Case No. 05-1404 and Consolidated Cases
(Nos. 05-1408, 1438, 1451, and 1453)

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

AMERICAN COUNCIL ON EDUCATION, *et al.*,
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents

On Petition for Review of an Order
of the Federal Communications Commission

PETITION FOR REHEARING EN BANC

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PETITION FOR REHEARING EN BANC

In 1994, Congress explicitly exempted Internet access and software applications from the reach of the Communications Assistance for Law Enforcement Act ("CALEA" or the "Act") (the relevant text of CALEA appears in the Addendum to this Petition).[1] By extending CALEA to reach both Internet access and software applications like "Voice over IP" ("VoIP"), the Federal Communications Commission (and a 2-1 majority decision of this Court[2]) overrode the clear statutory language of CALEA.

The undersigned Petitioners in 05-1408, 05-1438, and 05-1451 (consolidated with *ACE v. FCC*, No. 05-1404, and other cases),[3] pursuant to Federal Rule of Appellate Procedure and Circuit Rule 35, respectfully request that this Court rehear *en banc* Petitioners' petition for review of the respondent Federal Communications Commission's ("FCC's") First Report and Order in *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, RM-10865, FCC 05-153, summarized in the Federal Register on October 13, 2005, at 70 Fed. Reg. 59664 (the "Order").

THIS PETITION INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE

In 1994, Congress took an unprecedented step and mandated that law enforcement agencies would be able to impose specific design requirements on the technical architecture of the public switched telephone network ("PSTN"). In passing CALEA, Congress enacted a focused response to specific

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[1] Pub. L. 103-414, 108 Stat. 4279 (1994) (codified, as amended, at 18 U.S.C § 2522 and 47 U.S.C. §§ 229, 1001-1010) (see Addendum).

[2] *ACE v. FCC*, No. 05-1404 et al. (D.C. App. June 9, 2006) (see Addendum).

[3] The Petitioners in Nos. 05-1404 and 05-1453 do not join in this petition for rehearing because the panel's decision provided those petitioners the primary relief they were seeking. The core concern of those petitioners was that CALEA not be extended (in direct contravention of the statutory language) to apply to private networks of the educational institutions that those petitioners represent. The panel reaffirmed that CALEA does not apply to private networks, and that the FCC's Order could not be construed to extend CALEA to such networks. *See ACE v. FCC*, at 7, 19-20. Thus, the Petitioners in 05-1404 and 05-1453 obtained the primary relief they sought. The undersigned Petitioners, to be clear, wholly agree with the Court's conclusions about the non-applicability of CALEA to private networks, and this Petition does not seek to disturb that portion of the panel's decision.

technical developments in the telephone network – the advent of digital and cellular technology[4] – and it imposed design obligations on telephone common carriers. Because Congress appreciated the burden that it was imposing on the telephone companies, it appropriated as part of CALEA $500,000,000 to help to defray a portion of the carriers' costs to comply with CALEA. *See* CALEA § 110, Pub. L. No. 103-414, 108 Stat. 4279 (1994).

In enacting CALEA, Congress was careful not to impose CALEA's burdens – either its financial costs or its harm to technical design freedom – on the new and emerging Internet.[5] As detailed more fully below, in two independent places in the CALEA statute, Congress made unmistakably clear that CALEA did not – and should not in the future – apply to the Internet. Then-FBI Director Louis Freeh squarely acknowledged in 1994 testimony that CALEA would not reach Internet communications, and he accepted that limitation because he had greater concerns about covering traditional telephone networks (where new technology was causing difficulties).

In 2004, the FBI asked the FCC to extend CALEA to the Internet. At no time, however, did any law enforcement agency identify any obstacles to intercepting Internet communications in the absence of CALEA, and indeed as far as the record on appeal reveals, 100% of attempted interceptions of Internet communications to date have been successful. Notwithstanding (a) the clear Congressional exclusion of the Internet from CALEA, (b) the complete lack of any evidence of any problem to be solved, and (c) the fact that the $500 million that Congress appropriated in 1994 to assist telephone companies in their

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[4] At the outset of its opinion, the panel majority makes a significant factual error by suggesting that CALEA was passed in response to Internet-related technologies such as DSL, cable modem service, and VoIP. *See ACE v. FCC*, at 3. In fact, as the record and legislative history make clear, CALEA was in no way a response to Internet technologies, which were just broadly emerging in the early 1990s.

[5] To be clear, Congress did not exempt Internet service or application providers from their obligations to comply with lawful wiretapping and interception orders, and Petitioners in no way challenge those obligations. This Petition only raises the question of whether CALEA, which requires telephone companies to redesign their networks in anticipation of future wiretap requests, can be applied to the Internet. Even in the absence of CALEA, Internet companies already can and do comply with lawful wiretap orders pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 212 (1968) ("Title III"), the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986) ("ECPA"), and the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1843 ("FISA").

compliance with CALEA has long since been used up, the FCC decided that it had the authority to extend CALEA to the Internet. It is this decision that is challenged in this appeal.

The far-reaching impact of this decision – reaching well beyond the litigants in this appeal – cannot be underestimated. The record below is replete with a broad range of comments detailing the harm to innovation and economic viability that will flow from allowing the FBI to impose design mandates on Internet technology. Unlike the intended target of CALEA (the telephone network, with a relatively few telephone companies operating a slowly evolving and centrally controlled network), the Internet permits and encourages technical innovation on an unprecedented scale, by large companies, startups, and individual innovators, all contributing to a dynamically changing and wholly decentralized network. By establishing the precedent that CALEA can be extended to Internet access and applications technology (including future technologies not yet even conceived), and permitting the FBI to impose design requirements on the Internet and future technologies, the FCC (and the 2-1 panel decision of this Court) has taken a major step toward slowing down the innovation and growth that the Internet has experienced over the past 15 years. This impact on the Internet and its future has been undertaken in direct conflict with specific exclusions of the Internet that Congress built into the text of CALEA itself. Petitioners respectfully submit that this appeal rises to the level of involving "a question of exceptional importance" as required under Federal Rule of Appellate Procedure 35(a) and this Court's precedents. *See, e.g. Jolly v. Listerman*, 675 F.2d 1308, 1310-11 (D.C. Cir. 1982) (Robinson, J. concurring) (*en banc* review justified only in cases with significance reaching far beyond the litigants).

ARGUMENT

The critical mistakes that the FCC – and the majority of the panel – made are (a) to conclude that CALEA contains an ambiguity where there is none, and (b) to focus on interpretations of the Telecommunications Act of *1996* to divine the meaning of a statute passed by Congress in *1994*. CALEA unambiguously excludes information services – including Internet access and applications – even where such information services might be "mixed" with transmission and switching. Thus, this appeal is

appropriately decided using a *Chevron* "step one" analysis.[6] See Part I below. Second, on the record before this Court, there is no justification for extending CALEA to "Voice over the Internet" ("VoIP") services. See Part II below.

I. THE STATUTORY LANGUAGE OF CALEA UNAMBIGUOUSLY EXCLUDES INFORMATION SERVICES SUCH AS THE INTERNET

The threshold error that the panel made in this case was to accept as a starting point the FCC's assertion that their exists an "irreconcilable tension" within the CALEA statute – an ambiguity in the statute that the panel allowed the FCC to resolve. *See ACE v. FCC*, at 6 (citing Order ¶ 18). Yet the plain language of the statute is not ambiguous, and a tension arises only when one starts with the FCC's assumption that the Internet 'should,' somehow, be covered by CALEA.[7]

The statutory language is of course the appropriate starting point in this case. In CALEA, Congress made clear in two distinct places that the statute does not apply to the Internet:

- in § 1001(6), Congress defined the term "information service" in a manner than plainly encompasses Internet access and Internet applications, and then in § 1001(8)(C)(i) Congress flatly declared that CALEA does not apply to "persons or entities insofar as they are engaged in providing information services;" and
- in § 1002(b)(2)(A), Congress again flatly declared that CALEA's requirements "do not apply to . . . information services."

There is no ambiguity or lack of clarity as to what Congress meant in crafting the narrowly-focused CALEA language: Congress twice stated in straightforward language that information services are not covered by CALEA.

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[6] *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

[7] In his dissent, Senior Judge Edwards correctly identifies the FCC's underlying goal in its rulemaking – to administratively amend CALEA so as to provide the additional authority sought by law enforcement. *See ACE v. FCC*, at 4 (Edwards, J., dissenting). But if law enforcement in fact needs additional authority, only Congress can provide it – as Judge Edwards concludes. *See id.* at 8.

A. The Statutory Language of Section 1001(8) Unambiguously Excludes Information Services

In the face of these two independent exclusions of information services from CALEA (and in an effort to shift this Court's analysis from *Chevron* "one" to *Chevron* "two"), the FCC seized upon § 1001(8)(B)(ii) – the "substantial replacement provision" ("SRP") – to create an ambiguity (and an asserted "irreconcilable tension") where no ambiguity or tension exists. *See* Order ¶ 18. It is this asserted "tension" that the panel majority used as its analytical starting point to conclude that the Court should defer to the FCC's strained reading of the statute. *See ACE v. FCC*, at 6. Yet a plain reading of the statutory language does not reveal any ambiguity that must be resolved.

The critical language is found in § 1001(8), which defines the "telecommunications carrier[s]" to which CALEA applies, and which includes the SRP in § 1001(8)(B) and the first of CALEA's two independent information service exclusions in § 1001(8)(C). In relevant part (and with emphasis added), the statute reads:

> (8) The term `telecommunications carrier'--
>
> (A) means a person or entity engaged in the transmission or switching of wire or electronic communications as *a common carrier* for hire; and
>
> (B) includes--
>
> . . .(ii) a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a *replacement for a substantial portion* of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this title; but
>
> (C) does *not* include--
>
> (i) persons or entities insofar as they are engaged in providing *information services* . . . .

