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DATA PROTECTION IN THE DIGITAL ECONOMY: LEGISLATING IN LIGHT OF *SORRELL v. IMS HEALTH INC.*

Abstract: Consumers overwhelmingly believe that companies do not do enough to protect their personal data. As Congress considers federal data protection legislation, it must ensure that any proposed legislation comports with the First Amendment. In 2011, in *Sorrell v. IMS Health Inc.*, the U.S. Supreme Court determined that a Vermont law prohibiting the use of physician-prescribing records for marketing purposes violated the First Amendment. At the heart of *Sorrell* is that shared data, unlike a traditional commodity like oil, conveys information and is thus First Amendment-protected speech. Since *Sorrell*, the use and retention of data, specifically personal data, has exploded and is only expected to increase. Nevertheless, the United States currently lacks comprehensive federal data protection legislation. To fill this legislative gap, state legislatures have begun to pass data protection laws. These laws apply either to specific types of data—such as biometric information or Internet service provider customer information—or simply all consumer data. As state and federal legislative efforts advance, lawmakers must consider the lessons from *Sorrell* to ensure that new legislation protects consumer privacy interests without infringing on data holders' protected speech. This Note argues that most data protection legislation will likely survive First Amendment scrutiny under *Sorrell* because the legislation establishes baseline personal data privacy rights while still generally allowing businesses to use personal data so long as they are transparent.

INTRODUCTION

Facebook's primary business model is built on monetizing personal information.[1] Facebook, to motivate user engagement, gives users the ability to change their privacy settings to determine how Facebook will use their personal information.[2] Despite such clear user privacy decisions, Facebook repeated-

[1] Complaint for Civil Penalties, Injunction, and Other Relief at 2, United States v. Facebook, Inc., No. 19-cv-2184 (D.D.C. July 24, 2019). In 2018 alone, Facebook made $55.8 billion in revenue, mostly from its advertising business. *Id.* Facebook's advertising business is incredibly lucrative because it has 2.2 billion active users per month and 100 million American active users per day. *See id.* (stating the size of Facebook's user base); *What Is an Active User?*, ADJUST, https://www.adjust.com/glossary/active-user/ [https://perma.cc/5PSB-DET4] (describing how online marketers use active user metrics to determine the size of a website or mobile application's advertising market).

[2] Complaint for Civil Penalties, Injunction, and Other Relief, *supra* note 1, at 2. Facebook users share personal information with Facebook by creating profiles, liking content, joining groups, uploading their own content, and connecting third-party apps to Facebook. *See id.* (describing how people interact with Facebook). Using Facebook privacy settings, users could seemingly limit the dissemination of their information to only their own Facebook friends. *Id.* at 4.

ly violated its users' privacy expectations for its own selfish benefit.[3] For example, in 2010, when Facebook users connected their accounts to a third-party application, the users agreed to share their Facebook information with the application.[4] Even though users were told they would only be sharing their own information, Facebook, by default, was actually sharing each consenting user's information and all of their friends' information with the third-party app, including friends who did not themselves use the third-party app.[5] In response, the Federal Trade Commission (FTC) filed a complaint against Facebook.[6] In 2012, the FTC settled with Facebook pursuant to the terms of an FTC order (2012 Order).[7] The 2012 Order prohibits Facebook from misrepresenting its privacy policies, including any overstatements of users' ability to control their privacy settings.[8] In 2019, the FTC filed another complaint against Facebook

[3] *See id.* at 2–6 (describing numerous occasions where Facebook failed to properly disclose how it was sharing users' information); Complaint at 6, *In re* Facebook, Inc., No. C-4365 (Fed. Trade Comm'n July 27, 2012) (describing how Facebook shared users' personal information with third party developers, even when users indicated that they only wanted to share their information with their Facebook friends).

[4] *See* Complaint for Civil Penalties, Injunction, and Other Relief, *supra* note 1, at 7 (showing how users granted permission to share their information with third-party apps). Facebook allows third-party applications to connect to Facebook by utilizing Facebook application programming interfaces (APIs). *Id.* APIs are software that allow different software applications to interact with each other. *What Is an API? (Application Programming Interface)*, MULESOFT, https://www.mulesoft.com/resources/api/what-is-an-api [https://perma.cc/VW33-74UK]. Developers, using Facebook APIs, can build applications for Facebook users or allow Facebook users to login to their third-party apps using their Facebook credentials. Complaint for Civil Penalties, Injunction, and Other Relief, *supra* note 1, at 7, Then, when Facebook users use the app or login with their Facebook credentials, they agree to share their information with the third-party app's developers. *Id.*

[5] Complaint for Civil Penalties, Injunction, and Other Relief, *supra* note 1, at 3. Facebook shared users' friends' data even if those friends did not use the third-party app. *Id.* Facebook also shared the friends' data even if those friends had used Facebook privacy settings to limit sharing of their information. *Id.* at 4. This deceptive practice affected millions of unsuspecting Facebook users. *Id.* Even though Facebook has a privacy settings page, users could only block Facebook from engaging in this deceptive sharing of their personal information if they managed to find the opt-out hidden on a different page. *Id.* at 3.

[6] *See generally* Complaint, *supra* note 3 (outlining how Facebook allegedly engaged in false and deceptive trade practices by sharing information in violation of users' stated privacy settings). The Federal Trade Commission (FTC) can bring actions against companies for engaging in unfair and deceptive practices. 15 U.S.C. § 45(a); *see also infra* notes 100–104 and accompanying text (describing the FTC's authority to safeguard consumer privacy).

[7] Complaint for Civil Penalties, Injunction, and Other Relief, *supra* note 1, at 3; Decision and Order at 3–4, *In re* Facebook, Inc., 2012 F.T.C. 136 (No. C-4365).

[8] Decision and Order, *supra* note 7, at 3–4. The order is still in effect today. *See id.* at 8–9 (stipulating that most provisions of the order terminate in July 2032 at the earliest). But, if the FTC alleges a violation of the order, the term of the order automatically extends to twenty years from the date the FTC files its complaint. *Id.* Under this procedure, the order's term extended when the FTC alleged violations of the order in 2019. *See id.* (stipulating the term of the FTC order). *See generally* Complaint for Civil Penalties, Injunction, and Other Relief, *supra* note 1 (alleging that Facebook violated the 2012 consent decree).

alleging violations of both the 2012 Order and section 5(a) of the FTC Act.[9] Facebook ultimately settled the FTC's new claims and entered a modified consent decree (2019 Order).[10] The 2019 Order requires Facebook to pay a five billion-dollar penalty and imposes additional limitations on Facebook's behavior related to its allegedly unfair and deceptive practices.[11] Facebook's five billion-dollar penalty is the largest penalty that the FTC has ever assessed for a privacy violation.[12]

The reality is that Facebook's profit-seeking personal data use practices are not unique.[13] Companies have always used their data, including customer personal data, to boost their business.[14] What is novel is the sheer quantity of information that most businesses can now collect at a low cost.[15] On an average day, people create tremendous amounts of data—they send 294 billion emails; they tweet 500 million times; they generate 4 million gigabytes of Facebook data; they send 65 billion WhatsApp messages; and they conduct 5 billion internet searches.[16] By 2025, the world's population will generate 463 billion exabytes of data each day.[17] Understanding, leveraging, and monetizing

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[9] *See generally* Complaint for Civil Penalties, Injunction, and Other Relief, *supra* note 1 (describing how Facebook violated the 2012 Order and the FTC Act). Section 5(a) of the FTC Act prohibits companies from engaging in unfair or deceptive trade practices. 15 U.S.C. § 45(a). Facebook allegedly violated the FTC Act by using phone numbers that were provided for two-factor authentication for advertising purposes. *See* Complaint for Civil Penalties, Injunction, and Other Relief, *supra* note 1, at 5, 36–39 (describing how Facebook encouraged users to provide their phone numbers for security purposes and then secretly used those numbers for marketing).

[10] Stipulated Order for Civil Penalty, Monetary Judgment, and Injunctive Relief at 1–2, United States v. Facebook, Inc., No. 19-cv-2184 (D.D.C. July 24, 2019).

[11] *Id.* at 3, 9–30. The consent decree resulting from the FTC's 2019 action (2019 Order) requires Facebook to establish an Independent Privacy Committee responsible for overseeing Facebook's privacy policies. *Id.* at 22–24. The 2019 Order also requires Facebook to undergo periodic privacy audits by independent auditors. *Id.* at 20–22. The 2019 Order prohibits Facebook from automatically employing facial recognition software to identify users in photos except where users have explicitly consented. *Id.* at 16.

[12] Press Release, Fed. Trade Comm'n, FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook (July 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions [https://perma.cc/VL37-4YSP]. It is also one of the largest fines the government has ever levied. *Id.*

[13] *See* U.N. Conf. on Trade & Dev., *Digital Economy Report 2019*, U.N. Doc. UNCTAD/DER/2019, at 27 (2019), https://unctad.org/system/files/official-document/der2019_en.pdf [https://perma.cc/Y7U6-6YR4] (discussing how companies have always used their information to help drive profits).

