No. 07-1312

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

National Cable & Telecommunications Association,

Petitioner

v.

Federal Communications Commission
and United States of America

Respondents

On Petition For Review of a Final Order of the
Federal Communications Commission

BRIEF FOR PRIVACY AND CONSUMER ORGANIZATIONS, TECHNICAL EXPERTS AND LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS URGING THE COURT TO DENY THE PETITION FOR REVIEW OF THE FCC'S 2007 ORDER

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, the Electronic Privacy Information Center ("EPIC") declares that it is a corporation with no parent corporation. No publicly held company owns 10% or more of the stock of EPIC.

IDENTITY OF *AMICI CURIAE*, INTEREST IN CASE, AUTHORITY TO FILE

EPIC has a strong interest in filing an *amicus curiae* brief in this case. The April 2, 2007 Order at issue in this case was issued by the Federal Communications Commission ("FCC") in response to an August 2005 petition from EPIC to the agency. EPIC believes the "opt-in" consent and other safeguards in the order are necessary in light of mounting evidence of "pretexting" and identity theft, based on the misuse of telephone records. EPIC seeks to detail in its *amicus curiae* brief that the opt-in approach is consistent with the First Amendment and is the most reasonable fit with the Congress's intent to protect the privacy of telephone subscriber's personal information. A decision against the FCC would jeopardize an individual's right to privacy, because individuals have a significant interest in controlling distribution of their personal information.

EPIC derives its authority to file this *amicus curiae* brief from its motion for leave to file to the D.C. Circuit Court of Appeals.

Amici Privacy, Consumer, and Civil Liberties Organizations

The American Policy Center, located in suburban Washington, D.C., is a nonprofit, grassroots action and education foundation dedicated to the promotion

of free enterprise and limited government regulations over commerce and individuals.

The Center for Digital Democracy, a national, not-for-profit group based in Washington, D.C., is dedicated to ensuring that the public interest is a fundamental part of the new digital communications landscape. From open broadband networks, to free or low-cost universal Internet access, to diverse ownership of new media outlets, to privacy and other consumer safeguards, CDD works to promote an electronic media system that fosters democratic expression and human rights.

Consumer Action is a national non-profit education and advocacy organization serving more than 10,000 community-based organizations with training, educational modules, and multi-lingual consumer publications since 1971.

The Electronic Frontier Foundation is a non-profit, member-supported civil liberties organization working to protect rights in the digital world.

Knowledge Ecology International is a non-profit public interest organization that searches for better outcomes, including new solutions, to the management of knowledge resources, with a focus on the challenges of protecting consumers and vulnerable populations.

The Liberty Coalition is a nonprofit transpartisan public policy advocacy organization seeking unifying solutions that preserve and strengthen civil liberties,

basic human rights and personal autonomy for the citizens of the United States and other nations.

The Owner-Operator Independent Drivers Association is the national trade association representing the interests of more than 162,000 independent owner-operators and professional truck drivers; over 98% of truckers use the cell phone as their primary form of personal communication as well as business information that is proprietary and/or personal and demands privacy.

The Privacy Rights Clearinghouse is a non-profit consumer education and advocacy organization, based in San Diego, CA, and established in 1992.

The U.S. Bill of Rights Foundation is a non-partisan public interest advocacy organization seeking remedies at law and public policy improvements on targeted issues that contravene the Bill of Rights and related Constitutional law.

The World Privacy Forum is a non-profit, non-partisan public interest research group based in California; the Forum focuses on in-depth research and analysis of privacy topics.

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SUMMARY OF ARGUMENT

I. If the D.C. Circuit Court of Appeals strikes down the Federal Communications Commission's 2007 Order requiring opt-in consent prior to disclosing CPNI to joint venture partners and independent contractors, the Court would jeopardize an individual's right to privacy. Consumers have a legitimate expectation of privacy with respect to sensitive personal information such as whom they call on a telephone; a carrier's right to communicate information about products and services does not include the right to build detailed profiles based on personal information obtained through private telephone calls.

II. The FCC's 2007 Order is analogous to numerous other federal laws and regulations implemented to protect consumer privacy and does not implicate any First Amendment concerns. In addition, the U.S. Supreme Court has held that a commercial entity that is not a news publication cannot claim full First Amendment protection for the information it includes in a credit report. CPNI is similar to credit reports and, at most, NCTA should be given limited First Amendment protection.

III. The opt-in approach of the FCC's 2007 Order is necessary to provide privacy protection to those consumers who desire it. An opt-out policy would provide neither adequate protection for consumer data nor sufficient

notice to consumers. Also, an opt-out policy is not economically preferable, because it would inflate consumer transaction costs.

ARGUMENT

I. INVALIDATING THE FCC ORDER WOULD JEOPARDIZE AN INDIVIDUAL'S RIGHT TO PRIVACY

American jurisprudence recognizes a fundamental right to privacy in personal communications; both the courts and Congress have recognized the paramount interest a citizen has in protecting her privacy. *See, e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 769 (1993) ("[T]he protection of potential clients' privacy is a substantial state interest."). In *Reno v. Condon*, 528 U.S. 141 (2000), the U.S. Supreme Court held that Congress can restrict the ability of state departments of motor vehicles ("DMV"s) to disclose personal information about a driver without that driver's express consent. *See id.* at 143-44.