In its Order, the FCC asserts that "[t]o give significance to the SRP," the SRP "*must"* include at least some information services, and thus (according to the FCC and the panel majority) there is some "irreconcilable tension" between the SRP in § 1001(8)(B) and the information services exclusion in § 1001(8)(C). *See* Order ¶ 19.

This analysis fails for at least two reasons. First, the SRP has clear "significance" without including any information services, and its significance is readily apparent from the statutory language. Looking at § 1008 as a whole, Congress has created a simple scheme:

transmission or switching provided by *common carriers*	are categorically included in CALEA under § 1001(8)(A);
transmission or switching provided by private or other *non*-common carriers (such as, for example, a variety of wireless and satellite services provided on a non-common carrier basis)[8]	are initially not covered by CALEA, but can be covered if the FCC "finds that such service is a *replacement for a substantial portion* of the local telephone exchange service and that it is in the public interest" to include the entity, under § 1001(8)(B); and
information services (whether provided by a common carrier or any other entity)	are categorically excluded from CALEA under § 1001(8)(C).

There is no need to conclude – as the FCC has done – that the SRP "must" somehow reach some information services in order to give it significance. The SRP has significance entirely on its own.

In short, there is no "irreconcilable tension" that warrants a strained construction of the statutory language by the agency. A simplification of the statutory language illustrates the point. At its essence – if indeed information services are addressed in *both* § 1001(8)(B) *and* (C) – § 1001(8) is similar to the following:

> The fruit to be served at lunch
> (A) shall be apples; and
> (B) can include other fruit if the agency so decides; but
> (C) cannot include oranges.

There is no "irreconcilable tension" in this structure to be resolved: apples will be served, and bananas, pears, etc., can also be served. But in no case can oranges be served. With CALEA, transmission or switching by common carriers is covered, some other non-common carriers might be covered if terms of the SRP are met, but in no case can information services – whether offered by common carriers, by entities covered by the SRP, or by other non-common carrier entities – be covered.

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[8] *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report & Order & Notice of Proposed Rulemaking, CC Docket No. 02-33, FCC 05-150, ¶ 14 (rel. Sept. 23, 2005), at ¶ 94 n.280 (citing wireless communications services, 24 Ghz fixed microwave service, local multipoint distribution services, and fixed satellite services).

B. The FCC's (and the Panel Majority's) Analysis of the Telecommunications Act of 1996 Does Not Alter the Statutory Language of CALEA, Enacted in 1994

In its Order, *see* Order ¶¶ 15-17, the FCC asserts that "the treatment of information services under CALEA is different from the treatment such services have been afforded under the Communications Act." Order ¶ 15. The FCC explains that under the Communications Act it has treated the terms "telecommunications service" and "information service" as "mutually exclusive." *Id.* Then, although admitting that CALEA does not even use the term "telecommunications service," the FCC asserts that

> structural and definitional features of the Communications Act that play a critical role in drawing the Act's regulatory dividing line between telecommunications service and information service, and that undergird the Commission's resulting classification of integrated broadband Internet access service as solely an information service for purposes of the Communications Act, are absent from CALEA.

Order ¶ 16. Based on this asserted difference between the two statutory schemes, the FCC decides first that the Communications Act does not control, *id.*, and then that there exists a "definitional ambiguity" in CALEA that the agency must resolve, Order ¶ 17.

This assertion of ambiguity fails for at least three reasons. First, nowhere does the FCC acknowledge (and the panel decision fails on the same score) that the relevant portions of the Communications Act were not passed by Congress until the Telecommunications Act of *1996*, and thus both the Communications Act definitions and the FCC's interpretations of those definitions all followed Congress's passage of CALEA in *1994* by at least two years. The statutory interpretation question before the Court is what did Congress intend *in 1994* when it passed CALEA, and there is no foundation to suggest that Congress in 1994 injected into CALEA an implicit narrowing of the scope of "information services" (a narrowing based solely on asserted differences with a 1996 statute).

Second, and moreover, even if the FCC is right that CALEA's definition of "information services" sweeps more broadly than that found in the 1996 Telecommunications Act, the upshot of that conclusion is simply that the information services that are categorically excluded from CALEA may be broader than if the 1996 definitions had been used. Regardless of the differences between CALEA and the Communications Act, information services and "entities to the extent they are providing information services" are still excluded from CALEA.

Finally, the threshold question under *Chevron* is whether the statutory language is *on its face* ambiguous, as the statute was drafted *in 1994*. The "ambiguity" that the FCC claims could not have emerged until 1996 or later. When Congress passed CALEA in 1994, the statutory language unambiguously and categorically excluded information services from its coverage. That clarity is not altered by the FCC's or the Court's analysis of the 1996 statute.

C. Even with Regard to "Mixed" Services There is No Ambiguity that Information Services are Unconditionally Excluded from Coverage by CALEA

In the *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005), the Supreme Court decided that under the Communications Act it was permissible for the FCC to treat Internet access service – which has both transmission and information service components – as a single unified offering that would be *treated as an unregulated information service*, and that such a decision was consistent with the deregulatory purpose of the Telecommunications Act of 1996. *See ACE v. FCC*, at 8-9 (discussing *Brand X*). In this case, the FCC did the opposite – it decided that the transmission and information service components would *be treated together not as an information service, but as a telecommunication service* (which the FCC deemed should be covered by CALEA). The majority of the panel decided that there was ambiguity and that the FCC had reasonably interpreted the statute.

This conclusion, however, completely overlooks one critical feature of the CALEA statutory language – an aspect where the CALEA statute differs significantly from the Communications Act. In the Communications Act, as the *Brand X* Court found, Congress had left the treatment of "mixed" services up to the FCC. With CALEA, in contrast, Congress did not leave the FCC any discretion; in CALEA, Congress specified that *even* in a case where information services might be offered together with transmission services, information services are *still* categorically excluded.

A return to the language of § 1001(8) (with emphasis added) makes this clear:

(8) The term `telecommunications carrier'--

(A) means a person or entity engaged *in the transmission or switching of wire or electronic communications* as a common carrier for hire; and

(B) includes [the SRP] . . . *but*

(C) *does not include--*

(i) persons or entities insofar as they are engaged in providing information services . . . .

What this language indicates is that even if a person is engaged in (1) the transmission or switching of communications (as a common carrier) *and* (2) the provision of information services, the information services are *still* excluded. Under the language of CALEA, information services are excluded even if offered by a common carrier. Thus, even if a common carrier is offering transmission services *mixed* with information services, the information services are flatly exempted from CALEA by § 1001(8)(C). By the same token, if a non-common carrier that is covered by the SRP in § 1001(8)(B) offers transmission service *mixed* with information service, the § 1001(8)(C) exclusion also flatly precludes the application of CALEA to information services.

In *Brand X*, the Supreme Court found, the statute was silent on the treatment of mixed services, thus giving the FCC the discretion to treat mixed services as information services, and thereby effectuate the expressed policy of Congress (the deregulation of telecommunications). *See* 125 S. Ct. at 2702-04. In stark contrast, in this case, CALEA is *not* silent on the treatment of mixed services – they are excluded, no matter how or by whom they are offered. When the FCC treated mixed services as transmission services and applied CALEA to them, it *overrode* the expressly stated policy decision of Congress to exclude information services.

D. The Statutory Language of Section 1002(b)(2)(A) *Independently* Excludes Information Services

Beyond the information services exclusion in CALEA's definitional section (§ 1001(8) discussed above), Congress wrote into CALEA an entirely independent exclusion of information services from

CALEA – in the Act's substantive provisions, § 1002(b)(2)(A). Neither the FCC Order nor the panel majority confronts this separate exclusion.[9]

Section 1001(8) defines "who" is covered by CALEA (and excludes entities insofar as they provide information services), while § 1002 defines "what" is covered by CALEA (and excludes *all* information services). No matter what entities are subject to CALEA under the definitions in § 1001, § 1002(b)(2)(A) makes clear that CALEA cannot be applied to those entities' information services such as Internet access or Internet applications. As with § 1001(8), the structure of § 1002 reinforces the conclusion that information services are wholly excluded from CALEA. Subsection 1002(a) is the substantive heart of the CALEA statute, specifying what specific actions a CALEA-covered entity must do. Subsection 1002(b), however, imposes blanket and unqualified "Limitations:"

> (b) LIMITATIONS-
>
> (1) …
>
> (2) INFORMATION SERVICES; PRIVATE NETWORKS AND INTERCONNECTION SERVICES AND FACILITIES- The requirements of subsection (a) do not apply to--
>
> (A) information services; or ….

Nowhere in the text of CALEA does the FCC have the authority to modify or in any way limit the information services exclusion, nor does CALEA give the FCC any power to modify the definition of information services. Thus, even if the SRP can somehow trump the § 1001(8)(C) exclusion, information services are *still* excluded from CALEA by § 1002(b)(2)(A).[10]

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[9] The Order cites § 1002(b)(2)(A) in two footnotes – notes 56 and 70 – but does not discuss the statutory provision in those notes or elsewhere in the Order. The panel majority similarly does not grapple with this second information services exclusion.

[10] It is striking that the panel majority gives effect to *one* of the two "Limitations" in § 1002(b)(2) – the private network exclusion found in § 1002(b)(2)(B) – but the panel totally fails to give *any* effect to the neighboring express exclusion of information services found in § 1002(b)(2)(A). S*ee ACE v. FCC*, at 20 (the "Order on review—like CALEA—expressly excludes 'private networks'") (citing § 1002(b)(2)(B)).