[14] *Id.*

[15] *Id.*

[16] Jeff Desjardins, *How Much Data Is Generated Each Day?*, WORLD ECON. F. (Apr. 17, 2019), https://www.weforum.org/agenda/2019/04/how-much-data-is-generated-each-day-cf4bddf29f/ [https://perma.cc/ZT8G-4VPF]. There are approximately 313 million Internet users in the United States. Joseph Johnson, *Internet Usage in the United States—Statistics & Facts*, STATISTA (Mar. 24, 2022), https://www.statista.com/topics/2237/internet-usage-in-the-united-states/ [https://perma.cc/SQS7-RFSD]. Of the 307 million Internet users, 276.8 million access the Internet via mobile device. *Id.*

[17] Desjardins, *supra* note 16. Individuals and organization generate this data through their daily digital activities. U.N. CONF. ON TRADE & DEV., *supra* note 13, at 27–28. For example, Facebook

this burgeoning trove of digital information has become a core tenet of the contemporary economy.[18]

The monetization of data, particularly personal data, has raised privacy concerns.[19] In fact, 78% of people express concern about their online privacy, but only 48% feel that the government does enough to protect their data.[20] Though cybercriminals are the leading source of online distrust, 75% of individuals cited social media companies as contributing to their wariness.[21] Yet, despite such broad concern, no omnibus data protection law exists in the United States; state legislatures have passed state-specific privacy laws, and the various federal privacy laws are sector-specific.[22]

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tracks users' interactions with the Facebook platform (e.g., posts, groups, friends, physical location), and through partnerships with marketers, it tracks off-Facebook activity of anyone, including non-users, who visits a Facebook partner's site. David Nield, *All the Ways Facebook Tracks You—and How to Limit It*, WIRED (Jan. 12, 2020), https://www.wired.com/story/ways-facebook-tracks-you-limit-it/ [https://perma.cc/T3DZ-PKMC]. An exabyte is a term of measurement for online storage comprised of bytes; it constitutes 2^{60} bytes, equating to approximately one quintillion bytes or one billion gigabytes. Alexander S. Gillis, *Definition: Exabyte (EB)*, TECHTARGET, https://www.techtarget.com/searchstorage/definition/exabyte [https://perma.cc/Q3GS-HC3Q] (Jan. 2022). Eight bits constitute one byte. *Id.* A bit is the fundamental unit of computer data storage. *Id.*

[18] U.N. CONF. ON TRADE & DEV., *supra* note 13, at 27.

[19] *Id.* at 28. Furthermore, digital data, unlike traditional commodities, is not consumed after a single use. *Id.* Instead, it can be used by multiple parties at once, infinitely duplicated and reused to derive additional value. *Id.*

[20] *CIGI-Ipsos Global Survey on Internet Security and Trust*, CTR. FOR INT'L GOVERNANCE INNOVATION (June 11, 2019), https://www.cigionline.org/cigi-ipsos-global-survey-internet-security-and-trust/ [https://perma.cc/V538-77A7]. Of those surveyed, 53% are more concerned about online privacy now than they were a year ago. *Id.* In addition, only 38% of North Americans felt their governments did enough to protect their online privacy. *Id.*

[21] *Id.* This figure is even higher in the United States, where 87% of those surveyed felt that social media was a source of their online distrust. *Id.*

[22] Andy Green, *Complete Guide to Privacy Laws in the US*, VARONIS, https://www.varonis.com/blog/us-privacy-laws/ [https://perma.cc/YG34-HNBE] (Apr. 2, 2021); *see, e.g.*, Privacy Act of 1974, 5 U.S.C. § 552a; Stored Communications Act, 18 U.S.C. §§ 2701–2712; Privacy of Consumer Financial Information, 16 C.F.R. §§ 313.1–.18 (2021); Dep't of Health & Hum. Servs. Security & Privacy Rules, 45 C.F.R. §§ 164.102–.534 (2021); California Consumer Privacy Act of 2018, CAL. CIV. CODE § 1798.100–.199.95 (West 2022). In contrast, Europe's General Data Protection Regulation (GDPR) set a new standard for data protection regulation around the world. Michael Nadeau, *General Data Protection Regulation (GDPR): What You Need to Know to Stay Compliant*, CSO (June 12, 2020), https://www.csoonline.com/article/3202771/general-data-protection-regulation-gdpr-requirements-deadlines-and-facts.html [https://perma.cc/2AA2-HG9R]. The GDPR governs the processing of personal data (meaning any information relating to a person) by controllers and processors established within the European Union (EU) or those outside the EU who offer services within the EU or monitor behavior within the EU. Commission Regulation 2016/679, 2016 O.J. (L 119) 32–33 [hereinafter GDPR]; *see infra* notes 110–111 and accompanying text (defining and explaining controllers and processors). A detailed discussion of the GDPR and the various state, federal, and constitutional privacy protections within the United States are beyond the scope of this Note. *See generally* DAVID BENDER, COMPUTER LAW: A GUIDE TO CYBERLAW AND DATA PRIVACY LAW (Matthew Bender rev. ed. 2020) (discussing privacy and data protection law).

Lawmakers have proposed comprehensive federal data protection legislation to help alleviate consumer concerns and safeguard individuals' data, but Congress has been unable to pass any of the proposed bills.[23] Unlike traditional economic regulations, data protection regulations trigger First Amendment concerns because any restriction on the dissemination of data inherently restricts speech by inhibiting the sharing of information.[24]

In 2011, in *Sorrell v. IMS Health Inc.*, the U.S. Supreme Court held that a Vermont law that prohibited the sale, disclosure, and use of pharmacy records that show the prescribing habits of physicians for marketing purposes did not survive First Amendment scrutiny.[25] Vermont offered two governmental interests to justify the law: (1) protecting medical privacy; and (2) promoting public

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[23] *E.g.*, Consumer Data Privacy and Security Act of 2020, S. 3456, 116th Cong. (2020); Data Protection Act of 2020, S. 3300, 116th Cong. (2020); Consumer Online Privacy Rights Act, S. 2968, 116th Cong. (2019); Online Privacy Act of 2019, H.R. 4978, 116th Cong. (2019); *see* JONATHAN M. GAFFNEY, CONG. RSCH. SERV., LSB10441, WATCHING THE WATCHERS: A COMPARISON OF PRIVACY BILLS IN THE 116TH CONGRESS 1 (2020) (describing Congress's efforts to pass federal data protection legislation); Cameron F. Kerry & Caitlin Chin, *How the 2020 Elections Will Shape the Federal Privacy Debate*, BROOKINGS (Oct. 26, 2020), https://www.brookings.edu/blog/techtank/2020/10/26/how-the-2020-elections-will-shape-the-federal-privacy-debate/ [https://perma.cc/A2MV-CR3V] (same); Nicole Lindsey, *Silicon Valley Lawmakers Introduce New Federal Privacy Law*, CPO MAG. (Nov. 22, 2019), https://www.cpomagazine.com/data-protection/silicon-valley-lawmakers-introduce-new-federal-privacy-law/ [https://perma.cc/DNF6-HU2S] (same); Nicole Lindsey, *US Senators Introduce New COPRA Digital Privacy Act*, CPO MAG. (Dec. 9, 2019), https://www.cpomagazine.com/data-protection/us-senators-introduce-new-copra-digital-privacy-act/ [https://perma.cc/7W9N-YVEN] (same).

[24] *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011) (stating that information creation and sharing are speech for First Amendment purposes (citing Bartnicki v. Vopper, 532 U.S. 514, 527 (2001))). In 2001, in *Bartnicki v. Vopper*, the U.S. Supreme Court recognized that sharing tape recordings with others is First Amendment-protected speech because the purpose of sharing the recording is to convey the information. 532 U.S. at 527. Under this same line of thinking, sharing digital data would also be speech because the purpose is to convey the recorded information to the recipient. *See id.* (describing how sharing a tape recording is speech for First Amendment purposes). In 2011, in *Sorrell v. IMS Health Inc.*, the U.S. Supreme Court, relying on *Bartnicki*, presumed that prescriber-identifying information that pharmacies and data miners shared for pharmaceutical marketing was First Amendment-protected speech because it is just another type of information being shared. *See* 564 U.S. at 570 (implying that prescriber-identifying information shared for pharmaceutical marketing is likely speech). In doing so, the Court refused to grant an exception to the general rule that "information is speech" for First Amendment purposes. *Id.* at 571.

[25] 564 U.S. at 557. To reach this conclusion, the Court rejected Vermont's argument that its law was a mere commercial regulation of nonexpressive conduct rather than speech. *Id.* at 566–67. The Court held that the law burdened speech because it targeted particular content and speakers. *Id.* at 567; *see infra* notes 44–85 and accompanying text (discussing First Amendment doctrine). The First Amendment does not bar regulations of nonexpressive conduct that have incidental burdens on speech. *Sorrell*, 564 U.S. at 567; *see* United States v. O'Brien, 391 U.S. 367, 377 (1968) (holding that a regulation of conduct with incidental burdens on expression does not run afoul of the First Amendment if: (1) the regulation furthers a substantial government interest; (2) the government's interest is unrelated to quelling speech; and (3) any incidental burden on First Amendment-protected expression is no greater than necessary to serve the government's interest).

health and lower healthcare costs.[26] The Court, applying a commercial speech inquiry, ultimately found that neither justification survived judicial scrutiny.[27] The law failed to serve its purported privacy interest because it allowed the use of prescriber information for any purpose except marketing.[28] Furthermore, the Court rejected the public health rationale because the law was targeted at suppressing the persuasive speech of pharmaceutical marketers.[29]As both states and the federal government look to pass comprehensive data protection legislation, lawmakers must consider the First Amendment implications of any new data protection laws in light of *Sorrell*.[30]

Part I of this Note examines First Amendment commercial speech doctrine and its application in *Sorrell*.[31] Part I also provides an overview of privacy law in the United States and European Union (EU).[32] Part II of this Note looks at recent case law to show how courts have applied commercial speech doctrine in the aftermath of *Sorrell*.[33] In addition, Part II also discusses how lower courts have applied commercial speech doctrine in challenges to state privacy laws.[34] Finally, Part II analyzes various scholarly opinions regarding *Sorrell*'s effect on commercial speech doctrine.[35] Lastly, Part III applies a post-*Sorrell* commercial speech inquiry to both the EU General Data Protection

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[26] *Sorrell*, 564 U.S. at 572. Even though the Court conceded that these interests are significant, the Court held that the law could not survive heightened judicial scrutiny. *Id.* at 557, 572.

