Telecommunications Act of 1996*, 13 FCC Rcd. 8061 (1998) ("*Second CPNI Order*") (Pet. App. at 55a-89a) (excerpts).

In the *Second CPNI Order*, the FCC adopted what it termed a "total service approach" to regulation of CPNI. 13 FCC Rcd. at 8081 (Pet. App. at 79a). Because Section 222 provides that a telecommunications carrier may use CPNI only "with the approval of the customer," the FCC interpreted the statute to mean that "approval" requires the affirmative, express consent of the customer prior to carrier use or disclosure of CPNI for purposes other than those expressly permitted. The FCC concluded that this

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*Orders*, the FCC created CPNI rules that were intended to prohibit AT&T, and later the Bell Operating Companies ("BOCs") and GTE, from capitalizing on their incumbent status by using CPNI generated from traditional telephone service to gain a market foothold in newer telecommunications services, such as data transmission and voicemail. *See* 13 FCC Rcd. at 8069 n.31-32 (Pet. App. at 64a-65a) (collecting citations). These rules restricted AT&T and the BOCs from using telephone service-generated CPNI to target existing telephone customers for unsolicited marketing regarding new telecommunications services. These pre-Section 222 CPNI restrictions remain in effect.

framework “best protects customer privacy interests, while furthering fair competition, and thereby best comports with the statutory language, history and structure of section 222.” 13 FCC Rcd. at 8084 (Pet. App. at 79a).

The FCC considered and rejected an “opt-out” approach, under which there would be a presumption of customer consent unless the customer expressly acted, after carrier notice, to block use of CPNI. *Second CPNI Order*, 13 FCC Rcd. at 8128 (Pet. App. at 82a-86a). The agency reasoned that the statutory bar against use or disclosure of private customer information absent “customer approval” warranted a rule that permits customers to restrict use of CPNI at their option. *Id.* at 8131 (Pet. App. at 86a-87a). Further, the Commission found that customers “may be unaware of the privacy protections afforded by section 222, and may not understand that they must take affirmative steps to restrict access to sensitive information.” *Id.* Thus, the FCC concluded that “it [is] difficult to construe a customer’s failure to respond to a notice as constituting an informed approval of its contents,” and accordingly adopted “a mechanism of express approval.” *Id.*

### ***The Court of Appeals’ Decision***

U S West filed a petition for review of the *Second CPNI Order* on May 18, 1998, contending that the FCC’s “opt-in” rules violate the First and Fifth Amendments to the Constitution. Claiming that restrictions on CPNI interfered with its right to engage in targeted direct marketing to its customers, U S West argued that CPNI is protected constitutional speech and that the agency’s rules did not meet the “commercial speech” requirements of *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). According to U S West, the “practical

impact” of the CPNI rules is to prevent speaking to customers “on an individualized basis,” an action tantamount to a restriction on speech altogether. 182 F.3d at 1243 (Pet. App. at 42a). *See* U S West Reply Br. at 6.

Without addressing this purported “practical impact” of the FCC’s rules, the court of appeals vacated the *Second CPNI Order* in a 2-1 decision. The majority opinion assumes, with little analysis, that the CPNI rules interfere with constitutionally protected speech. Analogizing to *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), where this Court overturned a statute barring targeted direct mail by personal injury attorneys, the court held that the CPNI rules are a restriction on “targeted speech.” The court of appeals did not reach the Fifth Amendment issue. Judge Briscoe, in dissent, wrote that the court’s analysis is “frustratingly vague” because the *Second CPNI Order* “does not . . . directly impact a carrier’s expressive activity.” 182 F.3d at 1244 (Pet. App. at 44a).

The court of appeals vacated the *Second CPNI Order* on the theory that the privacy interest relied on by the FCC is not, standing alone, a substantial state interest that satisfies the *Central Hudson* standard for restrictions on commercial speech. The court concluded that “[n]either Congress nor the FCC explicitly stated what ‘privacy’ harm § 222 seeks to protect against.” *Id.* at 1235 (Pet. App. at 21a). Further, the court expressed “doubts about whether this interest, as presented, rises to the level of ‘substantial’” under *Central Hudson*. *Id.* (Pet. App. at 21a-22a).