E. The Exclusion of Internet Access and Applications is Squarely Consistent with Congressional Intent

As noted above, the CALEA statute grew out of some technical difficulties that law enforcement began to encounter in the early 1990's in carrying out wiretaps on the public switched telephone network ("PSTN"). In response, the FBI proposed to Congress in 1992 a sweeping statute that would have allowed the FBI to impose technical design mandates on *any* provider of *any* electronic communications, *including* Internet communications.[11] As then-FBI Director Louis Freeh acknowledged in 1994, that broad 1992 proposal "was rejected out of hand" by Congress.[12]

In 1994, the FBI returned with a much more limited proposed statute, one that (in Director Freeh's words) was "narrowly focused and covers . . . only those segments of the telecommunications industry where the vast majority of the problems exist – that is, on common carriers, a segment of the industry which historically has been subject to regulation."[13] In sections entitled "Narrow scope," both the House and Senate Reports accompanying what became CALEA made the narrowness of the bill very clear:

> *Narrow scope*
>
> It is also important from a privacy standpoint to recognize that the scope of the legislation has been greatly narrowed. The only entities required to comply with the functional requirements are telecommunications common carriers, the components of the public switched network where law enforcement agencies have always served most of their surveillance orders. . . .
>
> [E]xcluded from coverage are all information services, such as Internet service providers or services such as Prodigy and America-On-Line.
>
> All of these . . . information services can be wiretapped pursuant to court order, and their owners must cooperate when presented with a wiretap order, *but these services and systems do not have to be designed so as to comply with the capability requirements.* Only telecommunications carriers, as defined in the bill, are required to design and build their switching and transmission systems to comply with the legislated requirements.

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[11] Section 2(g)(1) of draft bill, available at http://www.eff.org/Privacy/Surveillance/CALEA/digtel92_bill.draft.

[12] Testimony of FBI Director Louis Freeh, Joint Hearings Before the Subcommittee on Technology and the Law of the Senate Judiciary Committee and the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, Mar. 18 and Aug. 11, 1994 (S. Hrg. 103-1022), at 49, available in part at http://www.eff.org/Privacy/Surveillance/CALEA/ freeh_031894_hearing.testimony [hereafter "Judiciary Hearings"].

[13] Freeh Testimony, Judiciary Hearings, at 16.

> Earlier digital telephony proposals covered all providers of electronic communications services . . . . That broad approach was not practical. Nor was it justified to meet any law enforcement need.[14]

Moreover, both the House and Senate Reports made crystal clear Congress intended that the information service *exclusion* from CALEA be broadly construed, that the term "information services" should encompass future technology, and that such technology would not be covered by CALEA:

> *It is the Committee's intention not to limit the definition of "information services" to such current services, but rather to anticipate the rapid development of advanced software and to include such software services in the definition of "information services."* By including such software-based electronic messaging services within the definition of information services, *they are excluded from compliance with the requirements of the bill.*[15]

Moreover, it was specifically clear to Congress that CALEA would not reach future *voice* services provided over the Internet. In a colloquy with FBI Director Freeh, Senator Leahy asked whether the CALEA proposal would leave out some future telephone service, and Freeh responded:

> I do know and I do concede that there are portions of the industry that are not addressed in [CALEA]. . . . In a perfect world, they would be in there, but we want to narrow the focus of this so we can get the greatest support by the Congress and the committees, because the last time we were here, we were told specifically that it was too broad and it had to be narrowed and focused. So we picked out where we think we have the greatest vulnerability.[16]

The legislative history strongly supports the plain meaning of the statutory language – that information services are excluded from the reach of CALEA. This Court should declare that the Federal Communications Commission lacks the authority to override the clear decision of Congress to exclude information services. If law enforcement has evidence to support their claim that CALEA should be

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[14] Senate Report 103-402, "The Digital Telephony Bill of 1994," Oct. 6, 1994, at 18-19 (emphasis added) [hereafter "Senate Report"]; House Report 103-827, "Telecommunications Carrier Assistance to the Government," Oct. 4, 1994, at 18, available at http://www.askcalea.net/docs/hr103827.pdf [hereafter "House Report"].

[15] House Report, at 21 (emphasis added). *See also* Senate Report, at 21-22.

[16] Freeh Testimony, Judiciary Hearings, at 49-50.

extended to reach the Internet (the record on appeal being wholly devoid of such evidence), law enforcement must seek that extension from Congress.[17]

II. THERE IS NO FOUNDATION ON THE RECORD BEFORE THIS COURT TO CONCLUDE THAT CALEA SHOULD BE EXTENDED TO REACH VOIP SERVICES.

In 2004, the FCC declared (for purposes of the Communications Act, not CALEA, but using the very similar definition of information services that appears in both Acts) that peer-to-peer Voice-over-Internet-Protocol (VoIP) was an information service.[18] In the CALEA context, however, the FCC has flatly refused to state – one way or another – whether *any* VoIP is or is not an information service. As detailed above, information services are excluded from CALEA (even if such services could be covered under the SRP), and thus the FCC simply cannot extend CALEA to "interconnected" VoIP without deciding whether it is an information service. At a bare minimum, this Court must vacate the FCC's extension of CALEA to VoIP and remand this matter to the agency for a determination of this critical question. Although the undersigned believe that VoIP is an information service, this FCC has not made that determination in the first instance, and thus its extension of CALEA to any VoIP cannot stand on this record.

This need for the FCC to clearly explain its treatment of VoIP is even stronger when viewed in light of *CALEA's* own definition of "electronic messaging service" in § 1001(4), a definition that is specifically incorporated in CALEA's definition of information services that are excluded from the statute. In § 1001(4), CALEA defines "electronic messaging service" to mean "software-based services that enable the sharing of data, images, *sound*, writing, or other information among computing devices controlled by the senders or recipients of the messages." This definition *precisely* describes Voice over

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[17] Although we do not separately brief the *Chevron* "step two" arguments, we certainly agree with Judge Edwards that the FCC has not justified its abandonment of its own well-established definition of information services. *See ACE v. FCC*, at 5-8 (Edwards, S.J., dissenting). We believe that Judge Edward's analysis of the *Chevron* "two" arguments provides an independent basis for rehearing.

[18] *See* In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, 19 F.C.C.R. 3307 (Feb. 12, 2004).

IP services. The FCC cannot extend CALEA to cover VoIP without explaining why it is not excluded as an information service, which incorporates the § 1001(4) definition of electronic messaging service.

It is perhaps theoretically possible that, on remand, the FCC could craft an explanation as to why "interconnected" VoIP is not an information service (and thus could be covered by CALEA) even though peer-to-peer VoIP is clearly an information service. The question of the classification of VoIP was squarely raised in comments before the agency, yet the FCC wholly failed to address this question. Until such time that the Commission makes such a determination, this Court cannot allow the FCC's extension of CALEA to any VoIP to stand. *See PSC v. Ky. V. FERC*, 397 F.3d 1004, 1008 (D.C. Cir. 2005) ("The Commission must respond meaningfully to the arguments raised before it."); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 632 (D.C. Cir. 1996) ("An agency's decision is arbitrary and capricious it if 'entirely failed to consider an important aspect of the problem.'") (citation omitted).

CONCLUSION

In 1994 Congress squarely stated that law enforcement should not be able to write technical design requirements for the Internet. Neither the FCC nor this Court should override theis Congressional decision.

The government has in this case invoked the need to fight terrorism and crime – an unquestionably important governmental goal. But as the Supreme Court has cautioned, "[i]n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *62 Cases of Jam v. United States*, 340 U.S. 593, 600 (1951). With CALEA, Congress clearly indicated that the statute would stop at the Internet. If law enforcement can demonstrate to Congress a need to extend CALEA to the Internet (something the government has wholly failed to do in this proceeding), then Congress – and only Congress – has the power to change the stopping point set out in the statutory language.

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ADDENDUM

Relevant statutory language

Panel opinion and dissent

Certificate as to Parties and Amici pursuant to Circuit Rule 28(a)(1)(A)

Disclosure Statement pursuant to Circuit Rule 26.1

Communications Assistance for Law Enforcement Act of 1994
Pub. L. No. 103-414, 108 Stat. 4279

One Hundred Third Congress
of the
United States of America

AT THE SECOND SESSION

An Act

To amend title 18, United States Code, to make clear a telecommunications carrier's duty to cooperate in the interception of communications for law enforcement purposes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I--INTERCEPTION OF DIGITAL AND OTHER COMMUNICATIONS

SEC. 101. SHORT TITLE.

This title may be cited as the `Communications Assistance for Law Enforcement Act'.

SEC. 102. DEFINITIONS. [47 U.S.C. § 1001]

For purposes of this title--

. . .

(6) The term `information services'--

(A) means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications; and

(B) includes--

(i) a service that permits a customer to retrieve stored information from, or file information for storage in, information storage facilities;
(ii) electronic publishing; and
(iii) electronic messaging services; but

(C) does not include any capability for a telecommunications carrier's internal management, control, or operation of its telecommunications network.

. . .

(8) The term `telecommunications carrier'--

(A) means a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire; and

(B) includes--

(i) a person or entity engaged in providing commercial mobile service (as defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d))); or
(ii) a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this title; but

(C) does not include--

(i) persons or entities insofar as they are engaged in providing information services; and
(ii) any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General.