[27] *Id.* at 572; *see infra* notes 66–85 and accompanying text (discussing First Amendment scrutiny of commercial speech regulations). Commercial speech is speech that concerns the speaker's and audience's commercial interests. *Speech*, BLACK'S LAW DICTIONARY (11th ed. 2019). Marketing communications are quintessential examples of commercial speech. *Id.* The First Amendment affords lower protections to commercial speech than other types of speech. *Id.* In *Sorrell*, the Court refused to conclude, as Vermont argued, that the law at issue burdened only commercial speech because the law could not survive judicial scrutiny under either a strict scrutiny or a commercial speech standard. 564 U.S. at 571.

[28] *Sorrell*, 564 U.S. at 572. Vermont argued that doctors have a privacy interest in their prescriber-identifying information because they have an expectation that it will only be used to fill the prescription. *Id.* The Court conceded that doctors have such a privacy interest. *Id.* Nevertheless, the Court concluded that the Vermont law did not serve this privacy interest because it generally allowed disclosure of purportedly private information. *Id.* at 572–73.

[29] *Id.* at 576–78. Vermont posited that pharmaceutical companies are more successful at promoting pricier brand-name medications if allowed to use prescriber-identifying information to inform their marketing. *Id.* at 576. Therefore, by preventing the use of such information in pharmaceutical marketing, doctors would be more likely to prescribe cheaper generic drugs. *Id.* In practical effect, Vermont was attempting to suppress this form of marketing because it was too persuasive upon doctors. *Id.* at 577–78. The Court recognized that although Vermont's law serves its policy goals in promoting public health and lowering healthcare costs, it does so in an impermissible, indirect way because the law "restrain[s] certain speech by certain speakers" to prevent the speech's adverse effects on listeners. *Id.* at 577.

[30] *See id.* at 570 (stating that sharing information is speech that the First Amendment protects).

[31] *See infra* notes 37–85, 136–169 and accompanying text.

[32] *See infra* notes 86–135 and accompanying text.

[33] *See infra* notes 170–188 and accompanying text.

[34] *See infra* notes 189–202 and accompanying text.

[35] *See infra* notes 203–214 and accompanying text.

Regulation (GDPR) and various state privacy laws to demonstrate how legislatures can avoid the pitfalls of Vermont in *Sorrell*.[36]

I. *SORRELL V. IMS HEALTH INC.*: COMMERCIAL SPEECH AND DATA PROTECTION

With the increase in the collection and monetization of personal information, consumers have increasingly called for legislatures to pass data protection legislation.[37] Because the First Amendment to the U.S. Constitution protects the sharing of information, legislatures must consider the First Amendment implication of any new data protection legislation.[38] In 2011, in *Sorrell v. IMS Health Inc.*, the U.S. Supreme Court brought these competing privacy and speech interests came to a head.[39] In *Sorrell*, the Court, applying its commercial speech inquiry, struck down a Vermont law that barred pharmacies from selling prescriber information for marketing purposes as violative of the First Amendment.[40] Section A examines First Amendment jurisprudence and commercial speech doctrine.[41] Section B discusses privacy law in the United States and the EU.[42] Section C looks at the clash between privacy and speech interests present in *Sorrell*.[43]

A. The First Amendment: Commercial Speech and the Central Hudson *Test*

In *Sorrell*, the Supreme Court, conducting a commercial speech inquiry, struck down a Vermont privacy law for violating the First Amendment.[44] The

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[36] *See infra* notes 215–266 and accompanying text.

[37] *See* U.N. CONF. ON TRADE & DEV., *supra* note 13, at 27 (discussing the exponential growth in data collection and processing); *2019 CIGI-Ipsos Global Survey on Internet Security and Trust*, *supra* note 20 (stating that most people do not feel that their government does enough to protect their data).

[38] *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011) (stating that creating and disseminating information is First Amendment-protected speech). Data protection legislation triggers First Amendment scrutiny because such legislation, to protect individuals' privacy, limits the ability of others to share and use peoples' personal information. *See* GDPR, *supra* note 22, at 36 (restricting when controllers or processors may use or disseminate personal information); *Sorrell*, 564 U.S. at 570 (stating that, generally, information is speech for First Amendment purposes).

[39] *See* 564 U.S. at 572–76 (discussing the Vermont law's competing privacy and speech interests).

[40] *Id.* at 557. Vermont argued that the law protected physicians' privacy by restricting the use of prescriber-identifying information in marketing. *Id.* at 572. The Court ultimately held that the law did not actually protect doctors' privacy because the law generally allowed the use of prescriber-identifying information for any purpose, except for marketing. *Id.* at 572–73. The Court highlighted that a law would actually serve a privacy interest if it generally prohibits the use or disclosure of certain information except in narrow, stipulated circumstances. *Id.* at 573.

[41] *See infra* notes 44–85 and accompanying text.

[42] *See infra* notes 86–135 and accompanying text.

[43] *See infra* notes 136–169 and accompanying text.

[44] 564 U.S. at 557.

First Amendment insulates speech from government regulation.[45] Subsection 1 of this Section discusses general First Amendment doctrine and the various levels of judicial scrutiny.[46] Subsection 2 of this Section examines the development of commercial speech doctrine.[47]

1. Freedom of Speech and Judicial Scrutiny

The First Amendment prohibits the government from limiting freedom of speech.[48] Freedom of speech extends to both individual and corporate speakers.[49] Despite the First Amendment's strong language, however, it was not until the early twentieth century that jurists began to see the Free Speech Clause as a constraint on government power.[50] The Court relies on three primary theories to justify the protection of speech: (1) the marketplace theory; (2) the autonomy theory; and, (3) the public discourse theory.[51] Under the marketplace theory, the First Amendment protects speech to facilitate the search for knowledge

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[45] *See* U.S. CONST. amend I (prohibiting the government from curtailing speech). The First Amendment is often called "the First Freedom" because it is core to modern notions of freedom. DAVID L. HUDSON, JR., LEGAL ALMANAC: THE FIRST AMENDMENT: FREEDOM OF SPEECH § 1:1 (2012). This is a bit of a misnomer because of the original twelve amendments proposed by James Madison, the First Amendment was actually Madison's third. *Id.*

[46] *See infra* notes 48–65 and accompanying text.

[47] *See infra* notes 66–85 and accompanying text.

[48] U.S. CONST. amend. I. Though the First Amendment stipulates that it only applies to congressional action, the U.S. Supreme Court eventually held that the Due Process Clause of the Fourteenth Amendment incorporates the First Amendment against the states. *See id.* ("Congress shall make no law . . . abridging the freedom of speech . . . ."); Gitlow v. New York, 268 U.S. 652, 666 (1925) (assuming that the Fourteenth Amendment's Due Process Clause's liberty interest includes the freedom of speech).

[49] *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 318–19 (2010) (holding that the government cannot prohibit corporate political speech). Historically, the Court did not think that corporations necessarily had First Amendment rights; rather, the Court thought that they only had the rights that were necessary for their corporate purpose. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 824 (1978) (Rehnquist, J., dissenting); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819); KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) 19 (2018).

[50] GREENFIELD, *supra* note 49, at 105; *see* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."). Justices Oliver Wendell Holmes and Louis Brandeis developed modern free speech doctrine in a series of early twentieth-century cases that dealt with political speech of unpopular political groups. GREENFIELD, *supra* note 49, at 105; *see* HUDSON, *supra* note 45, § 1:4 (describing how Justices Holmes and Brandeis developed the foundation of free speech doctrine (first citing Whitney v. California, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969); then citing *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting); and then citing Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting))). In these opinions, Justices Holmes and Brandeis articulated their theories for why the First Amendment should protect speech. GREENFIELD, *supra* note 49, at 105; *see, e.g.*, *Whitney*, 274 U.S. at 375–76 (Brandeis, J., concurring) (stating that the First Amendment protects speech to support autonomy and facilitate political discourse); *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (articulating that the First Amendment protects speech to allow for the free exchange of ideas).

[51] GREENFIELD, *supra* note 49, at 105.

and truth.[52] Through the free trade of ideas, the truth will prevail over falsehood.[53] Under the autonomy theory, the First Amendment protects speech because it allows people to express themselves and develop their own identities.[54] Lastly, under the public discourse theory, the First Amendment protects speech to facilitate democratic self-governance.[55]

Generally, courts classify regulations of speech as content-based or content-neutral.[56] A content-based regulation regulates speech based on the content it conveys.[57] Viewpoint-based regulations, which are an especially prob-

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[52] *Id.* at 106 (quoting *Abrams*, 250 U.S. at 628, 630 (Holmes, J., dissenting)). Justice Holmes is credited with creating the marketplace theory in his dissent in the U.S. Supreme Court's 1919 case *Abrams v. United States*. 250 U.S. at 630–31; GREENFIELD, *supra* note 49, at 106. In *Abrams*, the Court upheld the convictions of five individuals under World War I's Espionage Act. 250 U.S. at 616–17, 623–24. The defendants had distributed leaflets criticizing President Woodrow Wilson for sending United States' troops into Russia. *Id.* at 619. Justice Holmes, in dissent, stated that the First Amendment's purpose is to protect the free exchange of ideas. *Id.* at 630. He further posited that any government attempt to block people from sharing their opinions is inherently suspect. *Id.*

[53] GREENFIELD, *supra* note 49, at 106 (quoting *Abrams*, 250 U.S. at 628, 630 (Holmes, J., dissenting)). Under the marketplace theory, the First Amendment even protects falsehoods because over time, truth will prevail over falsehood in the minds of the listening public. *Id.* at 107. Under this theory, Justice Louis Brandeis posited that the best way to combat false speech is not to ban such speech, but rather to combat it with truthful speech in the marketplace. *Id.* (quoting *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring)); HUDSON, *supra* note 45, § 1:4. The marketplace theory has become the primary theory upon which courts rely. GREENFIELD, *supra* note 49, at 108.

