No. 99-1427

In the Supreme Court of the United States

COMPETITION POLICY INSTITUTE, PETITIONER

v.

U S WEST, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

WILLIAM B. SCHULTZ
Acting Assistant Attorney General

MARK B. STERN
JACOB M. LEWIS
SUSAN L. PACHOLSKI
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514–2217

CHRISTOPHER J. WRIGHT
General Counsel
Federal Communication Commission
Washington, D.C. 20554

QUESTION PRESENTED

In 47 U.S.C. 222(c)(1) (Supp. III 1997), Congress provided that a telecommunications carrier that obtains information about an individual customer's calling pattern through its provision of telecommunications services to that customer may use that information only incident to its provision of the telecommunications service from which the information was derived, "[e]xcept as required by law or with the approval of the customer." In a regulation implementing Section 222, 47 C.F.R. 64.2007, the Federal Communications Commission (FCC) required that, to obtain customer approval for further use of the customer's calling information, the carrier must obtain the express permission of the customer. The question presented is whether that regulation requiring such express customer permission is a proper implementation of Section 222(c)(1), in light of asserted First Amendment concerns.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statute:

Miscellaneous: Page

In the Supreme Court of the United States

No. 99-1427

COMPETITION POLICY INSTITUTE, PETITIONER

v.

U S WEST, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-54a) is reported at 182 F.3d 1224. The Federal Communications Commission's Report and Order that is the subject of the court of appeals' decision is reported at 13 F.C.C.R. 8061.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1999. Petitions for rehearing were denied on November 30, 1999 (Pet. App. 90a-92a). The petition for a writ of certiorari was filed on February 28, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a challenge to regulations of the Federal Communications Commission (FCC) implementing provisions of the Telecommunications Act of 1996 (the 1996 Act or the Act), Pub. L. No. 104-104, 110 Stat. 56, intended to protect privacy of customer information and to promote competition in telecommunications services. The 1996 Act established a new national policy framework for telephone and related services, designed to promote competition in both local and long-distance markets. See generally *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999); *SBC Communications Inc.* v. *FCC*, 138 F.3d 410, 412-413 (D.C. Cir. 1998).

As part of the new framework, Congress adopted 47 U.S.C. 222 (Supp. III 1997), entitled "Privacy of customer information," to govern the use that telecommunications carriers may make of customer information that carriers obtain in their provision of service. Section 222 places on all telecommunications carriers "a duty to protect the confidentiality of proprietary information of * * * customers," 47 U.S.C. 222(a) (Supp. III 1997), and to that end restricts the use that telephone carriers may make of "customer proprietary network information" (CPNI), 47 U.S.C. 222(c)(1) (Supp. III 1997). CPNI includes information about customers' individual calling patterns, such as the specific numbers that an individual customer calls, as well as when and how often an individual customer makes calls.[1] See 47 U.S.C. 222(f)(1) (Supp. III 1997). CPNI

[1] The statute defines CPNI as "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

does not include aggregate customer information, that is, information relating to groups of services or customers from which individual identities and characteristics have been removed. See 47 U.S.C. 222(c)(3) and (f)(2) (Supp. III 1997).

The provision central to this case, Section 222(c)(1), states:

> Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

The Act thus prohibits carriers from using an individual customer's CPNI unless that customer "approv[es]" such use, or unless the CPNI is used in the carriers' provision of "the telecommunications service from which such information is derived," or services incident thereto. That restriction prevents carriers from disclosing customer information to third parties, such as other carriers; it also limits carriers' ability to use their customers' information themselves—for example, in the development of an individually customized marketing

---

carrier by the customer solely by virtue of the carrier-customer relationship," and as "information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier." 47 U.S.C. 222(f)(1)(A) and (B) (Supp. III 1997).

strategy for a telecommunications service other than the one from which the CPNI was derived.