SEC. 103. ASSISTANCE CAPABILITY REQUIREMENTS. [47 U.S.C. § 1002]

(a) CAPABILITY REQUIREMENTS- Except as provided in subsections (b), (c), and (d) of this section and sections 108(a) and 109(b) and (d), a telecommunications carrier shall ensure that its equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications are capable of--

. . .

(b) LIMITATIONS-

(1) DESIGN OF FEATURES AND SYSTEMS CONFIGURATIONS- This title does not authorize any law enforcement agency or officer--

(A) to require any specific design of equipment, facilities, services, features, or system configurations to be adopted by any provider of a wire or electronic communication service, any manufacturer of telecommunications equipment, or any provider of telecommunications support services; or
(B) to prohibit the adoption of any equipment, facility, service, or feature by any provider of a wire or electronic communication service, any manufacturer of telecommunications equipment, or any provider of telecommunications support services.

(2) INFORMATION SERVICES; PRIVATE NETWORKS AND INTERCONNECTION SERVICES AND FACILITIES- The requirements of subsection (a) do not apply to--

(A) information services; or
(B) equipment, facilities, or services that support the transport or switching of communications for private networks or for the sole purpose of interconnecting telecommunications carriers.

(3) ENCRYPTION- A telecommunications carrier shall not be responsible for decrypting, or ensuring the government's ability to decrypt, any communication encrypted by a subscriber or customer, unless the encryption was provided by the carrier and the carrier possesses the information necessary to decrypt the communication.

. . .

SEC. 109. PAYMENT OF COSTS OF TELECOMMUNICATIONS CARRIERS TO COMPLY WITH CAPABILITY REQUIREMENTS. [47 U.S.C. § 1008]

. . .

(b) EQUIPMENT, FACILITIES, AND SERVICES DEPLOYED AFTER JANUARY 1, 1995-

. . .

(2) COMPENSATION- If compliance with the assistance capability requirements of section 103 is not reasonably achievable with respect to equipment, facilities, or services deployed after January 1, 1995--

(A) the Attorney General, on application of a telecommunications carrier, may agree, subject to the availability of appropriations, to pay the telecommunications carrier for the additional reasonable costs of making compliance with such assistance capability requirements reasonably achievable; and
(B) if the Attorney General does not agree to pay such costs, the telecommunications carrier shall be deemed to be in compliance with such capability requirements.

. . .

SEC. 110. AUTHORIZATION OF APPROPRIATIONS. [47 U.S.C. § 1009]

There are authorized to be appropriated to carry out this title a total of $500,000,000 for fiscal years 1995, 1996, 1997, and 1998. Such sums are authorized to remain available until expended.

. . . .

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 5, 2006 Decided June 9, 2006

No. 05-1404

AMERICAN COUNCIL ON EDUCATION,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
RESPONDENTS

VERIZON TELEPHONE COMPANIES AND
CELLCO PARTNERSHIP, *D/B/A* VERIZON WIRELESS,
D/B/A VERIZON WIRELESS,
INTERVENORS

Consolidated with
05-1408, 05-1438, 05-1451, 05-1453

On Petitions for Review of an Order of the
Federal Communications Commission

Matthew A. Brill argued the cause for petitioners. With him on the briefs were *Maureen E. Mahoney*, *Richard P. Bress*, *Barry J. Blonien*, *James Xavier Dempsey*, *John B. Morris, Jr.*, *Albert Gidari*, *Gerard J. Waldron*, *Andrew J. Schwartzman*,

Harold J. Feld, *Jason Oxman*, and *Marc Rotenberg*. *John M. Devaney* entered an appearance.

Jacob M. Lewis, Attorney, Federal Communications Commission, argued the cause for respondent. With him on the brief were *Samuel L. Feder*, General Counsel, *John E. Ingle*, Deputy Associate General Counsel, and *Joseph R. Palmore*, Counsel.

Peter D. Keisler, Assistant Attorney General, U.S. Department of Justice, *Douglas N. Letter*, Litigation Counsel, and *Scott R. McIntosh*, Attorney, were on the brief for respondent United States.

Michael E. Glover, *Karen Zacharia*, *Joshua E. Swift*, *John Scott, Samir C. Jain*, and *Meredith B. Halama* were on the brief for intervenors Verizon and Verizon Wireless in support of respondents.

Before: SENTELLE and BROWN, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* SENTELLE.

Dissenting opinion by *Senior Circuit Judge* EDWARDS.

SENTELLE, *Circuit Judge*: In 2004, several law-enforcement agencies petitioned the Federal Communications Commission ("FCC" or "the Commission") to clarify the scope of the Communications Assistance for Law Enforcement Act, 47 U.S.C. §§ 1001-1010 ("CALEA" or "the Act"), with respect to certain broadband Internet services. In response, the Commission ruled that providers of broadband Internet access and voice over Internet protocol ("VoIP") services are regulable as "telecommunications carriers" under the Act. As

"telecommunications carriers," broadband and VoIP providers must ensure that law-enforcement officers are able to intercept communications transmitted over the providers' networks. The American Council on Education and various other interested parties (collectively "ACE") petition for review, arguing that the Commission's interpretation of CALEA was unlawful. Because we disagree, we deny the petition.

I

Before the dawn of the digital era, there were few technological obstacles to the government's wiretapping capabilities: Eavesdropping on a phone call was as easy as finding the copper wires that ran into every caller's home. With the advent of the digital age, however, the architecture of the world's communications networks changed drastically. In the place of physical copper wires that connected individual end-users, new communications technologies (such as digital subscriber line ("DSL"), cable modems, and VoIP)[1] substituted ethereal and encrypted digital signals that were much harder to intercept and decode using old-fashioned call-interception techniques.

Responding to these changing technologies, in 1994 Congress passed CALEA, which requires "telecommunications carriers" to "ensure" that their networks are technologically "capable" of being accessed by authorized law enforcement

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[1] Throughout this opinion we refer collectively to DSL and cable modems as "broadband Internet access services," or simply "broadband." We refer to interconnected VoIP services—which allow users to make phone calls over broadband connections—simply as "VoIP." *See generally In re IP-Enabled Services*, 19 F.C.C.R. 4863 (2004) (providing background information on both broadband and VoIP).

officials.[2] 47 U.S.C. § 1002(a). While CALEA's substantive provisions apply to "telecommunications carrier[s]," they do not apply to "information services." *See id.* § 1002(a), (b). Determining which communications services fall where is the crux of this case.

A

CALEA applies only to "telecommunications carriers." *See id.* § 1002(a). The Act defines a "telecommunications carrier" as an "entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire." *Id*. § 1001(8)(A). However, in addition to providers of "transmission or switching," CALEA's definition of a "telecommunications carrier" also includes:

> [1] a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that [2] *the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service* and that [3] it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this subchapter . . . .

Id. § 1001(8)(B)(ii) (emphasis added). Section 1001(8)(B)(ii)—which is commonly referenced as CALEA's "Substantial Replacement Provision" or "SRP"—allows the

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[2] CALEA does *not* affect the scope of the government's wiretapping powers. Those powers instead come from the Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified as amended in scattered sections of 5, 18, and 42 U.S.C.), and the Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783 (1978), 50 U.S.C. §§ 1801-1871.

Commission to expand the definition of a "telecommunications carrier" to include new technologies that substantially replace the functions of an old-fashioned telephone network.

CALEA does not apply to "persons or entities insofar as they are engaged in providing information services." *Id.* § 1001(8)(C)(i) (the "information-services exclusion"). The Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." *Id.* § 1001(6)(A). Because information-service providers are not subject to CALEA, they need not make their networks accessible to law-enforcement agencies. *See id.* § 1002(b)(2)(A).

B

In 2004, the United States Department of Justice, the Federal Bureau of Investigation, and the United States Drug Enforcement Administration (collectively, "the DOJ") filed a joint petition for expedited rulemaking before the FCC. The DOJ explained that "[t]he ability of federal, state, and local law enforcement to carry out critical electronic surveillance is being compromised today by providers who have failed to implement CALEA-compliant intercept capabilities." In response, the Commission issued a notice of proposed rulemaking and invited comments on whether certain communications providers—including broadband and VoIP providers—must comply with CALEA. *See Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Notice of Proposed Rulemaking and Declaratory Ruling, 19 F.C.C.R. 15676, 15677 (2004).

After receiving thousands of pages of comments from more than 40 interested parties, the Commission ruled that

broadband and VoIP providers are covered (at least in part) by CALEA's definition of "telecommunications carriers." *See Communications Assistance for Law Enforcement and Broadband Access and Services*, 20 F.C.C.R. 14989, ¶ 8 (2005) ("*Order*"). To avoid an "irreconcilable tension" between CALEA's SRP and the information-services exclusion, the Commission concluded that the Act creates three categories of communications services: pure telecommunications (which plainly fall within CALEA), pure information (which plainly fall outside CALEA), and hybrid telecommunications-information services (which are only partially governed by CALEA). *Id.* ¶ 18.