[54] GREENFIELD, *supra* note 49, at 115–16 (quoting *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring)). In 1927, in *Whitney v. California*, the U.S. Supreme Court upheld a conviction under a state criminal syndicalism statute. 274 U.S. at 359, 371–72. The defendant had violated the California law by organizing a meeting of the Communist Labor Party. *Id.* at 366. Justice Louis Brandeis, in a concurring opinion, opined on the true purpose of the Free Speech Clause. *Id.* at 375 (Brandeis, J., concurring). He posited that the freedom protected by the Constitution includes the freedom "to develop [one's] faculties." *Id.* Thus, the First Amendment protects speech because expression is central to human self-fulfillment. GREENFIELD, *supra* note 49, at 116. Justice Brandeis concurred in the judgment, not because of the Party's future goal to bring about a future proletariat revolution in the United States, but rather because there was testimony that established a conspiracy among members of the Party to commit crimes in the present. *Whitney*, 274 U.S. at 379 (Brandeis, J., concurring).

[55] GREENFIELD, *supra* note 49, at 123–24 (quoting *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring)). Justice Brandeis believed that freedom of speech allows people to develop their own political philosophy and debate issues on matters of public concern. *Id.* (quoting *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring)). Justice Brandeis saw public political discourse as a civic duty and that such discourse guarded against a tyrannical government. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring). Therefore, the First Amendment protects speech because it facilitates democracy. GREENFIELD, *supra* note 49, at 123.

[56] *See* Turner Broad. Sys. v. F.C.C., 512 U.S. 622, 641–42 (1994) (describing the difference between content-based and content-neutral regulations of speech).

[57] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015). In 2015, in *Reed v. Town of Gilbert*, the Supreme Court held that the Town of Gilbert's Sign Code was an unconstitutional content-based regulation of speech. *Id.* at 159. The Town of Gilbert's Sign Code imposed different restrictions on displaying signs depending on the message that the sign conveyed. *Id.* at 159–61. For example, individuals could display ideological signs indefinitely without a permit, but they could only display political signs sixty days before a primary election until fifteen days after an election. *Id.* at 159–60. Therefore, the *Reed* Court held that the Sign Code was a content-based regulation of speech that did not survive strict scrutiny. *Id.* at 159. Some scholars believe that *Reed* could foreclose all content-based regula-

lematic form of content-based regulations, limit speech based on the communicated ideology or perspective.[58] The Court assumes that content-based regulations of speech are unconstitutional.[59] Courts apply strict scrutiny to content-based regulations.[60] To survive strict scrutiny, a regulation must be narrowly tailored to serve a compelling government interest.[61]

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tions of speech, including commercial speech regulations. *See* Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 179 (discussing how commercial speech advocates believe that *Reed*'s bright-line rule silently and implicitly overruled all commercial speech jurisprudence); Susan L. Trevarthen & Adam M. Hapner, *The True Impact of* Reed v. Town of Gilbert *on Sign Regulation*, 49 STETSON L. REV. 509, 521, 528 (2020) (highlighting that *Reed* raised questions as to whether its bright-line rule for content-based regulations applies in other contexts); *see also infra* notes 66–85 and accompanying text (discussing the First Amendment's commercial speech protections). *But see* Enrique Armijo, Reed v. Town of Gilbert*: Relax, Everybody*, 58 B.C. L. Rev. 66, 69 (2017) (stating that scholars who believe that *Reed* radically altered First Amendment jurisprudence need to "relax"). Such a reading of *Reed* would effectively overturn longstanding doctrine where the Court has ruled that the First Amendment does not protect certain narrow categories of content. *See* Shanor, *supra*, at 179; *see also infra* note 65 and accompanying text (listing categories of content that the First Amendment does not protect). Most courts have held that *Reed* has no effect on these content-based categorizations, like commercial speech, under the theory that the Supreme Court does not implicitly overrule its own decisions. Trevarthen & Hapner, *supra*, at 528–29 & n.137 (first citing Nationwide Biweekly Admin., Inc. v. Owen, 873 F.3d 716, 732 (9th Cir. 2017); and then citing Cal. Outdoor Equity Partners v. City of Corona, No. CV 15-03172 (AGRx), 2015 WL 4163346, at *10 (C.D. Cal. July 9, 2015)).

[58] *Reed*, 576 U.S. at 168–69. In *Reed*, the Town argued that the Sign Code was content neutral because it did not favor or suppress any particular viewpoint. *Id.* at 168. The Court flatly rejected this contention. *Id.* at 168–69. The Court stated that viewpoint discrimination is a particularly problematic form of content-based regulation, and a content-based regulation of speech is any measure that targets a specific subject matter even if the measure does not favor some viewpoints over others. *Id.* Thus, the Court held that the Sign Code was content-based because it treated signs differently depending on the message they conveyed. *Id.* at 169.

[59] *Id.* at 163. Content-based regulations are presumptively unconstitutional because such restrictions, even if supported by innocent motives, are effectively a form of government censorship. *Id.* at 167. To allow an innocent use of content-based regulation of speech would open the door for the government to use content-based measures to eliminate disfavored messages. *Id.* As an example, a regulation that prohibits the display of signs criticizing foreign governments within a certain distance of their embassies is a content-based regulation. *See generally* Boos v. Barry, 485 U.S. 312 (1988) (holding that a ban on political signs critiquing a foreign government near that government's embassy is an unconstitutional content-based regulation of speech).

[60] *Reed*, 576 U.S. at 164.

[61] *Id.* at 163. In *Reed*, the Town offered two government interests to support the Sign Code: (1) preserving the Town's aesthetic appeal; and (2) traffic safety. *Id.* at 171. Even assuming that both interests are compelling, the Court found that the regulation was not narrowly tailored to further the government's interest because the Code was underinclusive. *Id.* at 172. Under-inclusivity is fatal to content-based regulations because the government cannot justify a restriction as serving a compelling interest when it leaves open other ways to damage that interest. *Id.* (quoting Republican Party of Minn. v. White, 536 U.S. 765, 780 (2002)). In *Reed*, the sign code was underinclusive in two ways. *Id.* First, in the context of the aesthetic interest, temporary directional signs pose the same aesthetic harms as any other sign, yet, the law treated them more harshly than other types of signs. *Id.* Second, looking at the traffic safety interest, temporary direction signs pose no additional, unique threat to traffic safety than other signs, but the law still treated them more harshly. *Id.* Thus, the sign code in *Reed* failed to serve its purported government interests by being underinclusive. *Id.*

Content-neutral regulations restrict the time, place, and manner of speech without referring to the message being conveyed.[62] Courts apply intermediate scrutiny to content-neutral regulations because, unlike content-based regulations, there is less risk that a content-neutral regulation suppresses views from public discourse.[63] To survive intermediate scrutiny, the regulation must be narrowly tailored to serve a significant, content-neutral government interest and must provide sufficient alternative opportunities to communicate.[64] Unlike content-neutral regulations, content-based regulations are presumptively unconstitutional; yet, the U.S. Supreme Court has recognized that certain types of content fall beyond the protection of the Free Speech Clause.[65]

2. Commercial Speech and the *Central Hudson* Test

Historically, courts held that the First Amendment did not protect commercial speech.[66] Courts have not explicitly defined commercial speech, however, they consider the following questions to determine if a particular communication constitutes commercial speech: (1) whether the communication proposes a commercial transaction; (2) whether the communication references

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[62] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). In 1989, in *Ward v. Rock Against Racism*, the U.S. Supreme Court upheld a city ordinance that regulated sound amplification at a government-owned concert venue as a content-neutral regulation of speech. *Id.* at 803. The ordinance at issue required all performers at a government-owned music venue to use supplied sound equipment and a government-contracted sound technician. *Id.* at 787. The government passed the ordinance due to the effects of loud live music on the surrounding community. *Id.* at 784. The Court held that this was a content-neutral regulation of speech because the contracted sound technician was to defer to the artistic sound mix choices of the performers while serving the government's interest in avoiding volume issues. *Id.* at 792–93.

[63] Turner Broad. Sys. v. F.C.C., 512 U.S. 622, 642 (1994).

[64] *Ward*, 491 U.S. at 791, 798. Narrow tailoring is satisfied even if the regulation imposed is not the least restrictive means of serving the government's interest. *Id.* at 798–99. As long as the means chosen are not too overbroad, a regulation will survive intermediate scrutiny even if there is a less restrictive way to serve the government's interest. *Id.* at 799–800.

[65] *See, e.g.*, New York v. Ferber, 458 U.S. 747, 764 (1982) (holding that child pornography is beyond the protections of the First Amendment); Cohen v. California, 403 U.S. 15, 21 (1971) (recognizing that the government can only limit the use of profanity if the use of profanity would invade another's substantial privacy interest); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (recognizing that the First Amendment does not protect incitements); Roth v. United States, 354 U.S. 476, 481 (1957) (holding that the First Amendment does not protect obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (holding that the freedom of speech does not extend to fighting words and stating that the First Amendment does not protect defamation).