2. In 1998, the FCC issued regulations to clarify the Act's requirements for carriers' use of CPNI. In its Report and Order accompanying the regulations, the FCC addressed two principal issues: (1) the scope of the phrase "telecommunications service from which such information is derived," as used in Section 222(c)(1)(A), and (2) the requirement that a carrier obtain "customer approval" for use of CPNI outside the telecommunications service from which it was derived. See Pet. App. 55a-89a (excerpts of FCC Report and Order); *In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Second Report and Order* (FCC Report and Order), 13 F.C.C.R. 8061 (1998) (full text of FCC Report and Order).

a. In construing the phrase "telecommunications service from which such information is derived," in Section 222(c)(1)(A), the FCC adopted a "total service approach," which permits a carrier to use a customer's CPNI, without the customer's prior approval, incident to any telecommunications service that it provides to that customer. The FCC understood Section 222(c)(1)(A) to distinguish among telecommunications services along traditional service lines—such as local, interexchange (long-distance), and cellular service. Pet. App. 75a. The FCC further concluded that the Act permits carriers to use a customer's information without prior approval within the bounds of the existing service relationship with the customer. For example, if a telecommunications carrier provides both local and cellular service to a customer, it may use a customer's

CPNI obtained from either service to market offerings incident to either service to that customer. The carrier may not, however, use that CPNI to market long-distance service to that customer, without the customer's approval.[2] *Id.* at 72a-73a.

b. The FCC also considered how a carrier may obtain customer "approval" for use of CPNI beyond the service from which it was derived. The FCC concluded that the term "approval" should be interpreted "in a manner that will best further consumer privacy interests and competition, as well as the principle of customer control" of CPNI. Pet. App. 81a. In light of those statutory objectives, the FCC concluded that "carriers must obtain express written, oral, or electronic approval" by a customer to use a customer's CPNI beyond the existing service relationship. *Ibid.* Such an "opt-in" approach, the FCC reasoned, would best ensure that customers confer knowing approval of the use of their information. See *id.* at 85a; see also *ibid.* (observing that "approval" connotes "an informed and deliberate response"). The FCC rejected an "opt-out" regime, under which a carrier could use CPNI beyond the existing service relationship as long as it had made a request to a customer for permission to use CPNI in that manner and the customer had not expressly objected to such use. An opt-out regime, the FCC explained, would not ensure informed consent, because customers might not read carriers' disclosures

---

[2] The FCC also determined that carriers may use customer information for the provision of inside wiring installation, maintenance, and repair services because these are services "necessary to, or used in, the provision" of the telecommunications service to which the customer subscribes, as provided for by the Act. Pet. App. 74a; see 47 U.S.C. 222(c)(1) (Supp. III 1997).

and might not comprehend the extent of their rights under the Act or the steps they must take to protect those rights. *Id.* at 85a-86a. With respect to promoting competition, the FCC found that an opt-in requirement limits the advantage that incumbent carriers have over new competitive entrants. *Id.* at 86a.

3. Respondent U S West, Inc., filed a petition for review, contending that the regulation's opt-in requirement for customer approval is arbitrary and capricious and violates the First and Fifth Amendments to the Constitution. A divided panel of the court of appeals vacated the regulation. Pet. App. 1a-54a.

a. The court declined to review the FCC's regulation and interpretation of the 1996 Act under traditional deferential administrative-law standards, in light of what it perceived as the "serious constitutional questions" raised by the opt-in regulation. Pet. App. 9a-11a. Rather, the court determined that it should analyze the validity of the regulation under the constitutional standards applicable to regulations of commercial speech.[3] See *id.* at 13a; *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980).

---

[3] In conducting that analysis, the court first determined that the CPNI regulation does in fact restrict speech. Pet. App. 11a-13a. In so ruling, the court rejected the government's point that the regulation does not prevent a carrier from communicating to any of its customers or limit anything that a carrier may say to its customers, but merely prohibits the carrier from using CPNI to determine how to target its marketing campaigns to particular customers. The court reasoned that "a restriction on speech tailored to a particular audience, 'targeted speech,' cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience, 'broadcast speech.'" *Id.* at 12a.

In employing the *Central Hudson* analysis, the court initially questioned whether the government had demonstrated that the interests it put forward in regulating CPNI, protecting customer privacy and fostering competition, are substantial. Pet. App. 18a-26a.[4] The court ultimately decided to assume for the sake of argument that the government had asserted a substantial interest in protecting customers from the disclosure of "sensitive and potentially embarrassing personal information." *Id.* at 22a. On the other hand, the court declined to conclude that promoting competition was a significant consideration in Congress's enactment of Section 222. That Section, the court reasoned, contains no explicit mention of competition, but rather reflects a dominant concern with the protection of privacy. *Id.* at 23a-24a. The court did accept, however, that Congress "may not have completely ignored competition in drafting [Section] 222," and so it agreed to consider that interest "in concert with the government's interest in protecting consumer privacy." *Id.* at 26a.