The FCC then concluded that broadband and VoIP are hybrid services that contain both "telecommunications" and "information" components.[3] *Id.* at ¶¶ 24-45. The Commission explained that CALEA applies to providers of those hybrid services only to the extent they qualify as "telecommunications carriers" under the three prongs of the SRP. First, providers of both technologies must perform switching and transport functions. *See id.* ¶ 26; *id.* ¶ 41. Second, providers of both technologies serve as replacements for a substantial functionality of local telephone exchange service: Broadband replaces the transmission function previously used to reach dial-up Internet service providers ("ISPs"), and VoIP replaces traditional telephone service's voice capabilities. *See id.* ¶¶ 27-31; *id.* ¶ 42. Third, the public interest requires application of CALEA to the "telecommunications" component of both technologies: The even-handed application of CALEA across

[3] Our dissenting colleague asserts that "[b]roadband Internet is an 'information service'—indeed, the Commission does not dispute this." Dissent at 2. However, in the *Order* the Commission determines that broadband Internet is not an "information service" for purposes of CALEA. *See Order*, 20 F.C.C.R. 14989, ¶¶ 37-38.

technologies will not impede competition or innovation (*id.* ¶¶ 33-34; *id.* ¶ 43), and "[t]he overwhelming importance of CALEA's assistance capability requirements to law enforcement efforts to safeguard homeland security and combat crime weighs heavily in favor" of applying CALEA broadly. *Id.* ¶ 35; *see also id.* ¶ 44.

Notwithstanding CALEA's breadth, the Commission clarified that the Act does not apply to "private networks." *See id.* ¶ 36 n.100 (citing 47 U.S.C. § 1002(b)(2)(B)). The FCC noted that some broadband companies "provide access to private education, library and research networks." *Id.* The Commission explained that these companies may or may not qualify for CALEA's private-networks exclusion:

> To the extent [the petitioners] are engaged in the provision of facilities-based private broadband networks or intranets that enable members to communicate with one another and/or retrieve information from shared data libraries not available to the general public, these networks appear to be private networks for purposes of CALEA. . . . We therefore make clear that providers of these networks are not included as "telecommunications carriers" under the SRP with respect to these networks. To the extent, however, that these private networks are interconnected with a public network, either the [public voice network] or the Internet, providers of the facilities that support the connection of the private network to a public network are subject to CALEA under the SRP.

Id. Thus, private networks—like broadband and VoIP—are excluded from CALEA insofar as they meet one of the statute's exclusions. *See* 47 U.S.C. § 1002(b)(2)(A) (excluding "information services"), (B) (excluding "private networks"). However, to the extent a service provider qualifies as a

"telecommunications carrier," it is subject to CALEA's substantive requirements. *See id.* § 1001(8).

The Commission recognized that it had separately adopted a different interpretation of a similar term ("telecommunications *service*") under a different statute. Interpreting the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 47 U.S.C. §§ 251-276 ("the Telecom Act" or "the 1996 Act"), the FCC previously concluded that broadband Internet service is *not* a "telecommunications service," and it therefore falls outside the ambit of the 1996 Act. *See In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4823 (2002) ("*Broadband Declaratory Ruling*"). To reconcile the *Order* (promulgated under CALEA) with the *Broadband Declaratory Ruling* (promulgated under the 1996 Act), the Commission emphasized that both CALEA and the Telecom Act are silent regarding how (or whether) the FCC should regulate mixed services that have both "telecommunications" and "information" components. *Order*, 20 F.C.C.R. 14989 ¶ 17. Thus, the FCC concluded that both statutes vest it with discretion to interpret Congress's ambiguous treatment of hybrid telecommunications-information services.

In the context of the 1996 Act, the Commission concluded that hybrid services fall entirely outside the statute's scope. Because the 1996 Act defines both "telecommunications service" and "information service" in terms of an "offering" to consumers, *see Broadband Declaratory Ruling*, 17 F.C.C.R. at 4820, ¶ 34, and because consumers perceive broadband Internet access to be a single "offer" for an integrated "information service," *id.* at 4821-24, ¶¶ 35-41, the FCC concluded that cable-modem service is exclusively an "information service," which is unregulable under the 1996 Act, *id.* at 4832, ¶ 59. The Commission further emphasized that its interpretation of the

Telecom Act is consistent with Congress's deregulatory goals. *See id.* at 4802, ¶ 5; *id.* at 4823-24, ¶¶ 40-41; *see also Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 502 n.20 (2002) (emphasizing "the deregulatory and competitive purposes of the [1996] Act"); *Cellco P'ship v. FCC*, 357 F.3d 88, 96-103 (D.C. Cir. 2004) (emphasizing the 1996 Act's "deregulatory purpose"). The Supreme Court upheld the FCC's *Broadband Declaratory Ruling* as a "reasonable" interpretation of the 1996 Act. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2708 (2005) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984)); *see also id.* at 2711 (upholding the Commission's conclusion that the purpose of the 1996 Act is to foster "a minimal regulatory environment that promotes investment and innovation in a competitive market" (internal quotation marks and citation omitted)).

However, the Telecom Act differs significantly from CALEA. Unlike CALEA, the 1996 Act does *not* contain an analogue to CALEA's SRP: While an entity is covered by CALEA if it provides transmission, switching, or the functional equivalent thereof, an entity is covered by the Telecom Act only if it provides "transmission." *See* 47 U.S.C. § 153(43). Also unlike CALEA, the Telecom Act does *not* contain an analogue to CALEA's "insofar as" clause: While an entity is excluded from CALEA only "insofar as" it provides "information services," the 1996 Act categorically excludes "information services" *en toto*. *See id.* § 153(44). Finally, unlike CALEA, the Telecom Act refers to *two* "service offerings": While CALEA refers only to an "offering" of "information services," the Telecom Act refers to "offerings" of both "telecommunications services" and "information services." *Id.* § 153(20), (46); *see also Broadband Declaratory Ruling*, 17 F.C.C.R. at 4823, ¶ 40 (emphasizing the fact that the 1996 Act—unlike CALEA—contains separate definitions for

"telecommunications" and "telecommunications service").

Drawing on the statutes' different texts, structures, legislative histories, and purposes, the FCC decided to resolve the ambiguities in CALEA and the 1996 Act differently. In light of "Congress's deliberate extension of CALEA's [substantive] requirements to providers satisfying the SRP," the FCC concluded that a telecommunications carrier should *not* escape the Act's reach altogether simply because the carrier's service offering has an "informational" component. *Order*, 20 F.C.C.R. 14989, ¶ 18. Thus, the FCC concluded that CALEA's definitional sections are *not* mutually exclusive: "[W]hen a single service comprises an information service component and a telecommunications component, Congress intended CALEA to apply to the telecommunications component." *Id.* at ¶ 21. The Commission further emphasized that its interpretation of CALEA is consistent with the Act's law-enforcement goals. *Id.*; *cf. Verizon*, 535 U.S. at 502 n.20.

II

ACE raises three arguments in its petition for review. First, ACE argues that broadband Internet access is an integrated "information service" under CALEA, and as such, it is uniformly excluded from the Act's substantive requirements. Second, ACE argues that VoIP similarly qualifies for CALEA's information-services exclusion. Third, ACE argues that the Commission unlawfully applied the Act to "private networks."

Our review is governed by the classic two-step approach set out in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See U. S. Telecom Ass'n v. FCC*, 227 F.3d 450, 457 (D.C. Cir. 2000). Under *Chevron*, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously

expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. However, if the statute is "silent or ambiguous with respect to the specific question at issue," we ask whether the agency's interpretation is "permissible," that is, "reasonable." *Id.* at 843-44; *see also Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005) ("A 'reasonable' explanation of how an agency's interpretation serves the statute's objectives is the stuff of which a 'permissible' construction is made; an explanation that is 'arbitrary, capricious, or manifestly contrary to the statute,' however, is not." (citations omitted)).

A

ACE first argues that broadband Internet access is an "information service," which falls completely beyond CALEA's reach. The Supreme Court has upheld the FCC's classification of broadband as an integrated "information service" under the Telecom Act. *See Brand X*, 125 S. Ct. at 2696. CALEA's definition of "information service" is virtually identical to the one included in the 1996 Act. *Compare* 47 U.S.C. § 1001(6) (CALEA), *with id.* § 153(20) (Telecom Act). Therefore, ACE concludes broadband providers must fall within the ambit of CALEA's identical "information services" exclusion. Notwithstanding the superficial attractiveness of ACE's argument, we disagree.

ACE's syllogism falls apart because CALEA and the Telecom Act are different statutes, and *Brand X* was a different case. Although ACE would have us read *Brand X* as controlling this controversy, that case did *not* hold that broadband Internet access is exclusively an "information service," devoid of any "telecommunications" component. Rather, it upheld the *FCC's* reasonable interpretation to that effect under a *different statute*. *See* 125 S. Ct. at 2708 (citing *Chevron*, 467 U.S. at 845 (step two)). Emphasizing that the Telecom Act "is ambiguous about

whether cable companies 'offer' telecommunications with cable modem service," *id.* at 2706, the Court concluded "that the Commission's construction was a reasonable policy choice for the Commission to make at *Chevron*'s second step," *id.* at 2708 (internal quotation marks, citation, and alteration omitted).

So here. CALEA expressly provides that the Commission may extend the definition of a "telecommunications carrier . . . to the extent that *the Commission finds* that [a] service is a replacement for a substantial portion of the local telephone service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier . . . ." 47 U.S.C. § 1001(8)(B)(ii) (emphasis added). Where, as here, "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight," so long as they reflect "reasonable policy choice[s]." *Chevron*, 467 U.S. at 843-45; *see also United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

The Commission's interpretation of CALEA represents a "reasonable policy choice." CALEA—unlike the 1996 Act—is a law-enforcement statute. *See* 47 U.S.C. § 1002(a) (requiring telecommunications carriers to enable "the government" to conduct electronic surveillance); *id.* § 1001(5) (defining "government" as any public entity "authorized by law to conduct electronic surveillance"). The Communications Act (of which the Telecom Act is part), by contrast, was enacted "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio . . . ." *Id.* § 151; *see also Verizon*, 535 U.S. at 502 n.20 (emphasizing "the deregulatory and competitive purposes of the [1996] Act"). The statutes' respective texts reflect their disparate objectives: While the 1996 Act is framed in terms of "offerings" made by "service"-

providers to consumers, CALEA's SRP empowers the FCC to expand its definition of a "telecommunication carrier" to meet the evolving needs of law enforcement officials. The Commission's interpretation of CALEA reasonably differs from its interpretation of the 1996 Act, given the differences between the two statutes.[4]

Specifically, CALEA differs from the 1996 Act in two important ways. First, CALEA's definition of "telecommunications carrier" is broader than the definition used in the 1996 Act. To highlight the difference, we present the statutory texts synoptically.