The majority reasoned that the agency was required to provide “empirical explanation and justification” showing that “dissemination of the information desired to be kept private would inflict specific and significant harm on individu-

als.” 182 F.3d at 1235 (Pet. App. at 22a). Finding that the FCC “fail[ed] to adequately consider an obvious and substantially less restrictive alternative, an opt-out strategy,” *id.* at 1238 (Pet. App. at 34a), the majority held that the CPNI Order is not “narrowly tailored” to protect customer privacy. The majority refused to apply *Chevron* deference<sup>3</sup> to the agency’s construction of Section 222 because, in its view, such deference is inappropriate when the agency interpretation “raises serious constitutional questions.” 182 F.3d at 1231 (Pet. App. at 14a) (citing *Williams v. Babbitt*, 115 F.3d 657, 661-62 (9th Cir. 1997)).

Judge Briscoe’s dissent argued that where a statute is silent or ambiguous, as Section 222 is on what form of “approval” must be provided for carrier use of CPNI, courts should defer to the agency’s interpretation where it is a reasonable construction of the statute. 182 F.3d at 1241-42 (Pet. App. at 36a-37a). She reasoned that U S West’s arguments were “aimed at the restrictions and requirements outlined in § 222 rather than the approval method adopted in the CPNI Order.” *Id.* at 1243 (Pet. App. at 42a). Judge Briscoe concluded that the CPNI rules do not affect speech because they “simply adopt[] from an extremely limited range of choices the particular method a carrier must use in obtaining customer approval.” *Id.* at 1243 (Pet. App. at 43a). Finally, Judge Briscoe criticized the majority’s rejection of the FCC’s privacy rationale because

The privacy interest did not originate with the FCC or the CPNI Order; rather, it originated with Congress when it enacted the restrictions outlined in § 222.

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<sup>3</sup> *Chevron U.S.A., Inc. v Natural Resources Defense Council*, 467 U.S. 837 (1984).

Precisely how the FCC could have or, for that matter, why it would have included in the administrative record “more empirical explanation and justification” for an interest that originated with Congress, and thus predated the administrative process in this case, is unclear. As an administrative agency, and not an independent branch of government, the FCC was obligated to implement without question Congress’ directive to require some form of customer approval.

182 F.3d at 1245 (Pet. App. at 46a-47a).

The full court of appeals, by a 6-5 vote, denied CPI’s petition for *en banc* rehearing on November 30, 1999 without opinion. (Pet. App. at 90a-92a).

### **SUMMARY OF ARGUMENT**

The court of appeals’ decision is a dangerous departure from settled rules of statutory construction and the proper role of federal courts in assessing the constitutionality of agency rules. An “opt-in” requirement for customer approval for use of CPNI is not the First Amendment equivalent to a direct ban on communication with customers. CPNI is data, not speech, and the FCC’s CPNI rules do not restrict or prohibit any communication in which a telephone company may desire to engage with any customer. Unlike the prohibitions on direct customer solicitation that this Court has invalidated, the FCC’s CPNI rules, at most, marginally increase the cost of “targeted marketing” by regulating the use of CPNI as a source of mailing lists. The court of appeals’ implicit assumption that an “opt-in” rule makes targeted commercial speech economically impossible is completely unsupported.

Addressing the governmental interest in customer privacy in the context of the FCC's rules is in any event improper, because the nature and sufficiency of that interest are relevant only to the constitutionality of the 1996 Act itself, a matter not challenged in this case. Both an "opt-in" and "opt-out" method would obviously affect some speech. Thus, the court of appeals used judicial review of agency action to collaterally attack the constitutionality of the statute itself, an impermissible exercise of judicial power that threatens the function of administrative agencies in implementing congressionally established public policies. Further, in assessing the applicability of customers' privacy interests, the court of appeals incorrectly applied a "least restrictive means" test to the FCC's regulations, contravening the more liberal standard for limitation of commercial speech under *Central Hudson*.

Finally, the court of appeals has erroneously imposed its own view of the relative merits of the different means of implementing Section 222 by rejecting the agency's reasonable interpretation that customer "approval" requires affirmative, "opt-in" consent. This conflicts with the *Chevron* deference due the agency and contradicts the FCC's rulemaking authority under the 1996 Act recently confirmed by this Court in *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999). Individually and collectively, these are compelling reasons why this Court should grant certiorari in order to examine, on the merits, the court of appeals' ruling on the profoundly important privacy questions raised in this case.