The court next concluded that the government had not met its burden of demonstrating that the regulation directly and materially advances its interests in protecting privacy and promoting competition. Pet. App. 26a-28a. It reached that conclusion in large part based on its reading of the FCC Report and Order as disclaiming any privacy concerns implicated by disclosure

---

[4] "[P]rivacy," the court stated, "is not an absolute good because it imposes real costs on society," Pet. App. 19a, and so "privacy may only constitute a substantial [governmental] interest if the government specifically articulates and properly justifies it," *id.* at 20a. The court also suggested that "[a] general level of discomfort from knowing that people can readily access information about us does not necessarily rise to the level of a substantial [governmental] interest under [*Central Hudson*]." *Id.* at 21a.

of CPNI within a carrier corporation.[5] *Id*. at 27a. The court also stated that the FCC had only "theorize[d]" as to how competition would be impeded by permitting incumbent carriers to use CPNI obtained in their existing service relationship to market new services to their customers. *Id.* at 28a.

In the centerpiece of its decision, the court concluded that the opt-in regime is not narrowly tailored because the FCC had failed adequately to consider an "opt-out" alternative, which the court believed is less restrictive of speech. Pet. App. 30a. The court rejected in particular the FCC's reliance on a marketing study conducted by U S West that showed that a majority of individuals, when contacted for approval to use their CPNI, declined to grant approval. That study, the court concluded, does not provide sufficient evidence that customers do not want carriers to use their CPNI because it may show only that "individuals are ambivalent or disinterested in the privacy of their CPNI or that customers are averse to marketing generally." *Id.* at 31a. Further, the court concluded, the FCC record does not show adequately that an opt-out strategy would *not* sufficiently protect customer privacy, and the court declined to defer to the FCC's "common sense judgment" and "experience" on that point. *Ibid.*

---

[5] The Court quoted a footnote in the FCC Report and Order explaining that customers ordinarily would not be concerned about the sharing of information within different parts of a carrier corporation that offers local, cellular, and long-distance services. See Pet. App. 27a. The Court overlooked the rest of that footnote, however, which states that customers do expect such information to be disclosed only for the purpose of improving the services the customer already receives. See FCC Report and Order, 13 F.C.C.R. at 8103 n.203.

The basis for the court's decision is best set out in its brief "Conclusion." The court there stated:

> The FCC failed to adequately consider the constitutional implications of its CPNI regulations. Even if we accept the government's proffered interests and assume those interests are substantial, the FCC still insufficiently justified its choice to adopt an opt-in regime. Consequently, its CPNI regulations must fall under the First Amendment. At the very least, the foregoing analysis shows that the CPNI regulations clearly raise a serious constitutional question, invoking the rule of constitutional doubt.

Pet. App. 33a. The court also remarked, however, that it was not requiring the FCC to adopt an "opt-out" approach, explaining that it was "merely find[ing] fault in the FCC's inadequate consideration of the approval mechanism alternatives in light of the First Amendment." *Id.* at 33a n.15.

b. Judge Briscoe dissented. Pet. App. 34a-54a. Employing the analysis of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), she concluded that the CPNI regulation is consistent with Section 222 because the statute does not indicate the precise method that a carrier must use to obtain customer approval, Pet. App. 38a, and the FCC's opt-in approach "legitimately forwards Congress' goal of ensuring that customers give informed consent for use of their individually identifiable CPNI," *id.* at 40a. She also concluded that the constitutional challenges raised by U S West are without merit and were not sufficiently serious to call for reliance on the

canon of statutory construction of avoiding constitutional doubts.[6] *Id.* at 41a-42a.

As an initial matter, Judge Briscoe questioned whether the challenged regulation has any impact on expressive activity at all, because it does not directly affect the manner in which a carrier may speak. Pet. App. 43a. Assuming the regulation is subject to First Amendment scrutiny, however, Judge Briscoe nonetheless found it valid. She first concluded that the government had demonstrated substantial interests in protecting customer privacy and promoting competition. She emphasized that those interests, reflected in the statute itself, originated in Congress, and that the FCC was bound faithfully to implement Congress's directive to require some form of customer approval. *Id.* at 46a-47a. She next found that the challenged regulation plainly promotes customer privacy and competition and that, in any event, it was "wholly unnecessary for the FCC to collect or consider any evidence regarding these two Congressional interests." *Id.* at 49a. Finally, she concluded that the opt-in method is narrowly tailored because "[t]he administrative record convincingly demonstrates" that the principal (and purportedly less restrictive) alternative suggested by U S West, an opt-out method, will "not ensure the Congressional goal of informed customer consent would be satisfied." *Id.* at 50a.