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[4] ACE attempts to obscure the differences between CALEA and the 1996 Act by arguing that "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." Pet. Br. at 26 (quoting *Smith v. City of Jackson*, 125 S. Ct. 1536, 1541 (2005) (internal quotation marks omitted)). Of course, ACE is correct—but only when Congress "*uses the same language* in two statutes *having similar purposes*." As illustrated herein, CALEA's language and purpose differ markedly from the 1996 Act.

CALEA	TELECOM ACT OF 1996
The term "telecommunications carrier" (A) means a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire; and (B) includes . . . (ii) a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this subchapter; but (C) does not include (i) persons or entities insofar as they are engaged in providing information services	The term "telecommunications carrier" means any provider of telecommunications services [*i.e.*, the offering of transmission for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used] . . . .
47 U.S.C. § 1001(8)	47 U.S.C. § 153(43), (44), (46)

While the Telecom Act limits its definition of "telecommunications services" to "transmission," CALEA's text is more inclusive: CALEA defines a "telecommunications carrier" as a provider of "transmission or switching" *plus* any provider that substantially replaces traditional transmission or

switching. *See id.* § 1001(8)(B)(ii) (SRP).[5]

The second major difference between the two statutes is that CALEA's text and structure suggest that its definitions for "telecommunications carrier" and "information services" are not mutually exclusive terms. Unlike the 1996 Act, CALEA does not refer to a "telecommunications *service*," nor does its definition of "telecommunications carrier" include a reference to a service "offering." Moreover, CALEA's definition of a "telecommunications carrier"—unlike the 1996 Act's definition of that term—excludes entities only "*insofar as* they are engaged in providing information services." *Id.* § 1001(8)(C)(i) (emphasis added). These distinctions suggest that CALEA does *not* define two mutually exclusive "services" that are independently "offered" to consumers. That is, under CALEA, a carrier might "offer" one "service" that contains both "telecommunications" and "information" components.

ACE's argument to the contrary relies on the fact that "information services," by statutory definition, are delivered "via telecommunications" under both CALEA and the Telecom Act. *See* CALEA § 1001(6)(A) (defining "information services" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications"); Telecom Act § 153(20) (same). In ACE's view, the "via

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[5] ACE attempts to cabin the expansive effect of the SRP by arguing that it applies only "to commercial providers of 'telecommunications' that are *not* common carriers for hire." Pet. Br. at 38 (emphasis added and removed). However, ACE's interpretation of the SRP would eviscerate the clause that immediately precedes it, which defines a telecommunications carrier as "a common carrier for hire." 47 U.S.C. § 1001(8)(A). Whatever the SRP's meaning, ACE's internally contradictory interpretation is not it.

telecommunications" clause makes the telecommunications and information components of an informational service offering inseparable under both statutes. That is, once the "telecommunications" dimension of an "information service" is removed, the definition of the latter term becomes a nullity. As a result, ACE argues, we should interpret CALEA to create two mutually exclusive categories of "telecommunications" and "information" services, which can never overlap.

ACE's analysis is inconsistent with our standard of review. We cannot set aside the Commission's reasonable interpretation of the Act in favor of an alternatively plausible (or an even better) one. *See*, *e.g.*, *Brand X*, 125 S. Ct. at 2699 ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."); *Citizens Coal Council v. Norton*, 330 F.3d 478, 482 (D.C. Cir. 2003) ("Even assuming the correctness of [an alternative interpretation], the ambiguity of the statute in combination with the *Chevron* doctrine eclipses the ability of the courts to substitute their preferred interpretation for an agency's reasonable interpretation when that agency is the entity authorized to administer the statute in question."); *Nat'l Mining Ass'n v. Babbitt*, 172 F.3d 906, 916 (D.C. Cir. 1999) ("If we were interpreting the statute *de novo*, we might well agree that appellant has the better argument. But we are not. And although the government's reading is a bit of a stretch, we think it passes the *Chevron* test."). The FCC offered a reasonable interpretation of CALEA, and *Chevron*'s second step requires nothing more.

We hasten to emphasize the continued vitality of CALEA's information-services exclusion. As the Commission explained:

> A facilities-based broadband Internet access service provider continues to have *no* CALEA obligations with respect to, for example, the storage functions of its e-mail service, its web-hosting and ["Domain Name System," or "DNS"] lookup functions or any other ["Internet Service Provider," or "ISP"] functionality of its Internet access service. It is only the "switching and transmission" component of its service that is subject to CALEA under our finding today.

Order, 20 F.C.C.R. 14989, ¶ 38 (emphasis in original and footnote omitted). Because CALEA's definitions for "telecommunications" and "information service" are not mutually exclusive, the Commission reasonably concluded that mixed services—such as broadband Internet access—are partially covered by (and partially excluded from) the statute: The "switching and transmission" portion of a broadband service offering—which replaces the "switching or transmission" portion of a dial-up Internet connection—is covered, while any "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," 47 U.S.C. § 1001(6)(A), is not.

The Commission has long distinguished between "information services" and the underlying "telecommunications" that transport them. *See*, *e.g.*, *Amendment of Section 64.702 of the Commission's Rules & Regulations* (*Second Computer Inquiry*), 77 F.C.C. 2d 384, 475, ¶ 231 (1980); *Universal Service Report*, 13 F.C.C.R. 24012, 24030, ¶ 36 (1998); *CALEA Second Report & Order,* 15 F.C.C.R. 7105, 7120, ¶ 27 (1999); *CPE/Enhanced Services Bundling Order*, 16 F.C.C.R. 7418, 7444, ¶ 43 (2001); *Section 271 Remand Order*, 16 F.C.C.R. 9751, 9770, ¶ 36 (2001); *Wireline Broadband Order*, 20 F.C.C.R. 14853, 14864, ¶ 16

(2005).[6] The FCC reasonably applied that well-settled distinction to give meaning to both the SRP and the information-services exclusion in the context of broadband providers. Accordingly, we deny the petition for review.

B

ACE next argues that the Commission arbitrarily and capriciously "refused to classify VoIP as either a telecommunications service or an information service." Pet. Br. at 33. At oral argument, ACE's counsel clarified that it is not challenging the merits of VoIP's classification in one category or the other; ACE argues only that the Commission must classify it. *See* Tr. of Oral Arg. at 13:14-19:03. We need not tarry long over this claim.

As we explained above, CALEA says nothing about "telecommunications *service[s]*." To the extent ACE and its fellow petitioners confusedly petitioned the Commission to

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[6] Our dissenting colleague argues that "[p]rior to the issuance of the instant Order, the Commission has consistently held that broadband Internet service is an 'information service.' It has never previously said otherwise. Indeed, it has never hinted otherwise." Dissent at 6. However, the Commission has consistently recognized that the telecommunications and information components of broadband are distinguishable. The fact that the Commission treated those components as an integrated service-offering under one statute does not preclude the Commission from reasonably treating those differentiable components differently under a different statute. *Cf. Brand X*, 125 S. Ct. at 2699-2700 ("[I]f the agency adequately explains the reasons for a reversal of policy, change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." (internal quotation marks and citation omitted)).

(mis)classify VoIP in relation to a nonexistent statutory term, the FCC did not err by declining the invitation. Moreover, ACE ignores the fact that the Commission *did* classify VoIP providers as "telecommunications *carriers*," *see Order*, 20 F.C.C.R. 14989, ¶¶ 39-44, while specifically excluding the voice-transmission portions of VoIP from the definition of "information services," *see id.* ¶ 45. Regardless of the merits of that classification—which ACE does not challenge—no one can deny that the Commission made it.

C

ACE's third and final argument focuses on a single word in a single sentence in a single footnote from the *Order*. The Commission noted: "To the extent [that] private networks are interconnected with a public network, either the [public voice network] or the Internet, providers of the facilities that *support* the connection of the private network to a public network are subject to CALEA under the SRP." *Order*, 20 F.C.C.R. 14989, ¶ 36 n.100 (emphasis added). Relying on language from the *proposed* rule, ACE insists that the inclusion of the word "support" in the FCC's final rule "provides no real comfort" for its fears that the Commission will extend its regulatory authority "throughout [an] entire private network." Pet. Br. at 46.

Although ACE's argument suggests the point is not necessarily self-evident, it should go without saying that a *proposed* rule is not a *final* rule. It should be equally obvious that a challenge to the Commission's possible future applications or extensions of CALEA does not ripen by virtue of a petitioner's unfounded fears. *See*, *e.g.*, *Fed. Express Corp. v. Mineta*, 373 F.3d 112, 119 (D.C. Cir. 2004) (holding "if and when [the petitioner's fear] does come to pass, judicial review of the issue 'is likely to stand on a much surer footing in the context of a specific application of this regulation than could be

the case in the framework of the generalized challenge made here.'" (quoting *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 164 (1967)); *Atl. States Legal Found. v. EPA*, 325 F.3d 281, 284-85 (D.C. Cir. 2003) (holding a speculative fear about possible future agency action does not present a case or controversy ripe for review). The *Order* on review—like CALEA—expressly excludes "private networks" from its reach. *See Order*, 20 F.C.C.R. 14989, ¶ 36; 47 U.S.C. § 1002(b)(2)(B). If and when the Commission expands its interpretation, an aggrieved party can bring a petition for review at that time.

