

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

CORRECTED PETITION FOR REHEARING EN BANC

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Certificate of Service

In 1994, Congress flatly exempted Internet access and software applications from the reach of the Communications Assistance for Law Enforcement Act, 47 U.S.C. §§ 1001-1010 (“CALEA”) (excerpted in the Addendum). By extending CALEA to reach both Internet access and software applications like “Voice over IP” (“VoIP”), the FCC—and a 2-1 panel majority¹—overrode the clear statutory language of CALEA. The undersigned Petitioners² respectfully request that this Court rehear *en banc* Petitioners’ petition for review of the FCC’s CALEA 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”). Congress focused in CALEA on specific developments in the telephone network—the advent of digital and cellular technology—and it imposed design obligations on telephone common carriers. Because Congress appreciated the burden that it was

¹ *ACE v. FCC*, No. 05-1404 et al. (D.C. App. June 9, 2006) (see Addendum).

² 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. Their core concern was that CALEA not be extended to apply to private networks of the educational institutions they represent. The panel reaffirmed that CALEA does not apply to private 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.

imposing on those companies, it appropriated \$500,000,000 to help to defray a portion of the carriers' costs to comply with CALEA. *See* CALEA § 110.³

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.⁴ In two independent places in CALEA, Congress made clear that CALEA did not (and should not in the future) apply to the Internet, and as detailed below, then-FBI Director Freeh squarely acknowledged this limitation.

In 2004, the FBI asked the FCC to extend CALEA to the Internet. Unlike with the PSTN in 1994, the FBI presented no evidence of problems intercepting Internet traffic, and indeed the record indicates that Internet interceptions to date have been successful. Notwithstanding (a) the clear Congressional exclusion of the Internet from CALEA, (b) the lack of any evidence of any problem, and (c) the exhaustion of the \$500 million appropriated in 1994 to assist telephone companies with CALEA compliance, the FCC decided that it had the authority to extend CALEA to the Internet. It is this decision that is challenged in this appeal.

³ At the outset of its opinion, the panel majority errs 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 makes clear, CALEA was *not* a response to Internet technologies that were only then emerging.

⁴ 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. Even in the absence of CALEA, Internet companies already can and do comply with lawful federal and state wiretap orders. *See ACE v. FCC*, at 4 n.2.

The far-reaching impact of this decision—extending 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 relatively few companies operating a stable and centrally controlled network), the Internet encourages technical innovation on an unprecedented scale, by startup companies and individual innovators, all contributing to a dynamically changing and wholly decentralized network. By establishing that CALEA can be extended to Internet access and applications technology, and permitting the FBI to impose design requirements on Internet applications, the FCC (and the 2-1 panel) has taken a major step toward slowing down the innovation and growth that have been vital to the Internet’s development. This impact directly conflicts with specific exclusions of the Internet that Congress built into the text of CALEA itself. This appeal rises to the level of involving “a question of exceptional importance” as required under FRAP 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 litigants).

ARGUMENT

The critical mistakes that the FCC – and the panel majority – 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 CALEA, enacted in 1994. CALEA unambiguously excludes information services—including Internet access and applications—even where such service is “mixed” with transmission and switching. Thus, this appeal is appropriately decided using a *Chevron* “step one” analysis.⁵ Second, on the record here, there is no justification for extending CALEA to “Voice over the Internet” (“VoIP”) services.

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 there 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.⁶

The statutory language is of course the appropriate starting point. Congress made clear in two distinct places in CALEA that it does not apply to the Internet. First, in § 1001(6), Congress defined “information service” to reach Internet access and applications, and then declared in § 1001(8)(C)(i) that CALEA does not apply

⁵ *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

⁶ 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, in conflict with the statutory language. *See ACE v. FCC*, at 4, 8 (Edwards, J., dissenting).

to any entities “insofar as they are engaged in providing information services.”
Second, in § 1002(b)(2)(A), Congress again 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.

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, the FCC seized upon § 1001(8)(B)(ii)—the “substantial replacement provision” (“SRP”)—to create an asserted ambiguity (and “irreconcilable tension”) where no ambiguity or tension exists. *See* Order ¶ 18. The panel majority used this asserted “tension” 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 statute does not reveal any ambiguity to be resolved. The key language is in § 1001(8), which includes the SRP in § 1001(8)(B) and the first of CALEA’s two independent information service exclusions in § 1001(8)(C). The statute reads (with emphasis added):

- (8) The term ‘telecommunications carrier’ [covered by CALEA]--
 - (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, ¶ 19, the FCC asserts that “[t]o give significance to the SRP” the SRP

“*must*” include at least some information services, and thus there is some

“irreconcilable tension” between the SRP and the information services exclusion.

This analysis fails for at least two reasons. First, the SRP standing alone has “significance.” Looking at § 1008 as a whole, Congress created a simple scheme:

Transmission or switching provided by <i>common carriers</i>	are categorically included in CALEA under § 1001(8)(A);
Transmission or switching provided by private or other <i>non-common carriers</i> (such as, for example, a variety of wireless and satellite services provided on a non-common carrier basis) ⁷	can be covered if the FCC finds the service to be a “ <i>replacement for a substantial portion</i> ” of the local phone service and it is in the public interest to do so, under § 1001(8)(B); and
information services—whether provided by a common carrier or 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.

Further, there is no “irreconcilable tension” that warrants a strained

⁷ 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).

construction of the statutory language by the agency. A simplification of the 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 the 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.