## REASONS FOR ISSUING THE WRIT

### I. THE COURT OF APPEALS' JUDGMENT IMPERMISSIBLY EXPANDS FIRST AMENDMENT PRINCIPLES TO OVERRULE RESTRICTIONS ON THE COMMERCIAL USE OF PERSONAL DATA THAT DO NOT DIRECTLY OR INDIRECTLY PROHIBIT SPEECH

The court of appeals' judgment is a highly troubling departure from settled standards of assessing commercial speech restrictions. First, the court treated the CPNI rules as a prohibition on speech, when in fact the FCC's regulations merely implement a statutory bar against commercial use of personal telecommunications data without customer consent. Second, the court improperly rejected congressional findings that such personal data warrants privacy protection and required the government to meet a First Amendment "strict scrutiny" standard inapplicable to commercial speech cases.

#### A. CPNI Is Data, Not Expression, That Is Not Constitutionally Protected

The First Amendment infirmity that the court of appeals purported to find in the FCC's "opt-in" CPNI rules is ephemeral. The limitations on the use of CPNI adopted in the *Second CPNI Order* are not directed at the content of communications with customers and do not prohibit, regulate or restrict any marketing communication by any telecommunications carrier.

Contrary to the court of appeals' analysis, CPNI itself is not speech, but rather data. Consistent with Section 222, the FCC defines CPNI as information about a customer's use of telecommunications "that is made available by the customer

solely by virtue of the customer-carrier relationship.” 47 C.F.R. § 64.2003(c). CPNI includes data regarding “to whom, where and when a customer places a call, as well as the types of service offerings to which the customer subscribes and the extent the service is used.” *Second CPNI Order*, 13 FCC Rcd. at 8064 (Pet. App. at 57a). Although this information is an ingredient that may be useful to focus marketing communications on a target audience, it is not, by itself, constitutionally protected speech. The issue in this case is only how CPNI can be used as the criteria by which telephone companies select customers and potential customers to receive their marketing communications. Importantly, the court of appeals did *not* hold that the FCC’s rules restrict the *publication* of CPNI itself.

CPNI is a source of data that can be used in developing carrier marketing campaigns targeting specific customers. The FCC’s regulations merely prevent carriers from using this data to market unrelated services — those services not “necessary to or used in” a customer’s existing communications services — without the affirmative consent of the customer. 47 U.S.C. § 222(c)(1) (Pet. App. at 95a). The CPNI rules do not prohibit any customer solicitations, but instead only affect the information that can be used to determine the audience to be solicited. While the data comprising CPNI may express some of the commercial attributes of telecommunications customers, “[i]t is possible to find some kernel of expression in almost every activity a person undertakes . . . [and] such a kernel is not sufficient to bring the activity within the protection of the First Amendment.” *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

The FCC’s CPNI rules do not restrict, let alone ban, any commercial speech. As Judge Briscoe’s dissent below explains, the agency’s choice of an “opt-in” rule for obtaining customer consent for use of telephone usage data does not “directly impact a carrier’s expressive activity (by, for example, limiting the manner in which the carrier can speak), nor does it indirectly impact a carrier’s expressive activity in such a manner as to warrant First Amendment scrutiny.” 182 F.3d at 1244 (Pet. App. at 47a-48a). Indeed, respondent U S West conceded that it was really arguing that the practical impact of the CPNI rules is only to prevent speaking to customers “on an individualized basis,” which does not prevent speech entirely but may make it less effective for targeted marketing purposes. 182 F.3d at 1243 (Pet. App. at 41a).

The court of appeals’ opinion never comes to grips with this important distinction. It is true that indirect burdens on protected speech can be constitutionally significant in some circumstances. The Tenth Circuit’s analysis, however, fails to differentiate between a direct speech restriction and the indirect economic effect, as claimed here, of a rule that may increase the cost of “individualized or customized” speech. These indirect economic impacts are not only questionable — there is no support in the record for the proposition that all targeted marketing communication is economically impractical absent use of CPNI — but have been recognized by this Court only where the restriction is an overriding deterrent to all speech. *See, e.g., United States v. NTEU*, 513 U.S. 454, 469 (1995) (ban on honoraria); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105 (1991) (ban on compensating criminals in publishing deals).