III

For the reasons set forth above, the petition for review is

Denied.

EDWARDS, *Senior Circuit Judge*, *dissenting*:

> ***Regardless of how serious the problem an administrative agency seeks to address . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.***
>
> ***FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000).**

The Communications Assistance for Law Enforcement Act ("CALEA") sets forth "assistance capability requirements," compelling "telecommunications carriers" to build and sustain their equipment in a manner that allows law enforcement agents to execute surveillance orders. Importantly, for purposes of this case, the statute

- explicitly states that "telecommunications carrier[s]" do not include "persons or entities insofar as they are engaged in providing information services," 47 U.S.C. § 1001(8)(C)(i) (2000),
- defines "information services" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," *id.* § 1001(6)(A), and
- expressly states that the assistance capability requirements "do not apply to [ ] information services," *id.* § 1002(b)(2)(A).

In determining that broadband Internet providers are subject to CALEA as "telecommunications carriers," and not excluded pursuant to the "information services" exemption, the Commission apparently forgot to read the words of the statute. CALEA does not give the FCC unlimited authority to regulate every telecommunications service that might conceivably be used to assist law enforcement. Quite the contrary. Section 1002 is precise and limited in its scope. It expressly states that

the statute's assistance capability requirements "do not apply to [ ] information services." *Id.* Broadband Internet is an "information service" – indeed, the Commission does not dispute this. Therefore, broadband Internet providers are exempt from the substantive provisions of CALEA.

The FCC apparently believes that law enforcement will be better served if broadband Internet providers are subject to CALEA's assistance capability requirements. Although the agency may be correct, it is not congressionally authorized to implement this view. In fact, the "information services" exemption prohibits the FCC from subjecting broadband service providers to CALEA's assistance capability requirements. If the FCC wants the additional authority that Congress withheld, it must lobby for a new statute. Until Congress decides that the "information services" exemption is ill-advised, the agency is bound to respect the legislature's will and we are bound to enforce it. *See Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) ("Were the courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.").

What we see in this case is an agency attempting to squeeze authority from a statute that does not give it. The FCC's interpretation completely nullifies the information services exception and manufactures broad new powers out of thin air.

The most troubling aspect of the FCC's interpretation of CALEA is that it is directly at odds with the statutory language. The statute defines "information services" as the offering of various information capabilities *via telecommunications*. 47 U.S.C. § 1001(6)(A). *See* Appendix. The offering of one of the

specified information capabilities "*via telecommunications"* is integral to the definition of exempt services. Despite this clear language, the Commission's Order states that "when a single service comprises an information service component and a telecommunications component, Congress intended CALEA to apply to the telecommunications component." *Communications Assistance for Law Enforcement and Broadband Services*, First Report and Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 14,989 ¶ 21 (2005) ("Order"). This is utter gobbledygook, and it certainly cannot be what Congress intended. Under the plain words of the statute, exempt information services are those specified services that include a telecommunications component. If, as the FCC would have it, the telecommunications component is excised, the statutorily defined exemption no longer exists. This makes no sense.

The net effect of the FCC's interpretation is to vitiate the statutory exception altogether. If all information services that are carried out "via telecommunications" are subject to CALEA, then the "information services" exemption is an empty set. Under the plain terms of the statute, this cannot be.

In the face of this reality, the Commission offers an example of a service that, under its interpretation, allegedly falls within the information services exception – the "storage functions of [a broadband Internet access provider's] e-mail service." Order at ¶ 38. The example highlights the absurdity of the agency's position. Once email storage functions are viewed apart from the telecommunications mechanism used to transmit email messages, there is no sense in which email services are offered "via telecommunications." Thus defined, email storage services fall outside of the statutory exception and are thus potentially subject to CALEA's requirements.

If the FCC had construed CALEA's information services exception consistent with the parallel provision in the Communications Act – which is identical in all relevant respects, *compare* 47 U.S.C. § 1001(6) (2000) (CALEA) *with id.* § 153(20) (Communications Act) – the agency would have given full effect to every provision of CALEA. And the FCC could have relied on the statute's "substantial replacement" provision to apply CALEA to services that are not information services and that do not otherwise fit within the definition of telecommunications carrier.

VoIP is an example of such a service. There is no doubt that VoIP replaces a substantial portion of local telephone exchange service – it offers exactly the same functionality as phone service. And, in contrast to broadband service, the Commission has explicitly refrained from designating VoIP as an information service under the Communications Act, *see Federal-State Joint Board on Universal Service*, Report to Congress, 13 F.C.C.R. 11,501, 11,541 ¶ 83 (1998).

It seems that the Commission had little interest in reading CALEA in a manner that is consistent with the statute's language and structure. The Commission's argument is quite revealing. By emphasizing the need to construe CALEA to "ensur[e] that technological change [does] not erode lawful surveillance authority," FCC's Br. at 30, the Commission betrays its true objective: administrative amendment of the statute. Our standard for reviewing an agency's interpretation of congressional commands does not permit us to ratify the FCC's unauthorized attempt to legislate new and better tools for law enforcement.

As *Chevron* and its progeny teach, an "agency's interpretation of the statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at

issue." *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002). In *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), the Court held that the FCC's congressionally authorized ability to modify the § 203 requirements of the Communications Act did not permit the agency to make basic and fundamental changes in the statute's regulatory scheme. In refusing to ratify the Commission's interpretation of the statute, the Court found it "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion – and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements." *Id.* at 231.

The Supreme Court reiterated this view in *Brown & Williamson*. There the Court rejected an attempt by the Food and Drug Administration to regulate tobacco products, noting that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." 529 U.S. at 160. *See also Am. Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005) (an agency does not possess plenary authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area); *Am. Bar Ass'n v. Federal Trade Comm'n*, 430 F.3d 457 (D.C. Cir. 2005) (same).

Similar considerations militate against the proposition that, in enacting CALEA, Congress quietly granted the FCC the authority to subject a new industry – providers of broadband service – to the intrusive requirements of the statute. In gauging the plausibility of the FCC's purported authority, one surely must look to the FCC's treatment of the "information services" exception under the Communications Act. A term in one statute does not necessarily control the Commission's actions under another statute. But here the Commission's earlier rulings show that "information services" has become a term of art. The

agency cannot simply ignore its prior *consistent* constructions of "information services," especially when it offers no coherent alternative interpretation. Under the Commission's current order, "information services" is meaningless.

Prior to the issuance of the instant Order, the Commission has consistently held that broadband Internet service is an "information service." It has never previously said otherwise. Indeed, it has never hinted otherwise. For example, in its Declaratory Ruling on the status of cable modem service under the Communications Act, the Commission held:

> As currently provisioned, cable modem service is a single, integrated service that enables the subscriber to utilize Internet access service through a cable provider's facilities and to realize the benefits of a comprehensive service offering.
>
> . . . Consistent with the statutory definition of information service, cable modem service provides the capabilities described above "via telecommunications." That telecommunications component is not, however, separable from the data-processing capabilities of the service. As provided to the end user the telecommunications is part and parcel of the cable modem service and is integral to its other capabilities.

Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilitites, Declaratory Ruling and Notice of Proposed Rulemaking,17 F.C.C.R. 4798, 4823 ¶¶ 38-39 (2002) (internal citations omitted). *See also Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* Report & Order & Notice of Proposed Rulemaking, CC Docket No. 02-33, FCC 05-150, ¶ 15 (rel. Sept. 23, 2005) ("Because wireline broadband Internet access service inextricably combines the offering of powerful computer capabilities with telecommunications, we conclude that it falls within the class of

services identified in the Act as 'information services.'"); *Federal-State Joint Board on Universal Service*, 13 F.C.C.R. at 11,539 ¶ 80 ("The provision of Internet access service involves data transport elements . . . . But the provision of Internet access service crucially involves information-processing elements as well; it offers end users information-service capabilities inextricably intertwined with data transport. As such, we conclude that it is appropriately classed as an 'information service.'") (internal citations omitted).

There is no doubt that an "initial agency interpretation is not instantly carved in stone"; nor is there any doubt that, if acting pursuant to delegated authority, an agency may adopt different interpretive positions to address different problems. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2700 (2005) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984)). But these points are of no moment in this case.

The question here is whether the FCC has identified a statutory predicate for enlarging CALEA's scope to encompass providers of broadband access. It has not. Merely saying that broadband is not an information service does not make it so, certainly not in light of all that the FCC has said in the past. And merely invoking *law enforcement*, "as though it were a talisman under which any agency decision is by definition unimpeachable," *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983), offends good sense.

The FCC can no more contend that "information service" providers are really "telecommunications carriers" because their regulation can facilitate the law enforcement purposes of CALEA, than the agency could assert that those who operate "movie theaters" are really "radio broadcasters" because their regulation would facilitate control of indecent material pursuant to 18 U.S.C. § 1464 (2000). There is absolutely no permissible

basis for this court to sustain the FCC's convoluted attempt to infer broad new powers under CALEA. The agency has simply abandoned the well-understood meaning of "information services" without offering any coherent alternative interpretation in its place. The net result is that the FCC has altogether gutted the "information services" exemption from CALEA. Only Congress can modify the statute in this way.

APPENDIX

The Applicable Provisions of the Communications Assistance for Law Enforcement Act, 47 U.S.C. § 1001 *et seq*.