Petitioner bases its First Amendment arguments on a 1999 Tenth Circuit Court of Appeals opinion, *US West v. FCC*, 182 F.3d 1224 (10th Cir. 1999). However, since that opinion, the D.C. Circuit Court of Appeals has twice found that legislation and regulations protecting personal information do not infringe upon free speech rights in *Trans Union Corp. v. FTC (Trans Union I)*, 245 F.3d 809 (D.C. Cir. 2001), and *Individual Reference Services Group, Inc. v. FTC*, 145 F. Supp. 2d 6 (D.D.C. 2001), a D.C. District Court opinion later affirmed by this Court.

In the 2001 opinion for *Trans Union I*, this Court upheld the Fair Credit Reporting Act against First Amendment challenges to restrictions on marketing use of credit files. This Court said, "we have no doubt that this interest -- protecting the privacy of consumer credit information -- is substantial" and upheld the FTC's ban on the sale of target marketing lists. *Trans Union I* at 818-19.

Also that year, the D.C. District Court upheld Federal Trade Commission ("FTC") regulations that required data brokers to give notice and an opportunity to opt-out to individuals before selling the individuals' "credit header" data (including: name, address, Social Security number). On summary judgment, the court rejected Individual Reference Services Group, Inc.'s ("IRSG") First and Fifth Amendment claims, stating, "[t]he speech does not involve any matter of public concern, but consists of information of interest solely to the speaker and the client audience. Thus, restriction on the dissemination of this nonpublic personal information does not impinge upon any public debate." *IRSG* at 8.

This Court affirmed the District Court's decision in *Trans Union v. FTC (Trans Union II)*, 295 F.3d 42, 52 (D.C. Cir. 2002), finding "The information Trans Union wishes to disclose here likewise implicates no public concern and therefore, as in *Trans Union I*, 'warrants "reduced constitutional protection."'"

In *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir. 1994), the Tenth Circuit recognized that an invasion of privacy is most pernicious when "it is

by those whose purpose is to use the information for pecuniary gain." *Id.* at 1511, 1514. This is exactly the purpose for which Petitioner would like to use CPNI -- to target consumers it believes might be interested in purchasing more of its services.

In addition, the protections afforded by the FCC's 2007 Order go well beyond concerns with the use or disclosure of publicly available information. The regulation and the underlying statute also protect even more sensitive data about telephone numbers the customer called or from which the customer received a call and the length of the call. As Justice Stewart wrote:

> Most private telephone subscribers may have their own numbers listed in a publicly distributed directory, but I doubt there are any who would be happy to have broadcast to the world a list of the local or long distance numbers they have called. This is not because such a list might in some sense be incriminating, but because it easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life. *Smith v. Maryland*, 442 U.S. 735, 748 (1979) (Stewart, J., dissenting).

It is notable that Congress recognized the importance of a citizen's privacy interest by enacting other statutes preventing disclosure of precisely the same information to the public at large. For example, Congress has enacted an elaborate statutory scheme to protect the privacy of telephone communications, *see* 18 U.S.C. §§ 2510-2522 (1994 & Supp. IV 1998), and specifically prohibited the use of pen registers without a court order. *See* 18 U.S.C. § 3121 (1994). Thus, the Congress has determined that people have a legitimate expectation of privacy with respect to the phone numbers they dial and has decided that this information is so

sensitive that it has developed an entire statutory scheme governing law enforcement's ability to collect such data. Similar rules have been established to protect the privacy of cable subscriber records, *see* 47 U.S.C. § 551 (1994), video rental records, *see* 18 U.S.C. § 2710 (1994), credit reports, *see* Fair Credit Reporting Act, 15 U.S.C. § 1681 (1994), and medical records, *see* 42 U.S.C. § 290dd-2(a) (1994).

Further, the FCC's 2007 Order not only protects the privacy interests of telephone customers, but also preserves important values recognized in the First Amendment context, including the right of individuals to decide, freely and without unnecessary burden, when they wish to disclose personal information to others. *See generally Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). The ability of individuals to keep private the records of their personal communications also implicates the constitutional interest in not chilling communications between free individuals through the fear of private surveillance. *See NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *see also Smith v. Maryland*, 442 U.S. 735, 751 (1979) (Marshall, J., dissenting).

Because invalidating the FCC's 2007 Order would jeopardize an individual's right to privacy and paramount right to keep private her most personal

information, this Court should reject the Petitioner's appeal and uphold the FCC's 2007 Order.

II. THE FCC'S 2007 ORDER NEED NOT IMPLICATE FIRST AMENDMENT CONCERNS

Many state and federal laws limit the disclosure of personal information by private entities without implicating the First Amendment. For example, the Fair Credit Reporting Act provides that a credit agency can only release a consumer's credit report under certain conditions and criminalizes unauthorized disclosures by employees of the consumer reporting agency. *See* Fair Credit Reporting Act, 15 U.S.C. § 1681r (Supp. III 1997); *see also* Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (1994) (prohibiting disclosure of a consumer's video rental records).