[66] *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942). In 1942, in *Valentine v. Chrestensen*, the U.S. Supreme Court unanimously ruled that a New York City Sanitary Code provision that outlawed the distribution of commercial advertisements in the streets did not violate the First Amendment. *Id.* at 53–55. The Court held that the First Amendment posed no bar on government regulation of commercial advertising. *Id.* at 54. Thus, the city could rightfully prohibit the distribution of advertisements in city streets. *Id.* at 54–55.

a particular product or service; and (3) whether the speaker has an economic motivation to engage in the communication.[67]

The Supreme Court has abandoned the idea that the First Amendment fails to protect commercial speech.[68] The Court first recognized some level of First Amendment protection for commercial communications in a pair of cases in the 1970s.[69] In 1975, in *Bigelow v. Virginia*, the Court held that a Virginia law that prohibited abortion services advertising violated the First Amendment.[70] In holding the Virginia law unconstitutional, the Court recognized that the First Amendment provides some protection to commercial communications, especially if the communications addressed matters of public concern, like abortion.[71] In reaching this conclusion, the Court stated that just because

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[67] *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–67 (1983) (describing why an informational pamphlet is commercial speech). No single affirmative response to one of these questions is necessarily dispositive of whether a particular communication is commercial in nature. *See id.* (stating that the combination of multiple affirmative answers led the Court to conclude an informational pamphlet to be commercial speech). Furthermore, just because a commercial communication may contain references to matters of public concern does not necessarily make the speech noncommercial. *Id.* at 67–68. Nevertheless, the Free Speech Clause fully protects a company's speech on matters of purely public concern. *Id.* at 68.

[68] *Compare* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 765, 770 (1976) (declaring that commercial communications share information for society's benefit, so the First Amendment should protect such communications), *with Valentine*, 316 U.S. at 54–55 (holding that the First Amendment does not protect commercial speech).

[69] *See Va. State Bd. of Pharmacy*, 425 U.S. at 765, 770 (holding that the First Amendment protects commercial communications); Bigelow v. Virginia, 421 U.S. 809, 826 (1975) (holding that the First Amendment provides some protection to advertising).

[70] 421 U.S. at 811–13, 829. The advertisement at issue appeared in a Virginian newspaper in 1971 and advertised abortion services available in New York City. *Id.* at 811–12. At the time, abortion was still illegal in Virginia as the U.S. Supreme Court had yet to hand down its landmark ruling in *Roe v. Wade*. *Id.* at 815 (citing Roe v. Wade, 410 U.S. 113 (1973)); *see also Roe*, 410 U.S. at 153–54 (holding that a woman has a constitutional right to determine whether to terminate her pregnancy). The County Court of Albemarle County tried and convicted Jeffery Bigelow, the managing editor of the newspaper, for violating the Virginia law. *Bigelow*, 412 U.S. at 811–13. He appealed to the Circuit Court of Albemarle County, where Bigelow waived his right to a jury trial. *Id.* at 813–14. The circuit court rejected Bigelow's claim that the Virginia law was unconstitutional. *Id.* at 814. On appeal to the Supreme Court of Virginia, that court also upheld the conviction and found no First Amendment violation by relying on *Valentine v. Christensen*. *Id.* at 814, 819; *see also Valentine*, 316 U.S. at 54–55 (holding that the First Amendment does not protect commercial speech). Bigelow subsequently appealed to the U.S. Supreme Court. *Bigelow*, 421 U.S. at 815. While his case was pending before the Court, the Court decided *Roe*, so it vacated the judgment and remanded the case back to the Supreme Court of Virginia. *Id.* Upon reconsideration, the Supreme Court of Virginia affirmed Bigelow's conviction once again because *Roe* did not concern advertising. *Id.* (citing Bigelow v. Commonwealth, 200 S.E.2d 680, 680 (Va. 1973), *rev'd sub nom*. Bigelow v. Virginia, 421 U.S. 809). Bigelow again appealed to the U.S. Supreme Court, which granted review to address the First Amendment questions raised. *Id.*

[71] *Bigelow*, 412 U.S. at 818, 822 (quoting Ginzburg v. United States, 383 U.S. 463, 474 (1966)). In reaching its conclusion, the Court recognized that the hardline position of *Valentine*—that the First Amendment does not protect commercial speech—was not workable. *Id.* at 820. The Court cited its landmark 1964 case *New York Times Co. v. Sullivan*, where the plaintiff brought a defamation suit based on content in an advertisement, as a clear example that the First Amendment offers some pro-

speech concerns the commercial marketplace does not mean that it does not contribute to the marketplace of ideas.[72]

But commercial speech protections are not restricted to commercial messages on matters of public concern; they apply to all commercial speech.[73] In 1976, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Court recognized that the First Amendment's protections extend to all commercial speech, not just commercial speech on matters of public concern.[74] Expanding on the reasoning of *Bigelow*, the Court established that both consumers and the public have a substantial interest in the unrestrained dissemination of commercial information to make informed decisions.[75] The Court, nevertheless, limited its holding: legislatures can regulate commercial

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tection to advertisements. *Id.* at 820–21 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964)).

[72] *Id.* at 825–26. The marketplace of ideas is a forum free of government regulation where ideas compete uninhibited for public acceptance. *Marketplace of Ideas*, BLACK'S LAW DICTIONARY, *supra* note 27. The Supreme Court often embraces the marketplace of ideas to justify protection of speech under the First Amendment. GREENFIELD, *supra* note 49, at 50. Justice Oliver Wendell Holmes championed this theory of the First Amendment, articulating it in his dissent in *Abrams*. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *id.* at 106. The idea behind the marketplace theory is that speech is protected to facilitate the search for truth and that truth will win out over falsehood in the marketplace. GREENFIELD, *supra* note 49, at 106; *see Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (stating that the public's widespread acceptance in the marketplace of ideas demonstrates truth).

[73] *Va. State Bd. of Pharmacy*, 425 U.S. at 760–61, 765 (citing *Bigelow*, 421 U.S. at 822).

[74] *Id.* (citing *Bigelow*, 421 U.S. at 822). In 1976, in *Va. State Bd. of Pharmacy*, the Court struck down a Virginia law that prohibited pharmacists from advertising prescription drug prices. *Id.* at 749–50, 770. An individual suffering from an illness that required her to use prescription drugs and two nonprofits brought suit, believing that the First Amendment entitled them to hear about drug prices from willing pharmacists because price information was valuable to consumers. *See id.* at 753–54 (describing prescription drug price variations within particular areas). Virginia, to justify the ban on prescription drug advertising, stated its purpose was to maintain professionalism of licensed pharmacists. *Id.* at 766–68. The Court rejected this justification because the price disclosure ban does not have any direct effects on pharmacist professionalism. *Id.* at 769. Any relation between the advertising ban and pharmacist professionalism is only speculative; it assumes how consumers would act if they had access to drug prices. *Id.* The First Amendment prohibits such speculative justifications to restrict access to information. *Id.* at 770.

[75] *Id.* at 763–65. The advertiser's economic motivation is inconsequential to the First Amendment analysis. *Id.* at 762. For example, just because a union and an employer engaged in a labor dispute are both advocating for their economic interests does not mean their respective advocacy in support of their position falls beyond the protection of the First Amendment. *Id.* Furthermore, many people likely value hearing commercial information over the day's hot political discourse. *Id.* at 763. This is especially true if the commercial information has a substantial impact on individuals' health and livelihood. *See id.* at 763–64 (describing how having access to prescription drug prices can alleviate burdens on consumers). In addition, society at large sometimes has an interest in the wide dissemination of commercial speech. *Id.* at 764. For example, a study on drug price disparities would inform their drug purchasing decisions. *Id.* at 764–65. In sum, sharing commercial information ensures that the public is adequately informed when individuals make economic decisions. *Id.* at 765. Ultimately, commercial information is just another form of information, and the First Amendment protects the "free flow of information." *Id.*

speech in some circumstances, particularly if it is false or deceptive.[76] Notably, the *Virginia State Board of Pharmacy* Court did not articulate the full extent of the government's authority to regulate commercial speech.[77]

The Court eventually set forth the contours of the government's authority to regulate commercial speech.[78] In 1980, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* (*Central Hudson*), the U.S. Supreme Court articulated a four-part test to determine whether a commercial speech regulation is unconstitutional, now known as the *Central Hudson* test.[79] First, a court must determine that the commercial speech at issue "concern[s] lawful activity" and is not "misleading."[80] Next, the court asks whether the government has offered a "substantial" government interest to justify the restriction.[81] If the answer to both inquiries is yes, the court then ascertains whether the challenged regulation "directly advances" the government's sub-

[76] *Id.* at 770–71. In this case, the speech at issue—the prescription drug prices—were neither false nor misleading. *Id.* at 771.

[77] *Id.* at 773. The Court held that the government could not completely prohibit the sharing of truthful commercial information out of fear of the potential effects that information would have on the public. *Id.* Nevertheless, the Court explicitly "reserve[ed] other questions" concerning when the government could properly regulate commercial speech. *Id.*

[78] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y. (*Central Hudson*), 447 U.S. 557, 566 (1980).

[79] *Id.* In the Supreme Court's 1980 case, *Central Hudson*, Central Hudson Gas & Electric Corporation, a utility company, challenged a Public Service Commission state regulation that prohibited electrical utilities from advertising their services. *Id.* at 558–59. The government implemented an advertising ban due to a fuel shortage in New York. *Id.* After a few years, when there was no longer a shortage, the Commission still decided to extend the advertising ban despite public comments from Central Hudson that the regulation likely violated the First Amendment. *Id.* at 559. The regulation itself prohibited promotional advertisements meant to spur the sale of additional utility services, but it allowed utility companies to issue informational ads about shifting electricity consumption to off-peak hours when there was lower electricity demand. *Id.* at 559–60. Ultimately, the Court, applying the new *Central Hudson* test, found that the advertising ban was unconstitutional because it was more extensive than necessary to serve the state's legitimate interest to promote energy conservation. *Id.* at 566, 568–70.