47 U.S.C. § 1001. Definitions.

* * * *

(6) The term **"*information services*" –**

(A) means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information ***via telecommunications***; and

(B) includes –

(i) a service that permits a customer to retrieve stored information from, or file information for storage in, information storage facilities;

(ii) electronic publishing; and

(iii) electronic messaging services; but

(C) does not include any capability for a telecommunications carrier's internal management, control, or operation of its telecommunications network.

* * * *

(8) The term **"telecommunications carrier"** –

* * *

(C) **does not include** –

(i) persons or entities insofar as they are engaged in **providing information services**;

* * * *

47 U.S.C. § 1002. Assistance capability requirements.

(a) Capability requirements

. . . a telecommunications carrier shall ensure that its equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications are capable of [serving government needs in intercepting digital and other communications] . . . .

(b) Limitations

* * * *

(2) Information services; private networks and interconnection services and facilities

The requirements of subsection (a) of this section do not apply to –

(A) **information services**;

* * * *

CERTIFICATE AS TO PARTIES AND AMICI

Pursuant to D.C. Circuit Rules 35(c) and 28(a)(1)(A), Petitioners submit the following statement of the parties and amici. The parties to this proceeding are as follows (there are no amici):.

Petitioners

American Association of Community Colleges (AACC)
American Association of State Colleges and Universities (AASCU)
American Civil Liberties Union (ACLU)
American Council on Education (ACE)
American Library Association (ALA)
Association of American Universities (AAU)
Association of Research Libraries (ARL)
Center for Democracy and Technology (CDT)
COMPTEL
Corporation for Education Network Initiatives in California (CENIC)
EDUCAUSE
Electronic Frontier Foundation (EFF)
Electronic Privacy Information Center (EPIC)
Internet2
National Association of College and University Business Officers (NACUBO)
National Association of Independent Colleges and Universities (NAICU)
National Association of State Universities and Land Grant Colleges (NASULGC)
National LamdaRail
Pacific Northwest GigaPOP
Pulver.com
Sun Microsystems, Inc.

Respondents

Federal Communications Commission (Commission)
United States

Intervenors

Verizon Telephone Company
Cellco Partnership

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Dated: July 21, 2006

DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Petitioners submit this disclosure statement.

American Association of Community Colleges (AACC)

Founded in 1920, the AACC has, over four decades, become the leading proponent and the national "voice for community colleges." It has no parent company and there is no company with any ownership interest. Today, the AACC's membership represents close to 95 percent of all accredited U.S. two-year community, junior and technical colleges and their 10.5 million students, as well as a growing number of international members in Puerto Rico, Japan, Great Britain, Korea, and the United Arab Emirates.

American Association of State Colleges and Universities (AASCU)

The AASCU represents more than 430 public colleges, universities and systems of higher education throughout the United States and its territories. It has no parent company and there is no company with any ownership interest. The AASCU was established in 1961 in response to "the growing impact of the federal government on higher education, particularly as it related to research grants and other grants-in-aid, had made it absolutely necessary that a strong national association be formed to represent the interests of students in state colleges and universities."

American Civil Liberties Union (ACLU)

The ACLU is composed of two separate corporate entities, the American Civil Liberties Union and the ACLU Foundation. Both the American Civil Liberties Union and the ACLU Foundation are national nonprofit and nonpartisan organizations with the same overall mission,

namely, protecting the civil liberties of United States citizens. The ACLU has two separate corporate entities in order to do a broad range of work to protect civil liberties consistent with U.S. federal income tax law requirements. Generally, the two organizations are collectively referred to as the ACLU. No parent corporation exists and no publicly held corporation exercises any ownership over the ACLU.

American Council on Education (ACE)

The ACE is a nonprofit organization located in Washington, D.C. It has no parent company and there is no company with any ownership interest. Its primary purpose is to advance education and educational methods through comprehensive, voluntary, and cooperative action from American educational associations, organizations, and institutions. The ACE has as its members and associates approximately 1,800 accredited, degree-granting colleges and universities and higher-education related associations, organizations, and corporations.

American Library Association (ALA)

The American Library Association is the oldest and largest library association in the world, with more than 64,000 members. It has no parent company and there is no company with any ownership interest. Its mission is to promote the highest quality library and information services and public access to information.

Association of American Universities (AAU)

The AAU is a nonprofit organization of sixty American universities and two Canadian universities. It has no parent company and there is no company with any ownership interest. The association serves its members in two major ways. It assists members in developing national policy positions on issues that relate to academic research and graduate and professional

education. It also provides them with a forum for discussing a broad range of other institutional issues, such as undergraduate education.

Association of Research Libraries (ARL)

The ARL is a nonprofit membership organization comprising the leading research libraries in North America. It has no parent company and there is no company with any ownership interest. Its mission is to shape and influence forces affecting the future of research libraries in the process of scholarly communication. ARL programs and services promote equitable access to and effective use of recorded knowledge in support of teaching, research, scholarship, and community service.

Center for Democracy and Technology (CDT)

The CDT is a non-profit public interest organization concerned about privacy, free speech, and other public policy issues related to the Internet. It does not have a corporate parent, and there is no company with any ownership interest.

COMPTEL

COMPTEL is the principal national association representing U.S., international and global competitive communications companies and their suppliers. COMPTEL's approximately 300 members include nationwide companies as well as smaller regional carriers providing local, long distance and Internet services. COMPTEL is a not-for-profit corporation and has not issued shares or debt securities to the public. COMPTEL does not have any parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Corporation for Education Network Initiatives in California (CENIC)

The CENIC is a non-profit corporation that designs, provisions and operates next generation Internet communications services. It has no parent company and there is no company

with any ownership interest. It represents the common interests of its associates, who are drawn from California's higher education academic and research communities and California's K–12 schools. The CENIC serves all University of California campuses, Caltech, Stanford, all California State University campuses, all California Community Colleges and the K–12 system.

EDUCAUSE

EDUCAUSE is a nonprofit association whose mission is to advance higher education by promoting the intelligent use of information technology. It has no parent company and there is no company with any ownership interest. EDUCAUSE programs include professional development activities, print and electronic publications, strategic policy initiatives, research, awards for leadership and exemplary practices, and a wealth of online information services. The current membership comprises over 2,000 colleges, universities, and education organizations, including more than 180 corporations, and more than 13,000 active member representatives. EDUCAUSE has offices in Boulder, Colorado, and Washington, D.C.

Electronic Frontier Foundation (EFF)

The EFF is a non-profit public interest organization concerned about privacy, free speech, and other public policy issues relating to the Internet. It does not have a corporate parent, and there is no company with any ownership interest.

Electronic Privacy Information Center (EPIC)

The EPIC is a non-profit public interest research center located in Washington, DC. It has no parent company and there is no company with any ownership interest, and EPIC has not issued shares or debt securities to the public. EPIC was founded in 1994 to focus public attention on emerging civil liberties issues and to protect privacy and constitutional values.

Internet2

Internet2 is a consortium being led by 206 universities working in partnership with industry and government to develop and deploy advanced network applications and technologies, accelerating the creation of tomorrow's Internet. It has no parent company and there is no company with any ownership interest. Internet2 is recreating the partnership among academia, industry and government that fostered today's Internet in its infancy.

National Association of College and University Business Officers (NACUBO)

Located in Washington, D.C., the NACUBO serves a membership of more than 2,500 colleges, universities, and higher education service providers across the country. It has no parent company and there is no company with any ownership interest. The NACUBO represents chief administrative and financial officers through a collaboration of knowledge and professional development, advocacy and community. Its vision is to define excellence in higher education business and financial management.

National Association of Independent Colleges and Universities (NAICU)

The NAICU serves as the unified national voice of independent higher education. It has no parent company and there is no company with any ownership interest. Since 1976, the association has represented private colleges and universities on policy issues with the federal government, such as those affecting student aid, taxation, and government regulation. With nearly 1,000 members nationwide, the NAICU reflects the diversity of private, nonprofit higher education in the United States.

National Association of State Universities and Land Grant Colleges (NASULGC)

Founded in 1887, the NASULGC is the nation's oldest higher education association. It has no parent company and there is no company with any ownership interest. The NASULGC is

dedicated to supporting excellence in teaching, research and public service. As of February 2004, the association's membership stood at 212 institutions.

National LambdaRail, LLC

National LambdaRail, LLC is a non-profit entity that serves to interconnect over 15 regional/state research and education networks. It has no parent company and there is no company with any ownership interest. It provides a nationwide research and education network capability that helps researchers, faculty and students carry out the mission and programs of their respective institutions through access to resources and collaboration with other institutions across the nation.

Pacific Northwest GigaPOP

Pacific Northwest GigaPOP is a non-profit corporation, serving research and education networks and organizations throughout the Pacific Rim. It has no parent company and there is no company with any ownership interest. It provides access to major research and education networks as well as inter-connection services to its members with the major national commodity Internet service providers.

Pulver.com

Pulver.com is a corporation involved in, among other activities, the development of Internet and communications technologies. It does not have a corporate parent, and no publicly held company holds 10% or more of stock or other ownership interest in it.

Sun Microsystems, Inc.

Sun Microsystems, Inc. is a publicly held corporation involved in, among other activities, the development of Internet and communications technologies. It does not have a corporate

parent, and no publicly held company holds 10% or more of stock or other ownership interest in it.

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Dated: July 21, 2006

CERTIFICATE OF SERVICE

I, John B. Morris, Jr., do hereby certify that on July 21, 2006, I caused copies of the foregoing Petition for Rehearing En Banc, in the matter of *American Council on Education v. Federal Communications Commission and the United States*, to be sent by first-class mail, postage prepaid, to the parties listed below.

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