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

This Court cited *Dun & Bradstreet* in its opinion in *Trans Union I*, "[l]ike the credit report in *Dun & Bradstreet*, which the Supreme Court found 'was speech solely in the interest of the speaker and its specific business audience,' the

information about individual consumers and their credit performance communicated by Trans Union target marketing lists is solely of interest to the company and its business customers and relates to no matter of public concern. Trans Union target marketing lists thus warrant 'reduced constitutional protection.'" *Trans Union I* at 818 (internal citations omitted). CPNI is similar to credit reports and marketing lists; CPNI is "solely of interest to the company and its business customers and relates to no matter of public concern." As a commercial entity that desires to use private information it has obtained from its customers for its own pecuniary gain, NCTA is entitled to, at most, limited First Amendment protection.

III. COMPREHENSIVE OPT-IN POLICY IS THE ONLY TRULY EFFECTIVE MEANS TO PROTECT CONSUMERS' PRIVACY

The FCC's 2007 Order requiring carriers to obtain customer consent prior to providing personal information to joint venture partners and independent contractors is necessary to provide privacy protection to those consumers who desire it. As FCC Commissioner Michael Copps stated, "[a] customer's private information should never be shared by a carrier with any entity for marketing purposes without a customer opting-in to the use of his or her personal information." Michael J. Copps, Commissioner, Fed. Commc'ns Comm'n, Statement on the Implementation of the Telecommunications Act of 1996:

Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-115 and WC Docket No. 04-36 (Apr. 2, 2007).

A. Opt-Out Policy Provides Inadequate Coverage and Notice

Petitioners claim that an opt-out policy is sufficient to protect consumers' privacy rights. Under such a policy, absent affirmative denial of consent from the customer, a carrier could use its customers' individually identifiable CPNI for marketing purposes, and also to disclose and provide access to joint venture partners and independent contractors.

This opt-out approach is inadequate because it is not calculated to reasonably inform consumers about their privacy options, and often customers may not know that they must affirmatively act to prevent carrier distribution of their CPNI. Under opt-out approaches, customers bear the burden of paying for and returning their opt-out notice. Such notices are often written in complex language that customers have neither patience nor ability to read, and are often concealed amongst less important "junk mail" notices from the same source. Mark Hochhauser, *Lost in the Fine Print: Readability of Financial Privacy Notices* (July 2001).

B. Opt-Out Policy Inflates Consumer Transaction Costs

Proponents of an opt-out approach may argue that such a system is economically preferable, as it increases the amount of information available to both producers and consumers, allows telecommunications carriers to tailor their services to specific customers and reduces prices. Yet this assertion erroneously assumes that the only costs at issue are those of production, without accounting for increased transaction costs incurred by the consumers seeking to exercise privacy rights created by statute. *See* Jeff Sovern, *Toward A New Model of Consumer Protection: The Problem of Inflated Transaction Costs,* 47 WM & MARY L. REV. 1635, 1644 (2006). Opt-out regimes create an economic incentive for businesses to make it difficult for consumers to exercise their preference not to disclose personal information to others. *Id*. Because opt-out systems do not require businesses to create inducements for consumers to choose affirmatively to disclose personal information, these systems encourage firms to engage in strategic behavior and thus inflate consumer transaction costs. *See* Jeff Sovern, *Opting in, Opting Out, or No Options at All: The Fight For Control of Personal Information,* 74 WASH. L. REV. 1033, 1099-1100 (1999).

In contrast, an opt-in system would permit consumers who wish to protect their privacy to do so, while encouraging telecommunications carriers to eliminate consumer transaction costs. *Id*. Because carriers profit from the use of consumer

information, and thus want as much information as possible, carriers would have an incentive to make it as easy as possible for consumers to consent to the use of their personal information. Such a system might include a comprehensible list of the benefits to opting-in, contained within a clearly marked mailing, with a pre-paid stamped envelope. This would avoid the transaction costs involved with attempting to contact by phone customers with the authority to opt-in. It also reduces the strategic behavior costs associated with opt-out — the costs associated with carriers providing consumers a message that carriers do not want consumers to receive — because the carriers would have an incentive to lower costs associated with providing customers a message that carriers are very eager to have the customer receive. *Id.* at 1101-02. Finally, opt-in might decrease the amount of information in the marketplace, but it permits carriers to target products at those who have specified an interest in such information, thereby decreasing the wasted costs associated with targeting uninterested customers. *Id.* at 1103.

CONCLUSION

For the reasons listed above, a*mici* respectfully request this Court to deny the Petition for Review of the FCC's 2007 Order.

Respectfully submitted,

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Dated: May 6, 2008

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 2,897 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2).

2. This brief 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). The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2008 in Times New Roman 14 font.

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CERTIFICATE OF SERVICE

I, Melissa Ngo, certify that two (2) copies of the foregoing Brief of *Amicus Curiae* Electronic Privacy Information Center was this day sent by first class mail to each of the following:

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