4. The government filed a petition for rehearing and suggestion for rehearing en banc. The panel denied the

---

[6] Judge Briscoe suggested that U S West's constitutional arguments are more appropriately aimed at the statute than the regulation and observed that U S West has not challenged the constitutionality of Section 222 itself. Pet. App. 42a-43a.

petition for rehearing, and the full court denied en banc review by a six to five vote. Pet. App. 90a-92a.

ARGUMENT

The court of appeals erred in invalidating the FCC's regulation requiring telecommunications carriers to obtain express customer approval to use a customer's CPNI for purposes beyond the telecommunications service from which the CPNI was derived. The court failed to accord the proper deference to the FCC's reasonable interpretation of the 1996 Act's "customer approval" requirement in 47 U.S.C. 222(c)(1) (Supp. III 1997). The court was also mistaken in its constitutional analysis of the CPNI regulation.

Nevertheless, certiorari is not warranted at this time to review the court of appeals' decision. The court of appeals struck down only the FCC's regulation, and did not hold that Section 222 itself is invalid. Moreover, the court made clear that it was not directing that the FCC adopt any particular regime on remand, and it therefore did not deny the FCC discretion to devise an approval requirement that will fulfill the 1996 Act's goals of protecting customer privacy and promoting competition. To the extent the court of appeals' decision was based on its perception that the administrative record was inadequate to sustain the validity of a particular scheme to regulate use of CPNI, proceedings on remand may also address that concern.[7]

1. a. The court of appeals' decision invalidating the FCC's CPNI regulation is in error. Indeed, the court's

---

[7] Although we have not filed a certiorari petition seeking review of the court of appeals' decision and argue here that the Court should not grant certiorari at this juncture, should the Court grant the petition we will defend the FCC's regulation on the merits.

entire methodology in analyzing that regulation is seriously flawed. The court was properly presented only with a challenge to the reasonableness of the FCC's regulation implementing the statutory requirement that carriers obtain customer approval if they wish to use CPNI for purposes beyond the telecommunications service from which it is derived. Respondent U S West did not raise a constitutional challenge to the underlying statute. Yet, without questioning that the FCC's regulation is faithful to the intent of Congress, the court engaged in an extensive constitutional analysis of the FCC's regulation and faulted the FCC for failing to develop an administrative record adequate to sustain the constitutionality of the regulation, even though the regulation serves interests written into law by Congress. The court was surely authorized to determine whether the FCC's regulation, including the construction of statutory terms that the regulation reflects, is consistent with the statute and is otherwise not arbitrary or capricious. But if that regulation is consistent with the statute (and we submit it is), then it was not appropriate for the court to find constitutional fault with the FCC for adopting a regulation that is faithful to a statute that has not itself been challenged as unconstitutional.

It is, moreover, far from clear that the regulation implicates carriers' free speech interests at all. As the dissent recognized (Pet. App. 43a-44a), neither Section 222 nor the FCC's regulation prevents any carrier from speaking. Section 222 merely requires carriers to obtain customer approval before using CPNI in certain circumstances, and the FCC regulation merely implements the Act's approval requirement, "adop[ting] from an extremely limited range of choices the particular method a carrier must use in obtaining customer

approval."[8] *Id.* at 43a. Nor is an opt-in regime categorically more restrictive of speech than an opt-out regime. Neither approach directly restricts any carrier's ability to speak to its customers, and both require the carrier to obtain approval, in one way or another, before putting customer information to use in developing particular marketing strategies. Carriers may continue to market any available service even to customers who refuse permission to use their CPNI. Neither the statute nor the regulation prohibits any customer from receiving solicitations, and neither requires any carrier to add anything to or delete anything from any message to potential customers. Cf. *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 706 (1986) (noting that "we have not traditionally subjected every criminal and civil sanction imposed through legal process to 'least restrictive means' scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction").