[80] *Id.* at 566. The First Amendment does not protect misleading commercial speech (like a false advertisement) or commercial speech promoting unlawful activity (like a murder-for-hire advertisement). *See id.* (stating that for the First Amendment to apply, the commercial speech "must concern lawful activity" and cannot be "misleading"). In *Central Hudson*, on the first prong, there was no dispute that the speech at issue was not misleading and did not relate to an unlawful activity. *Id.* Nevertheless, the New York Court of Appeals doubted whether the speech itself was commercial due to the monopolistic nature of the utility market. *Id.* at 566–67. That court stated that because the utility market is a monopoly, any advertising by utility companies would not improve consumer decision-making. *Id.* The U.S. Supreme Court ultimately rejected this reasoning and held the advertisements to be commercial speech because the advertisements still helped consumers make informed decisions, especially as the monopolist develops new services. *Id.* at 567–68.

[81] *Id.* at 566. The government offered two substantial interests to justify the advertising ban in *Central Hudson*. *Id.* at 568. The first interest was to conserve energy. *Id.* The second interest was to ensure that utility rates were fair and efficient. *Id.* at 569.

stantial interest.[82] If so, the court must then decide whether the restriction on speech is "not more extensive than is necessary" to advance the government's interest.[83] The Court has since repeatedly applied the *Central Hudson* test when considering challenges to regulations that inhibit commercial speech.[84] Consequently, as legislatures look to pass new data protection regulations, they must consider whether such regulations comport with *Central Hudson*'s limitations on regulations of commercial speech.[85]

B. Privacy and Data Protection: A Compelling Interest Indeed

As consumers increasingly advocate for legislatures to pass comprehensive federal data protection legislation, it is important to understand the current state of privacy law at the state, federal, and international levels.[86] Subsection 1 of this Section examines U.S. federal privacy law.[87] Subsection 2 provides an overview of the EU General Data Protection Regulation (GDPR) that serves as a standard for data protection legislation across the world.[88] Lastly, Subsection 3 discusses the United States' state-level comprehensive privacy laws.[89]

1. United States Federal Privacy Law

The United States government has long recognized the importance of individuals' privacy, particularly in the context of government searches and sei-

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[82] *Id.* at 566. The Court held that the advertising ban did not directly advance the government's interest in maintaining fair and efficient utility rates because the impact of advertising on utility rates was merely speculative. *Id.* at 569. Nevertheless, the Court held that there was a direct connection between the advertising ban and the government's desire to conserve energy because Central Hudson would have no reason to challenge the ban unless it felt that advertising would increase revenues. *Id.*

[83] *Id.* at 566. Turning to the final prong, the Court held that the advertising ban was more extensive than necessary to further the government's substantial interest in energy conservation because the advertising prohibition prevented utility companies from advertising products and services that do not increase energy use. *Id.* at 569–70.

[84] *See, e.g.*, 44 Liquormart v. Rhode Island, 517 U.S. 484, 489, 504–08 (1996) (applying the *Central Hudson* test, the Court struck down a Rhode Island law that prohibited ads containing alcohol prices); Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 330, 340–43 (1986) (applying the *Central Hudson* test, the Court upheld a regulation that restricted casino advertising directed to Puerto Rico's residents), *abrogated by 44 Liquormart*, 517 U.S. 484; *see also Central Hudson*, 447 U.S. at 566 (establishing the *Central Hudson* test).

[85] *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 571–72 (2011) (holding a Vermont law that protected prescriber information unconstitutional under a commercial speech inquiry); *see also Central Hudson*, 447 U.S. at 566 (establishing a test that limits the government's ability to regulate commercial speech).

[86] *See 2019 CIGI-Ipsos Global Survey on Internet Security and Trust*, *supra* note 20 (stating that only 48% of people believe that the government does enough to safeguard personal data); *see also infra* notes 90–118 and accompanying text (providing a limited overview of privacy law).

[87] *See infra* notes 90–106 and accompanying text.

[88] Nadeau, *supra* note 22; *see infra* notes 107–118 and accompanying text.

[89] *See infra* notes 119–135 and accompanying text.

zures.[90] These original privacy protections, embodied in the Fourth Amendment, applied only to invasions by the government.[91] Though the Fourth Amendment explicitly mentions only four zones—"persons, houses, papers, and effects"—to which its protections extend, the U.S. Supreme Court has extended its protections to anywhere one has a "reasonable expectation of privacy."[92]

Beyond the Fourth Amendment's privacy protections against the government, Congress has recognized that certain types of information are potentially sensitive in nature and should be safeguarded to protect the individual's privacy.[93] These types of protected information include health information, education records, financial records, children's online information, state Department of Motor Vehicle records, and even video rental history.[94] Furthermore, the

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[90] *See, e.g.*, U.S. CONST. amend. IV (protecting individuals' "persons, houses, papers, and effects" from government search and seizure).

[91] *See id.* (prohibiting "unreasonable searches and seizures" and requiring specific warrants supported by probable cause to conduct a search or seizure).

[92] *Id.*; Katz v. United States, 389 U.S. 347, 351 (1967); *Katz*, 389 U.S. at 360 (Harlan, J., concurring). As the Court stated in 1967 in *Katz v. United States*, "the Fourth Amendment protects people, not places." 389 U.S. at 351. Justice Harlan, concurring, articulated that because the Fourth Amendment protects people, such protection should extend to anywhere that a person subjectively believes that they have a right to privacy so long as such belief is objectively reasonable. *Id.* at 361 (Harlan, J., concurring). Justice Louis Brandeis originally championed this adaptive view of the Fourth Amendment in his famous dissent in the Supreme Court's 1928 case, *Olmstead v. United States*, where Justice Brandeis recognized that changing technology gives the government new ways to invade one's privacy such that the Fourth Amendment's protections must expand to ensure that the "right to be let alone" is preserved. 277 U.S. 438, 473, 478 (1928) (Brandeis, J., dissenting), *overruled by Katz*, 389 U.S. 347. A notable caveat to the reasonable expectation of privacy standard is that people may not have a reasonable expectation of privacy in information shared with a third party. Smith v. Maryland, 442 U.S. 735, 744 (1979) (quoting United States v. Miller, 425 U.S. 435, 443 (1976)). This, however, is not a bright-line rule; courts recognize that in some instances, people have an expectation of privacy in information shared with third parties. *See, e.g.*, FED. R. EVID. 501 (recognizing that the common-law rules of privilege still govern the admissibility of certain evidence); Carpenter v. United States, 138 S. Ct. 2206, 2216–17 (2018) (holding that people have an expectation of privacy in their cell site location information even though they share this information with a third party).

[93] *See* S. REP. NO. 100-599, at 2–4 (1988) (describing the expansion of the individual right to privacy through federal legislation).

[94] *See* 42 U.S.C. § 1320d-2 (granting the Secretary of Health and Human Services the authority to draft regulations concerning the privacy of individuals' health information); Dep't of Health & Hum. Servs. Security & Privacy Rules, 45 C.F.R. §§ 164.102–.534 (2021) (detailing the privacy requirements for individuals' health information); Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (conditioning federal education funding on educational institutions' adherence to FERPA's privacy requirements for students' education records); Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801–6809, 6821–6827 (requiring financial institutions to implement a privacy policy for their customers' financial information); Children's Online Privacy Protection Act (COPPA), 15 U.S.C. §§ 6501–6506 (prohibiting websites directed at children from collecting personal information from children without parental consent); Driver's Privacy Protection Act (DPPA), 18 U.S.C. §§ 2721–2725 (prohibiting the sharing of personal information maintained by a state's department of motor vehicles); Video Privacy Protection Act (VPPA), 18 U.S.C. § 2710 (prohibiting disclosure of individuals' video rental history). There is no federal private right of action for violations of FERPA's privacy requirements. Gonzaga Univ. v. Doe, 536 U.S. 273, 287 (2002). Similarly, there is no private right of action for violations of the Health Insurance Portability and Accountability Act's (HIPAA) privacy

government, at the dawn of the digital revolution, recognized both the benefits and the potential consequences that may come with the digitization of individuals' personal information.[95] Consequently, Congress passed the Privacy Act of 1974 to prevent government misuse of digital personal data and to protect individuals' privacy.[96] The Privacy Act places limits on federal government agencies' collection, maintenance, use, and disclosure of personal information.[97]

Data privacy concerns due to the collection of personal data are not unique to government actors, however; they also apply to companies collecting data.[98] Furthermore, these concerns have only grown with the explosion of computer and Internet use.[99] Due to the lack of comprehensive federal data protection law, the FTC currently serves as the primary federal authority on data privacy regulation and enforcement.[100] The FTC Act bans companies from

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rule. Acara v. Banks, 470 F.3d 569, 571–72 (5th Cir. 2006). Congress passed the VPPA after a newspaper published Judge Robert Bork's video rental history during his Supreme Court confirmation hearings. S. REP. NO. 100-599, at 5. Comedian John Oliver, recognizing the swiftness with which Congress acted in enacting the VPPA in response to the Robert Bork tapes, threatened to expose lawmakers' personal information purchased through data brokers unless Congress enacts comprehensive federal data protection legislation. Last Week Tonight, *Data Brokers: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Apr. 11, 2022), https://www.youtube.com/watch?v=wqn3gR1WTcA [https://perma.cc/E86V-Z8LW]; Ky Henderson, *John Oliver Blackmails Congress with Their Own Digital Data*, ROLLING STONE (Apr. 11, 2022), https://www.rollingstone.com/tv/tv-news/last-week-tonight-john-oliver-recap-season-9-episode-7-congress-data-1335598/ [https://perma.cc/Z3HR-F87T].