The court of appeals appears to have assumed, without analysis, that the impact of the CPNI rules is so significant that, for constitutional purposes, they should be treated as a restriction on speech even though the rules allow U S West to engage in any speech it wants, to whatever audience it chooses. While the First Amendment “protects [the speakers’] right not only to advocate their cause but also to select what they believe is the most appropriate means for so doing,” *Meyer v. Grant*, 486 U.S. 414, 424 (1988), the CPNI rules do not prohibit carriers from selecting the means of engaging in commercial speech. For instance, nothing precludes U S West and other telephone companies from using other sources of information (mailing lists, consumer market research, etc.) to “target” its marketing speech to a customized audience. Whether or not the purported economic impact of its inability to use CPNI as the basis for marketing campaigns rises to a level sufficient to warrant constitutional scrutiny is at best questionable and, in any event, remains unaddressed in the court of appeals’ decision.<sup>4</sup>

Thus, this case substantially differs from the commercial speech decisions relied on by respondent and the court of appeals. Contrary to the court’s citation of *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), this case does not involve any direct ban on “targeted” speech. In *Went For It* and similar cases, the courts were examining rules that prohibited speech itself. For instance, the Florida Bar rule in *Went For It* made direct mail advertisements to accident vic-

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<sup>4</sup> *See, e.g.*, 182 F.3d at 1232 (Pet. App. at 13a) (“The existence of alternative channels of communication, such as broadcast speech, does not eliminate the fact that the CPNI regulations restrict speech.”).

tims unlawful. *Id.* at 620-21. Similarly, *Martin v. Struthers*, 319 U.S. 141 (1943), *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), *Schneider v. State*, 308 U.S. 147 (1939), and *Edenfield v. Fane*, 507 U.S. 761 (1993), all involved outright prohibitions on direct or in-person solicitations. Each of these cases invalidated regulations that prevented solicitation of customers. In contrast, the *Second CPNI Order* does not prevent soliciting customers; it eliminates one method of gathering information to determine which customers to solicit.

The speech constraint U S West complains of is no more than a restriction on telecommunications carriers' ability to presume that a customer consents to using his personal information when the carrier cannot or has not obtained express consent from that customer. The First Amendment does not require that a customer's consent be assumed. Indeed, such a result impermissibly impairs an individual's ability to assert his privacy rights guaranteed under the Constitution. "[W]e have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).<sup>5</sup> When

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<sup>5</sup> Similarly, there is no impermissible abridgement of the right to receive information in the *Second CPNI Order*. The First Amendment "necessarily protects the right to receive" information. *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972). The *Second CPNI Order* allows the customer to receive information by giving his affirmative consent. Such a slight effect on the rights of a listener is clearly constitutional. This Court has recognized the strong government interest in certain forms of economic regulation, even though such regulations may have an incidental effect on rights of

*footnote continued on nextpage*

Congress enacted Section 222, it protected customers from just this sort of unwanted speech associated with telecommunications carriers using CPNI for marketing purposes.

[W]e have been careful to acknowledge that unwilling listeners may be protected when in their own homes. In *Schneider*, for example, in striking down a complete ban on handbilling, we spoke of a right to distribute literature only “to one willing to receive it.” Similarly, when we invalidated a ban on door-to-door solicitation in *Martin*, we did so on the basis that the “home owner could protect himself from such intrusion by an appropriate sign ‘that he is unwilling to be disturbed.’”

*Frisby*, 487 U.S. at 485 (1988) (internal citations omitted).

Section 222, and the FCC’s implementing “opt-in” rule for customer approval, are thus a valid exercise of government authority to protect against unwanted use of private data. The FCC’s CPNI restrictions are similar to efforts of homeowners to curtail door-to-door solicitation — empowering customers to prevent unwanted commercial solicitation via targeted marketing. Regulation in this area is thus entirely appropriate, because the government may “prohibit speech when a ‘captive’ audience cannot avoid” it. *Frisby*, 487 U.S. at 487. As further discussed in the next section, even if the CPNI rules did restrict commercial speech, the FCC’s *Second CPNI Order* is completely consistent with this Court’s settled commercial speech precedents.

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speech and association. *National Association for the Advancement of Colored People, et. al., v. Claiborne*, 458 U.S. 886, 912 (1982).