b. Even if First Amendment scrutiny is apposite, the court of appeals erred in concluding that the FCC regulation fails First Amendment review. The FCC regulation raises no serious concern under the constitutional analysis for commercial speech, properly applied. Under that analysis, the regulation is constitutional if it directly advances a substantial governmental interest and if it is narrowly tailored to serve that interest. See *Central Hudson Gas & Elec. Co.* v. *Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). The court found two

---

[8] In the course of the rulemaking proceeding, carriers identified only three possible methods of obtaining customer approval: (1) express written approval, (2) express written, oral, or electronic approval, or (3) approval implied through customer's failure to opt-out of carrier's use of CPNI. Pet. App. 38a.

constitutional deficiencies in the FCC's regulation: first, it concluded that the regulation does not directly advance either privacy or procompetitive interests, and second, and more centrally, it ruled that the regulation is not narrowly tailored to serve those interests. Both conclusions are erroneous.[9]

---

[9] As we have noted above (see pp. 6-7, *supra*), the court also questioned whether the FCC had adequately demonstrated that the governmental interests assertedly served by the regulation, customer privacy and competition, are substantial interests. See Pet. App. 18a-26a. The court eventually assumed, however, that preventing customer embarrassment from disclosure of CPNI is a substantial interest, see *id.* at 22a, and it did not completely discount the interest in promoting competition, see *id.* at 26a. Although the court's constitutional ruling therefore does not ultimately rest on a conclusion that the interests put forward by the FCC are not substantial, we nonetheless observe that the doubts expressed by the court about the substantiality of those interests lack force.

First, the court believed that the FCC had failed to provide an adequate explanation of the privacy interest served by its regulation. But as we have explained, the statute itself requires customer privacy to be protected, see 47 U.S.C. 222(a) (Supp. III 1997), and the FCC was charged with carrying out Congress's directive to protect the privacy interest identified in the statute. Thus, as the dissent recognized, it was not the FCC's task to justify or explain the privacy interest; rather, "the FCC was obligated to implement without question Congress' directive to require some form of customer approval." Pet. App. 47a. In addition, the government unquestionably has a substantial interest in protecting the privacy of personal information, especially, as even the majority recognized, in this age of "exploding information." *Id.* at 2a. Finally, although the majority indicated that "Congress did not intend for competition to be a significant purpose of [Section] 222," *id.* at 24a, that suggestion is also wrong. The overarching purpose of the 1996 Act was to "promote competition," see Pub. L. No. 104-104, 110 Stat. 56 (preamble), and the legislative history of Section 222 makes clear that it was specifically intended to foster the dual

(i) Contrary to the majority's conclusion, the FCC's customer approval requirements plainly further the statute's twin goals of protecting customer privacy and furthering competition. As for the privacy interest, the FCC determined that an opt-in approach will most effectively ensure that CPNI will not be used unless customers have given their informed consent to such use. Without customer approval, a carrier may neither use CPNI itself for purposes other than the service from which the CPNI was derived nor disclose it to anyone else.

The court found that privacy interest fatally undermined by a footnote in the FCC Report and Order to the effect that customers would not perceive their privacy invaded by having CPNI disclosed *within* a carrier. Pet. App. 27a. But the court misunderstood the footnote (or overlooked most of it); while the FCC expressed the view that customers do expect to have CPNI used within their *existing* service relationship with a carrier, it concluded that customers *do not* have the same expectation when the carrier seeks to use CPNI *beyond* the existing service relationship. See FCC Report and Order, 13 F.C.C.R. 8061, 8103 n.203 (1998). That footnote is consistent with the rest of the FCC Report and Order, in which the FCC concluded that customers "do not expect that carriers will use CPNI to market offerings outside the total service to which they subscribe." *Id.* at 8107 (italics omitted).

---

purposes of protecting privacy and promoting competition. The Conference Report accompanying the 1996 Act explains that Section 222 "strives to balance both competitive and consumer privacy interests with respect to CPNI." S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 205 (1996).

The opt-in requirement also directly advances the congressional interest of promoting competition. Restricting incumbents' use of CPNI derived from long relationships with customers limits their advantages over new entrants into telecommunications markets, who cannot rely on accumulated CPNI from years of service to target their marketing efforts. FCC Report and Order, 13 F.C.C.R. at 8134.