B. The FCC’s (and the Panel Majority’s) Analysis of the 1996 Act Does Not Alter the Statutory Language of the 1994 CALEA

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 it has treated the terms “telecommunications service” and

“information service” as “mutually exclusive.” *Id.* Then, 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 statutes, the FCC decides first that the Communications Act does not control, *id.*, and then that there exists a “definitional ambiguity” in CALEA that the FCC must resolve, Order ¶ 17.

This assertion of ambiguity fails for a variety of 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 1996, and thus both the Communications Act definitions and the FCC’s analysis of those definitions all followed passage of CALEA in 1994 by at least 2 years. The statutory interpretation issue here 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.” Under *Chevron*, the threshold question is whether the statutory language is *on its face* ambiguous, as it was drafted *in 1994*. The FCC’s claimed “ambiguity” could not have emerged until 1996 or later. When Congress acted in 1994, its language unambiguously and categorically excluded information services from CALEA.

Moreover, even if the FCC is right that CALEA’s definition of “information services” sweeps more broadly than that found in the 1996 Act, the upshot 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 the two acts, information services and “entities to the extent they are providing information services” are still excluded from CALEA.

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 two 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 *Brand X* indicates, Congress had left the treatment of “mixed” services up to the FCC. Here, in contrast, Congress did not leave the FCC 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) (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 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.⁸

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 § 1001, § 1002(b)(2)(A) makes clear that CALEA does not apply to those entities’ information services such as Internet access or applications. The structure of § 1002 reinforces this conclusion: 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:”

⁸ The Order cites § 1002(b)(2)(A) in two footnotes (56 and 70) but does not discuss the provision. The panel majority also failed to grapple with this second exclusion.

(b) LIMITATIONS- ...

(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, or modify the definition of information services. Thus, even if the SRP can somehow trump the § 1001(8)(C) exclusion, information services are *still* excluded by § 1002(b)(2)(A).⁹

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

The CALEA statute grew out of 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 1992, the FBI proposed a sweeping statute that would have allowed the technical design mandates on *any* provider of *any* electronic communications, *including* the Internet. As FBI Director Freeh later acknowledged, that broad 1992 proposal "was rejected out of hand" by Congress.¹⁰

In 1994, the FBI returned with a very limited proposed statute, one that was "narrowly focused and covers . . . only [the industry] where the vast majority of the

⁹ Although 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)—it totally fails to give *any* effect to the neighboring express exclusion of information services found in § 1002(b)(2)(A). See *ACE v. FCC*, at 20.

¹⁰ Testimony of FBI Director Louis Freeh, Joint Senate & House Hearings, Mar. 18 and Aug. 11, 1994 (S. Hrg. 103-1022), at 49 [hereafter "Judiciary Hearings"].

problems exist – that is, on common carriers”¹¹ In sections entitled “Narrow scope,” both the House and Senate Reports made the narrowness of the bill clear:

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. . . . [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 . . . are required to design and build their switching and transmission systems to comply with the legislated requirements. 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.¹²

Both the Reports made clear that Congress intended that the information service *exclusion* from CALEA be broadly construed and encompass future technology:

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.*¹³

Moreover, it was specifically clear to Congress that CALEA would not reach future *voice* services provided over the Internet. Asked whether CALEA would omit some future telephone service, FBI Director Freeh responded:

¹¹ Freeh Testimony, Judiciary Hearings, at 16.

¹² Senate Report 103-402, at 18-19 (emphasis added) [hereafter “Senate Report”]; House Report 103-827, at 18 [hereafter “House Report”].

¹³ House Report, at 21 (emphasis added). *See also* Senate Report, at 21-22.

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.¹⁴

This history supports the plain meaning of the statutory language—that information services are excluded from CALEA, and the FCC lacks authority to override the decision of Congress to exclude information services. If there is a need to extend CALEA to the Internet, law enforcement must seek the extension from Congress.¹⁵

II. CALEA CANNOT ON THE RECORD BEFORE THIS COURT BE EXTENDED TO REACH VOICE-OVER-IP SERVICES.

In 2004, the FCC declared (under the Communications Act) that peer-to-peer VoIP was an information service.¹⁶ In the CALEA context, however, the FCC has flatly refused to state—one way or another—whether *any* VoIP is an information service. Because CALEA excludes information services, the FCC cannot extend it to “interconnected” VoIP without *first* deciding whether it is an information service. At a minimum, this Court must vacate the extension of CALEA to VoIP and remand this matter to the agency for this determination.

¹⁴ Freeh Testimony, Judiciary Hearings, at 49-50.

¹⁵ We also agree with Judge Edwards that, under *Chevron* “two,” 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). His analysis of the *Chevron* “two” arguments provides an independent basis for rehearing.

¹⁶ *See* Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecomm. Nor a Telecomm. Service, 19 F.C.C.R. 3307 (Feb. 12, 2004).

The FCC's failure is even clearer in light of *CALEA*'s own definition of "electronic messaging services," which are excluded as information services. In § 1001(4), *CALEA* defines "electronic messaging service" to mean "software-based services that enable the sharing of . . . *sound* . . . among computing devices controlled by the senders or recipients of the messages." This definition *precisely* describes Voice over IP services. The FCC cannot extend *CALEA* to cover VoIP without explaining why it is not an excluded electronic messaging 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).

CONCLUSION

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. Only Congress has the power to change that stopping point.

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Dated: July 28, 2006

CERTIFICATE OF SERVICE

I, John B. Morris, Jr., do hereby certify that on July 28, 2006, I caused copies of the foregoing Corrected 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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