B. The FCC’s “Opt-In” Approach Is Plainly a “Reasonable” Means of Protecting Consumer Privacy Interests

Commercial speech doctrine requires the government to have a “substantial interest” in regulating the affected speech and to fashion regulations that “materially advance” that interest. *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Even if CPNI itself were considered speech for First Amendment purposes, the court of appeals below strayed from proper commercial speech analysis in rejecting the sufficiency of the governmental interest in telecommunications privacy and in requiring the FCC to meet a “least restrictive means” standard inapplicable in commercial speech cases.

First, the court of appeals held that the governmental interest in protecting telephone customer privacy is insufficient to qualify as a “substantial” interest for purposes of First Amendment commercial speech analysis.<sup>6</sup> The flaw in this approach is that the privacy interest in CPNI was established by Congress in enacting Section 222, not by the FCC in deciding how to implement that statute’s command for customer “approval.” Whether an “opt-in” or “opt-out” approach is permissible under the 1996 Act is a question completely unrelated to whether customer privacy is a constitutionally sufficient governmental interest under the *Central Hudson* First Amendment test. More importantly, it

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<sup>6</sup> “Neither Congress nor the FCC explicitly stated what ‘privacy’ harm § 222 seeks to protect against.” 182 F.3d. at 1235 (Pet App. at 21a). Further, the court expressed “doubts about whether this interest, as presented, rises to the level of ‘substantial’” under *Central Hudson*. *Id.*

is settled that “[p]rotection of potential clients’ privacy is a substantial state interest.” *Edenfield v. Fane*, 507 U.S. at 769. Thus, the *Second CPNI Order* regulates only matter in which the government clearly has a substantial interest.

Second, the question of “opt-in” versus “opt-out” as a means of implementing Section 222 is not a matter of constitutional significance. Both place requirements on carriers that must be met before CPNI is used or disclosed. Both increase the cost of engaging in the “targeted speech” of which respondent complains here. And as discussed in Section II below, both would be permissible interpretations of the “approval” proviso in the statute.

Third, and most significantly, in deciding whether the FCC’s *Second CPNI Order* “materially advances” the governmental interest in customer privacy, the court of appeals erroneously required the FCC to demonstrate that its CPNI rules were the least restrictive alternative for regulating CPNI. The Tenth Circuit held that the FCC had “fail[ed] to adequately consider an obvious and substantially less restrictive alternative,” the “opt-in” method. 182 F.3d at 1238 (Pet App. at 30a). But the FCC in fact expressly evaluated the relative merits of the opt-out alternative.<sup>7</sup>

Further, it is settled that the “‘least restrictive means’ test has no role in the commercial speech context.” *Florida Bar*

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<sup>7</sup> The FCC concluded that “imposing an express approval requirement provides superior protection for privacy interests because, unlike under the opt-out approach, when customers must affirmatively act before their CPNI is used or disclosed, the confidentiality of CPNI is preserved until the customer is actually informed of its statutory protections.” *Second CPNI Order*, 13 FCC Rcd. at 8133 (Pet App. at 87a).

*v. Went for It*, 515 U.S. 618, 632 (1995). As this Court explained in *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989), in commercial speech cases the fit between the restrictions and the governmental interest does not need to be “perfect, but reasonable.” A commercial speech regulation “can, in fact, be more extensive than is necessary to serve the government’s interest as long as it is not unreasonably so. This intermediate level of scrutiny is a far cry from strict scrutiny, under which the government interest must be ‘compelling’ and the regulation ‘narrowly tailored’ to serve that interest.” *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 434 (1993) (Blackmun, J., concurring).

There is no legitimate question that the FCC’s opt-in scheme for implementing Section 222 is a “reasonable” means of effectuating the clearly substantial governmental interest in protecting the privacy of customer tele-communications usage information. Instead, by attacking the privacy basis for CPNI protections and applying strict scrutiny to the FCC’s implementation of that congressionally mandated policy, the court of appeals below has “stray[ed] from the narrow scope of the *CPNI Order* and effectively take[n] into account the statutory restrictions on CPNI usage.” 182 F.3d at 1244 (Briscoe, J., dissenting) (Pet. App. at 44a). Therefore, the court of appeals’ decision to vacate the *Second CPNI Order* must be reversed.