(ii) The panel focused much of its criticism on the FCC's supposed failure to consider the opt-out approach as a less restrictive alternative to the opt-in requirement.[10] See Pet. App. 30a. In fact, the FCC gave extensive consideration to the relative merits of the opt-in and opt-out approaches, and it determined quite explicitly that the governmental interests in protecting privacy and promoting competition would not be served as well by an opt-out approach. See *id.* at 82a-88a. The FCC also explained that its "conclusion [was] guided by the natural, common sense understanding of the [statutory] term 'approval,' which

---

[10] The panel nowhere explained, however, why an opt-out approach is less restrictive of speech than an opt-in rule. As we have explained (pp. 12-13, *supra*), the choice between an opt-out approach and an opt-in approach, while it may have economic consequences for carriers, does not have any direct effect on a carrier's ability to speak. The court's conclusion that an opt-out approach would be less restrictive appears to have been based on its acceptance of the argument that an opt-in approach would result in fewer approvals and would be more expensive to carry out. But an opt-in rule nonetheless does not prevent a carrier from speaking to anyone in its audience that it could reach under an opt-out rule; under either approach, it is still free to offer all telecommunications services to any of its customers. What a carrier cannot do—under either approach—is use CPNI, without the customer's approval, to identify a particular target audience for services that that audience does not already receive.

we believe generally connotes an informed and deliberate response." *Id.* at 85a. And the FCC determined that "[a]n express approval best ensures such a knowing response." *Id.* at 85a-86a. By contrast, the FCC explained, customers under an opt-out regime might not read their opt-out notices, and opt-out notices might not effectively inform customers of their right to restrict use of CPNI or of the steps they must take to exercise that right; therefore, "there is no assurance that any implied consent would be truly informed." *Id.* at 86a.

The FCC further determined that an opt-in rule would better promote competition than an opt-out regime. An opt-out approach, the FCC observed, would result in a greater percentage of implied "approvals" by customers to use their CPNI and would thus place new entrants at a greater competitive disadvantage vis-à-vis incumbents. The FCC also determined that there was a "greater incentive for carriers to use CPNI under this new statutory scheme, and thus greater potential for abuse." 13 F.C.C.R. at 8134.

2. Despite the serious deficiencies in the decision below, we do not believe that the decision warrants the Court's review at this time. The court of appeals did not purport to invalidate any portion of the 1996 Act. Rather, the court merely vacated a particular regulation, promulgated by the FCC to implement a provision of that statute, because it either was unconstitutional or raised serious constitutional questions in light of deficiencies the court perceived in the administrative record. The majority also did not order the FCC to undertake any particular course of action on remand.

As we read the court of appeals' decision, therefore, it certainly remains open to the FCC on remand to

adopt an opt-out approach to implement Section 222. While that approach may not have been the FCC's preferred implementation of the statute, the court of appeals did not suggest that it would contravene the statute or would be unconstitutional. Nor did the court of appeals express any doubt that if the FCC adopted an opt-out rule on remand, it could require carriers to inform customers of their right to opt out in particularly effective ways, to ensure that customers do not inadvertently lose their right to prevent unlimited disclosure of their private information.

Further, since the principal failing the majority found in the FCC's regulation was an inadequate *factual* justification for the opt-in rule, it may be open to the FCC on remand to readopt such a rule, if it were based on evidence in the administrative record sufficient to satisfy a court's First Amendment scrutiny. It is also conceivable, for example, that upon further consideration, the FCC might conclude that an opt-out rule would suffice for inferring "approval of the customer" for certain limited categories of non-public disclosure but that an opt-in rule would be required for any disclosure exceeding those limitations. Should the FCC on remand either adopt an opt-out rule or develop an expanded record as a basis for again adopting an opt-in rule, or perhaps a hybrid rule, and the new regulation is then challenged in the court of appeals and set aside, the Court may then have occasion to address any constitutional issues raised by restrictions on carriers' use of private customer information, as well as any substantial statutory or regulatory questions that would then be presented. At this point, however, we do not believe the Court's review is necessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

WILLIAM B. SCHULTZ
Acting Assistant Attorney General

MARK B. STERN
JACOB M. LEWIS
SUSAN L. PACHOLSKI
Attorneys

CHRISTOPHER J. WRIGHT
General Counsel
Federal Communication Commission

APRIL 2000