[95] *See* S. REP. NO. 93-1183, at 9–10 (1974) (listing both the benefits and the downsides of the digitization of records); U.S. DEP'T OF HEALTH, EDUC. & WELFARE, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS, at viii–ix (1973) (stating that harms may flow from the digitization of personal information as the use of computers expands).

[96] S. REP. NO. 93-1183, at 1.

[97] *See* 5 U.S.C. § 552a (imposing requirements on federal agencies use of personal information).

[98] *See* Brooke Auxier et al., *Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information*, PEW RSCH. CTR. (Nov. 15, 2019), https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/ [https://perma.cc/8735-LWEU] (showing that most Americans believe that they lack control over their information, regardless of whether a company or the government collected it).

[99] *See id.* (describing how 70% of people feel that their information is less secure than it was five years ago); CAMILLE RYAN, U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES: 2016, at 1–2 (2018), https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-39.pdf [https://perma.cc/AH9G-Y7GC] (providing computer ownership statistics over time). In 1984, only 8% of U.S. households had computers. RYAN, *supra*, at 1. By 2016, 89% of U.S. households had one. *Id.* Internet use also experienced rapid growth—18% of households reported using the Internet in 1997 versus 73% in 2015. *Id.* at 3. This growth in Internet use simultaneously fueled an explosion in consumer data generation. *See* Desjardins, *supra* note 16 (discussing how much data people generate online every day).

[100] 1 RAYMOND T. NIMMER & HOLLY K. TOWLE, DATA PRIVACY, PROTECTION, AND SECURITY LAW § 8.01(2) (2020); *Protecting Consumer Privacy and Security*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy-security [https://perma.cc/2HPG-N2KS]. The FTC Act grants the FTC the authority to prevent "unfair or deceptive [trade] acts or practices." 15 U.S.C. § 45(a)(2). Pursuant to this general grant of authority, the FTC polices privacy violations. *See, e.g.*, F.T.C. v. Wyndham Worldwide Corp., 799 F.3d 236, 240–41 (3d Cir. 2015)

engaging in unfair or deceptive practices in the marketplace.[101] The Act also empowers the FTC to initiate proceedings against those who it believes engage in unfair or deceptive practices.[102] Pursuant to its statutory authority, the FTC can bring actions against companies that fail to adhere to their stated privacy policies.[103] In addition, the FTC can bring actions against companies that fail to use reasonable security measures to safeguard personal information under the theory that such a failure is an unfair practice likely to cause substantial consumer injury.[104] As people accept more terms of service and privacy policies—typically without reading them—the need for broad data protection legislation only grows.[105] In the meantime, state laws, like the California Privacy

(holding Wyndham liable for a privacy policy violation). Typically, violations occur because a company failed to comply with its own stated privacy policy. *E.g.*, *id.* (stating that Wyndham violated the FTC Act by failing to adhere to its own stated privacy policy). In contrast, a comprehensive data protection regulation would apply generally to the processing of personal information and provide consumers enforceable rights in their personal information. *Compare* GDPR, *supra* note 22, at 32, 39–47 (stating that the GDPR "applies to the processing of personal data" and granting individuals exercisable rights in their personal data), *with* 15 U.S.C. § 45(a)(1) (prohibiting "unfair or deceptive acts or practices"). Because the United States lacks such a law that delegates enforcement and/or regulatory authority to either an extant or as-of-yet created government agency, the FTC, through its general authority, regulates data privacy and cybersecurity. *Compare* GDPR, *supra* note 22, at 65–70 (creating supervisory authorities responsible for enforcing the GDPR), *with* 15 U.S.C. § 45(a)(2) (granting the FTC the authority to stop businesses from engaging in "unfair or deceptive acts or practices").

[101] 15 U.S.C. § 45(a)(1).

[102] *Id.* § 45(a)(2), (b). Note, however, that the FTC can only declare a practice unfair if: (1) the practice is likely to cause consumers substantial injury; (2) consumers cannot reasonably avoid the practice; and (3) continued use of the practice does not create other benefits to consumers or competition that outweigh the injury that the practice caused. *Id.* § 45(n).

[103] 1 NIMMER & TOWLE, *supra* note 100, § 8.01(2); *see, e.g.*, *Wyndham Worldwide Corp.*, 799 F.3d at 240–41 (holding Wyndham liable under the FTC Act for failing to adhere to its stated privacy policy). As a policy matter, it would be unsound to allow companies to avoid compliance with their own stated privacy policies. *See Wyndham Worldwide Corp.*, 799 F.3d at 245 (describing how consumers rely on stated privacy policies). Businesses attract privacy-conscious consumers by publishing privacy policies. *Id.* Thus, it would be improper for companies to retain profits from clients who relied upon a stated privacy policy when a company failed to adhere to it. *Id.*

[104] 1 NIMMER & TOWLE, *supra* note 100, § 8.01(2) (quoting Complaint ¶ 9, *In re* BJ's Wholesale Club, FTC File No. 0423160 (June 16, 2005)). Such actions raise substantial questions regarding the lack of fair notice to companies regarding what cybersecurity measures they must implement in order to not run afoul of the FTC. *Id. But see Wyndham Worldwide Corp.*, 799 F.3d at 249–59 (holding that Wyndham had fair notice of the security measures it was expected to adopt).

[105] *See* Auxier et al., *supra* note 98 (stating that 97% of Americans believe they have agreed to a privacy policy but only 22% are likely to read a privacy policy before agreeing to it); Wayne R. Barnes, *Social Media and the Rise in Consumer Bargaining Power*, 14 U. PA. J. BUS. L. 661, 663–64 (2012) (describing the increasing frequency that consumers agree to form contracts, like terms of use, in light of the growth of online activity (quoting W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971))); *see, e.g.*, *Terms of Service*, FACEBOOK, https://www.facebook.com/terms [https://perma.cc/66HF-3GGU] (allowing Facebook to unilaterally update their terms).

Rights Act (CPRA), and foreign laws, like the EU's GDPR, can serve as blueprints for Congress.[106]

2. The European Union General Data Protection Regulation (GDPR)

The EU GDPR set a new standard for privacy laws around the world.[107] The GDPR governs the processing of personal data—meaning any information relating to a person.[108] The GDPR applies to controllers and processors that are either: (1) established within the EU; or (2) those outside the EU who offer services within the EU or monitor behavior within the EU.[109] A controller is any person or organization that sets the purpose and means of processing personal data.[110] A processor is anyone that processes personal information at the controller's direction.[111] Processing means any operation performed on personal data, including storage, retrieval, use, or sharing.[112] The GDPR has several exceptions to its broad authority to regulate processing, including processing for personal or household activities.[113]

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[106] *See infra* notes 107–135, 215–266 and accompanying text (outlining key provisions and statutory purposes of state privacy laws and the GDPR and detailing how such laws would survive First Amendment scrutiny).

[107] Nadeau, *supra* note 22. The GDPR replaced the EU's 1995 Data Protection Directive. *Id. See generally* Council Directive 95/46, 1995 O.J. (L 281) 31 (EC) (enacting the Data Protection Directive).

[108] GDPR, *supra* note 22, at 32–33. Processing is any operation, manual or automated, performed on personal data. *Id.* at 33. Some examples of processing include data use, data collection, data storage, and data retrieval. *Id.*

[109] *Id.* at 32–33. For example, the GDPR applies to Facebook because Facebook processes personal data in relation to the social media services it provides to individuals in the EU. *See id.* (stating that the GDPR applies to processing by foreign controllers and processors that process personal information related to services offered within the EU); *Terms of Service*, *supra* note 105.

[110] GDPR, *supra* note 22, at 33. For example, Facebook is a controller because it determines what personal information to collect and how to use it, namely to target advertisements. *See id.* (defining controller); *Terms of Service*, *supra* note 105 (describing how Facebook processes personal information to determine which advertisements to show its users); *Data Policy*, FACEBOOK, https://www.facebook.com/about/privacy/update [https://perma.cc/F4AT-S86T] (specifying the types of personal information that Facebook collects, how Facebook uses that information, and how Facebook shares that information).

[111] GDPR, *supra* note 22, at 33. For example, Facebook would also be a processor because it engages in processing at their own direction in accordance with their stated terms. *See id.* (defining processor); *Terms of Service*, *supra* note 105 (indicating that Facebook processes personal information to facilitate advertising); *Data Policy*, *supra* note 110 (describing how Facebook processes the personal information it collects).

[112] GDPR, *supra* note 22, at 33. Processing includes both manual and automated operations performed on personal data. *Id.* The GDPR, however, only applies to: (1) any fully or partially automated processing; and (2) any manual processing used for filing purposes. *Id.* at 32.

[113] *Id.* For example, keeping an address book for personal correspondence is a personal or household activity. *Id.* at 3–4. Another exception is processing related to the administration of the criminal justice system, including processing to prevent threats to the general public. *Id.* at 32.