## II. THE COURT OF APPEALS' DECISION CONTRAVENES SEPARATION OF POWERS BY SUBSTITUTING JUDICIAL POLICY JUDG- MENTS FOR AGENCY RESPONSIBILITY IN STATUTORY INTERPRETATION

Well-settled principles of administrative law dictate that when Congress enacts legislation and a federal agency promulgates rules pursuant to that legislation, federal courts are to presume the validity of the agency's judgment. *Chevron U.S.A, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). This presumption carries the day unless the agency has acted contrary to the expressed will of Congress or has violated rights secured by the Constitution. *Rust v. Sullivan*, 500 U.S. 173, 190 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

In this case, the court of appeals refused to exercise the requisite *Chevron* deference, relying instead on its own uninformed policy determinations and constitutional concerns to vacate the agency's rules. This arrogation of power cannot be squared with well-established administrative law, Article III limitations on the role of the judiciary vis-a-vis the executive, or this Court's recognition of the FCC's plenary rulemaking powers under the 1996 Act.

### A. The FCC's *Second CPNI Order* Raises No Grave Constitutional Issues Warranting Departure from Chevron Deference to Administrative Interpretation

This Court's landmark *Chevron* decision provides a clear standard for reviewing agency interpretations of ambiguous statutes:

[I]f the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

467 U.S. at 842-43.

A federal agency’s entitlement to judicial deference on review may be limited only when “grave and doubtful constitutional questions” are raised by agency action. *United States ex rel. Hudson v. Delaware & Hudson Co.*, 213 U.S. 366, 408. *Accord, Rust v. Sullivan*, 500 U.S. at 191; *DeBartolo*, 485 U.S. at 575; *Williams v. Babbitt*, 115 F.3d 657, 662 (9<sup>th</sup> Cir. 1997), *cert. denied*, \_\_\_ U.S. \_\_\_, 118 S. Ct. 1795 (1998). Thus, not any merely colorable claim as to the constitutionality of a regulation will strip an agency of *Chevron* deference. Rather, courts “limit this intrusion on agency power to situations where it’s absolutely necessary.” *Babbitt*, 115 F.3d at 662.

Where an act of Congress necessarily touches constitutional concerns, reasoned agency judgment weighing equally rational policy alternatives must not be displaced.<sup>8</sup> For example, in *Rust*, this Court evaluated Department of Health and Human Services regulations prohibiting federally funded entities from advocating abortion as a method of family

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<sup>8</sup> “If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, we should not disturb it.” *United States v. Shimer*, 367 U.S. 374, 383 (1961).

planning. The Court, bound by its earlier decision in *Roe v. Wade*, 410 U.S. 113 (1973), recognized that “any set of regulations promulgated by the Secretary [of the Department] . . . would be challenged on constitutional grounds.” 500 U.S. at 191. According deference to the Secretary’s policy determination, however, the Court found that his action did not, as against other possible actions, “raise the sort of ‘grave and doubtful constitutional questions’ that would lead us to assume Congress did not intend to authorize their issuance.” *Id.*

Thus, agencies are not precluded from exercising their regulatory discretion when an act of Congress, although raising possible constitutional issues, requires agencies to interpret and enforce its provisions. Here, however, the court of appeals failed to apply this principle of judicial restraint, holding that the mere existence of a constitutional question was sufficient to justify a *de novo* standard of judicial review and accord no deference to the findings or reasoning of the agency. 182 F.3d at 1231 (Pet. App. at 11a). This misapplication of constitutional sensitivity resulted in the court’s vacating the *Second CPNI Order* on the basis of its own policy judgment, thereby encroaching upon the power of the executive branch to adopt regulatory policy within its statutory authority.

The *Second CPNI Order* does not raise “grave and doubtful constitutional questions” that support *de novo* review of the FCC’s decision. Assuming CPNI is “speech,” the lack of a definition in Section 222 compelled the FCC to decide whether “approval of the customer” requires affirmative, “opt-in” consent or passive, “opt-out” rejection. There is no question that, under *Chevron*, the FCC’s interpretation would be entitled to judicial deference in the

absence of a constitutional challenge, because without any statutory definition of “approval,” the legislation is manifestly ambiguous. Having before it a statutory requirement for customer approval for use or disclosure of CPNI, the FCC was required to fashion some mechanism to implement the “approval” standard in practice.

Even if the court of appeals’ First Amendment concerns were relevant to the FCC’s rules (as opposed to the underlying statute), they are makeweight, for the reasons explained in detail above. Consequently, by construing *DeBartolo* to override *Chevron* whenever a possible constitutional issue lurks in judicial review of agency rulemakings, the court of appeals assumed the role of policy maker. The court of appeals reasoned that the “the FCC still insufficiently justified its choice to adopt an opt-in regime,” 182 F.3d at 1240 (Pet. App. at 33a), solely because the court believed that the opt-out alternative was preferable in terms of protecting carriers’ commercial speech interests. But neither the statute, nor the FCC’s rules, present “grave and doubtful constitutional questions” under this Court’s commercial speech jurisprudence. Without the necessary constitutional predicate, the court of appeals’ judgment is simply the court’s imposition of its own view on proper public policy in lieu of those of the expert agency charged by Congress with regulating telecommunications. Long-standing precedent prohibits this kind of judicial encroachment upon the discretion of administrative agencies. *Chevron*, 467 U.S. at 844; *United States v. Shimer*, 367 U.S. 372, 382 (1961).

As this Court has recognized, Congress has intentionally relied upon this administrative expertise, endowing the FCC

with plenary jurisdiction to regulate telecommunications under the Communications Act of 1934<sup>9</sup> and again in the 1996 Act. In *Iowa Utilities Board*, the Court reiterated that the FCC has broad authority to implement the Act's terms and make congressional policy a reality. *Iowa Utils. Bd.*, 119 S. Ct. at 730 (“the grant in § 201 [of the Act] means what it says: The FCC has rulemaking authority to carry out ‘the provisions of this Act.’”). Given this broad agency jurisdiction over today’s complex telecommunications industry, and the absence of any “grave” constitutional issue, the court of appeals’ rejection of *Chevron* deference is a very unsettling departure from appropriate bounds of limited judicial review that warrants this Court’s consideration on the merits.

B. Federal Courts May Not Apply Concerns of  
Constitutionality to Quite Different Concerns  
Regarding Agency Implementation

The court of appeals’ reasoning calls into question the judgment of Congress, not the FCC. U S West sought review of the FCC’s *Second CPNI Order* pursuant to Section 402(a) of the Communications Act, 47 U.S.C. § 402(a), on grounds that the FCC’s rules violated the First and Fifth Amendments to the Constitution. 182 F.3d at 1231 (Pet. App. at 8a). Nowhere in the proceedings below was the validity of the underlying provisions of Section 222 addressed or questioned, as the majority acknowledges. *Id.* Nonetheless, the gravamen of the majority’s conclusion rests

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<sup>9</sup> *E.g.*, *Capital Cities Cable v. Crisp*, 467 U.S. 691, 699-700 (1984) (“the Court [has] found that that Commission had been given ‘broad responsibilities’ to regulate all aspects of interstate communication by wire or radio by virtue of section 2(a) of the Communications Act of 1934”).

squarely on an attack on the congressional statute and the policy underpinnings of its language.<sup>10</sup>

Addressing only the First Amendment issue, the court of appeals conducted its analysis under *Central Hudson* with a heavy-handed suspicion of the validity of Congress's motivation in enacting Section 222. First, the court second-guessed the privacy interest at stake in Section 222, noting dubiously that "the breadth of the concept of privacy requires us to pay particular attention to attempts by the government to assert privacy as a substantial state interest." 182 F.3d at 1234 (Pet. App. at 18a). The court then found that "[n]either Congress nor the FCC explicitly stated what 'privacy' harm § 222 seeks to protect against." 182 F.3d at 1235 (Pet. App. at 21a). As Judge Briscoe correctly observed in dissent, this statement reveals the majority's clear animus toward Section 222 itself, and not the FCC's subsequent rules. 182 F.3d at 1244 (Pet. App. at 44a).

In collaterally attacking the constitutionality of Section 222, the court of appeals purported to follow the old canon first articulated in *Hooper v. California*, 155 U.S. 648, 657 (1895), that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." 182 F.3d at 1231 (Pet. App. at 9a-10a). Indeed, federal courts are required to avoid deciding cases on constitutional grounds where a statutory holding is sufficient to dispose of the matter. *Rust*, 500 U.S. at 191 (citation omitted). In

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<sup>10</sup> As Judge Briscoe aptly noted in dissent, "[i]t is difficult to tell from the majority's opinion where its analysis of the CPNI Order ends and its analysis of the statute begins. For much of the opinion, the majority appears to be reviewing the constitutionality of § 222 rather than the CPNI Order." 182 F.3d at 1244 n.6 (Pet. App. at 44a).

reaching out to decide the First Amendment question based on an invalid rejection of administrative agency discretion in resolving statutory ambiguities, the court of appeals has established a new and risky role for courts, one that can easily lead to the inadvertent creation of judge-made rights in the context of judicial review of administrative action. As Judge Posner has written,

[t]he practical effect of interpreting statutes to avoid raising constitutional questions is therefore to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Constitution — to create a judge-made constitutional ‘penumbra’ that has much the same prohibitory effect as the judge-made (or at least amplified) Constitution itself. And we do not need that.<sup>11</sup>

The court of appeals’ conclusion that it was required to pay “particular attention” to the validity of the privacy considerations underlying Section 222 and the FCC’s CPNI rules is misplaced. Congress’s intent to protect consumer privacy in the midst of the exploding information age is unmistakable. Not only does Section 222 impose privacy obligations on telecommunications carriers, but Section 631, 47 U.S.C. § 551, requires cable operators to inform all subscribers upon commencing service that the operator will collect “personally identifiable information” about the subscriber and to explain the parameters for “the nature, frequency, and purpose of any disclosure” of the information. 47 U.S.C. § 551(a)(1) (Pet. App. at 99a).

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<sup>11</sup> Richard A. Posner, *Statutory Interpretation - In The Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 816 (1983).

Congress's interest in privacy thus pervades communications and is evident a variety of existing and proposed legislation.<sup>12</sup>

Moreover, this Court's decisions require federal courts to defer to congressional legislative judgments even if a particular statute raises potential constitutional concerns. In *Turner Broadcasting v. FCC*, 520 U.S. 180 (1997), the Court reviewed Congress's "must-carry" provisions included in the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534-535, under the First Amendment. Despite the clear effect of those provisions — federally compelled speech imposed on cable providers — the Court gave deference to Congress, both in its factual findings and policy judgment in support of must-carry rules. 520 U.S. at 195-96. The Court found that "[e]ven in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy." 520 U.S. at 196.<sup>13</sup>

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<sup>12</sup> See, e.g., Child Online Privacy Protection Act, 15 U.S.C. 6501 (1998). Congress's continued interest in protecting consumer privacy is evidenced in several pending legislative initiatives: H.R. 313, 106<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1999); H.R. 367, 106<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1999); H.R. 514, 106<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1999); H.R. 1057, 106<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1999); H.R. 1910, 106<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1999); S. 759, 106<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1999); S. 573, 106<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1999); S. 854, 106<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1999).

<sup>13</sup> See also *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 365 (1985) (courts must defer to Congress's judgment when Fifth  
*footnote continued on nextpage*

Thus, the court of appeals plainly encroached upon Congress's power rejecting, for its own reasons, the "'privacy' harm § 222 seeks to protect against." 182 F.3d at 1234 (Pet. App. at 21a).

In sum, the court of appeals seriously erred by confusing its constitutional reservations about Section 222 with the validity of the FCC's *Second CPNI Order*. When presented with constitutional infirmities in a statute, federal courts must address those issues directly and should not clothe qualms about a statute's constitutionality in the garb of Administrative Procedure Act review. Federal courts are bound to presume that Congress acted within the bounds of the Constitution and must not "lightly assume that Congress intended to infringe constitutionally protected liberties or usurp the power constitutionally forbidden it." *DeBartolo*, 485 U.S. at 575. The court of appeals here has demonstrated a marked and improper indifference to Congress's express policy judgments, running roughshod over powers of the legislature.

The court of appeals' decision below is thus either a disregard of Congress's expressed intent or the *sub silentio* judicial repeal of a federal statute. Even if they were based on valid public policy, either of these explanations raises grave separation of powers implications, for each represents improper judicial intrusion into the law-making province of Congress.

## CONCLUSION

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Amendment due process concerns arise out of a statute).

For all these reasons, the writ of certiorari should be granted.

Respectfully submitted,

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