The GDPR seeks to balance two objectives: (1) the fundamental right of people to the protection of their personal data; and (2) the facilitation of the free movement of personal data within the EU.[114] To serve these interests, the GDPR provides six lawful bases for processing, including when an individual consents to the processing and when processing is necessary to perform a contract to which the data subject is a party.[115] The GDPR vests specific rights in individuals concerning the processing of their personal information, including rights of access, rectification, erasure, and data portability.[116] The GDPR also imposes obligations on controllers and processors, including data breach notification requirements and ensuring data protection by design and default.[117] Furthermore, the GDPR provides clear principles that govern how controllers and processors can process personal data.[118]

3. Comprehensive State Privacy Laws

Since California passed the California Consumer Privacy Act of 2018, other states have worked to pass their own comprehensive privacy legislation.[119] As of April 1, 2022, California, Colorado, Utah, and Virginia have each passed their own comprehensive privacy legislation.[120] Of these four states,

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[114] *Id.* These objectives fit the EU's effort to create a Digital Single Market. *See Shaping the Digital Single Market*, EUROPEAN COMM'N, https://ec.europa.eu/digital-single-market/en/shaping-digital-single-market [https://perma.cc/HC5X-RMNR] (stating the EU's goal to build a digital market with strong data protections where anyone can easily go online). A Digital Single Market would guarantee that "persons, services, and capital" can move freely online and that people and businesses can participate online under the promise of "fair competition" and data protection, regardless of their physical location. *Id.*

[115] GDPR, *supra* note 22, at 36. An example of processing necessary to perform a contract occurs when someone uses Uber because Uber must process an individual's location—that the user either enters manually or allows Uber to gather automatically—to provide its ridesharing service. *See id.* (allowing processing necessary to carry out a contract); *Uber Privacy Notice*, UBER, https://www.uber.com/legal/en/document/?country=united-states&lang=en&name=privacy-notice [https://perma.cc/3PWW-AH2E] (Dec. 22, 2021) (describing how Uber processes location data to provide its services). The other four lawful bases for processing are: (1) when processing is necessary for compliance with a controller's legal obligations; (2) when processing is necessary to protect the vital interests of a person; (3) when processing is necessary to perform a task in the public's interest or in the exercise of a controller's official authority; and (4) when processing is necessary to pursue the legitimate interests of the controller or a third party so long as individuals' fundamental rights to data protection do not outweigh the controller's or third party's legitimate interests. GDPR, *supra* note 22, at 36. Processing for marketing purposes can be considered a legitimate interest. *Id.* at 9. An individual may object to processing, however, if the controller processes personal data for marketing purposes. *Id.* at 44–45.

[116] *See* GDPR, *supra* note 22, at 39–47 (stipulating the rights of data subjects under the GDPR).

[117] *See id.* at 47–60 (imposing obligations on controllers and processors).

[118] *See id.* at 35–36 (establishing principles that apply to the processing of personal data).

[119] Taylor Kay Lively, *US State Privacy Legislation Tracker*, IAPP, https://iapp.org/resources/article/us-state-privacy-legislation-tracker/ [https://perma.cc/3CMU-UVBK] (Apr. 7, 2022).

[120] *Id. See generally* California Privacy Rights Act of 2020, 2020 Cal. Legis. Serv. Prop. 24 (West) (to be codified in scattered sections of CAL. CIV. CODE § 1798) (protecting personal data at the

Colorado, Utah, and Virginia enacted largely similar statutes that use the traditional controller-processor distinctions, in comparison to California's statute that applies to "businesses."[121]

a. The California Privacy Rights Act and Its Approach

In November 2020, California voters passed the CPRA via ballot initiative.[122] The CPRA strengthens the privacy protections of California consumers by amending the California Consumer Privacy Act of 2018 (CCPA).[123] The law intends to ensure that consumers have certain privacy rights regarding their personal data and that businesses have a responsibility to consumers to respect these rights.[124] Notably, the CPRA's findings clearly state that consumers should have the ability to limit the use of their personal information for advertising purposes because businesses collect personal information en masse and then

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state level); Colorado Privacy Act, 2021 Colo. Sess. Laws 3445–67 (same); Utah Consumer Privacy Act, S.B. 227, 2022 Gen. Sess. (Utah 2022) (to be codified in several sections of UTAH CODE ANN. §§ 13-2-1, 13-61) (same); Virginia Consumer Data Protection Act, VA. CODE ANN. §§ 59.1-575 to -585 (2021) (same).

[121] *Compare* Colorado Privacy Act, 2021 Colo. Sess. Laws at 3447–49 (implementing a controller/processor privacy framework similar to the GDPR), *and* Utah Consumer Privacy Act, Utah S.B. 227 § 2 (same), *and* Virginia Consumer Data Protection Act, VA. CODE ANN. §§ 59.1-575 to -585 (same), *with* California Privacy Rights Act of 2020, §§ 1–31 (applying privacy protections to personal information held by businesses).

[122] Brandon P. Reilly & Scott T. Lashway, *The California Privacy Rights Act Has Passed: What's in It?*, MANATT (Nov. 11, 2020), https://www.manatt.com/insights/newsletters/client-alert/the-california-privacy-rights-act-has-passed [https://perma.cc/35RM-B5NU]. *See generally* California Privacy Rights Act of 2020 (modifying California's data protection law).

[123] *See* California Privacy Rights Act of 2020, § 2(C), (E)–(H) (recognizing that the privacy protections that the California Consumer Privacy Act (CCPA) granted should expand to better protect consumers). The law's findings recognize that many businesses collect personal information and consumers do not necessarily understand how businesses use their information. *Id.* § 2(E). The CCPA passed in June 2018. Maria Korolov, *California Consumer Privacy Act (CCPA): What You Need to Know to Be Compliant*, CSO (July 7, 2020), https://www.csoonline.com/article/3292578/california-consumer-privacy-act-what-you-need-to-know-to-be-compliant.html [https://perma.cc/YN9L-RWBR]. The CCPA was a compromise between California legislators and privacy rights activists. John Myers & Jazmine Ulloa, *California Lawmakers Agree to New Consumer Privacy Rules That Would Avert Showdown on the November Ballot*, L.A. TIMES (June 21, 2018), https://www.latimes.com/politics/la-pol-ca-privacy-initiative-legislature-agreement-20180621-story.html [https://perma.cc/W5Y6-NJPQ]. Originally, the activists were attempting to enact consumer privacy protections through a ballot initiative. *Id.* Many business groups and notable companies, like Facebook and Google, opposed the ballot initiative. *Id.* The CCPA as a compromise preserved many of the consumer protections of the original ballot initiative, but as a concession to business groups, left enforcement of most violations to the California Attorney General. *Id.*

[124] *See* California Privacy Rights Act of 2020, § 3(A)–(B) (listing the privacy rights of consumers and the responsibility of businesses to respect those rights). Some consumer rights include the right to know who is collecting their personal information, how those who collect data use it, and to whom they disclose it. *Id.* § 3(A)(1). Responsibilities of businesses include telling consumers how they collect and use personal information, limiting the collection of personal information to specific disclosed purposes, and providing consumers access to their personal information. *Id.* § 3(B)(1)–(4).

trade it with other companies to create highly detailed, personalized advertising profiles.[125] Under the CPRA, consumers have specific rights concerning their personal information.[126] These rights include: (1) the right to know what personal information the business collects; (2) the right to access their collected information; (3) the right to correct inaccurate personal information; (4) the right to know to whom and what personal information the business shares; and (5) the right to opt out of the sale or sharing of their personal information.[127] In sum, the CPRA seeks to protect privacy by establishing and imposing specific consumer rights and imposing constraints on how businesses can collect and use personal information.[128]

b. The Virginia, Colorado, and Utah Approaches

The Virginia, Colorado, and Utah laws were passed through the traditional legislative process.[129] Like the GDPR, the Virginia, Colorado, and Utah laws each govern the processing of personal information and adopt the familiar controller-processor distinction.[130] These laws set out to ensure that consumers have rights in their personal information and that companies respect these

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[125] *Id.* § 2(I).

[126] *E.g.*, CAL. CIV. CODE § 1798.110 (West 2022) (effective Jan. 1, 2023) (granting consumers a right to know what personal information businesses collect about them and a right to access that information).

[127] *See id.* § 1798.105 (effective Jan. 1, 2023) (granting consumers a right to have their personal information deleted); *Id.* § 1798.106 (effective Jan. 1, 2023) (giving consumers a right to correct inaccuracies in their personal information); *Id.* § 1798.110 (effective Jan. 1, 2023) (establishing consumer rights to know and access their personal information that businesses hold); *Id.* § 1798.115 (effective Jan. 1, 2023) (providing consumers with a right to know what personal information business share about them and with whom they share it); *Id.* § 1798.120 (effective Jan. 1, 2023) (giving consumers a right to opt-out of the sale or sharing of their personal information).

[128] *See* California Privacy Rights Act of 2020, § 3(A)–(B) (stating that the California Privacy Rights Act's (CPRA) statutory purpose is to protect the privacy rights of consumers and establishing principles governing the rights of consumers and the responsibilities of businesses to their consumers).

[129] *See* Joseph Duball, *Utah on the Cusp of US's Latest Comprehensive State Privacy Law*, IAPP (Mar. 3, 2022), https://iapp.org/news/a/utah-on-the-cusp-of-uss-latest-comprehensive-state-privacy-law/ [https://perma.cc/2BXQ-HQ4G] (describing how the Utah legislature quickly passed the Utah Consumer Privacy Act); *SB 1392 Consumer Data Protection Act; Establishes a Framework for Controlling and Processing Personal Data.*, VA. LEGIS. INFO. SYS., https://lis.virginia.gov/cgi-bin/legp604.exe?211+sum+SB1392 [https://perma.cc/KHN3-2XT9] (providing the legislative history of the Virginia Consumer Data Protection Act's (VCDPA) passage); *SB21-190, Protect Personal Data Privacy*, COLO. GEN. ASSEMBLY, https://leg.colorado.gov/bills/sb21-190 [https://perma.cc/D4V4-MA4W] (providing the legislative history of Colorado's privacy law). *But see* Reilly & Lashway, *supra* note 122 (describing how the CPRA was passed via ballot initiative).

[130] *See* COLO. REV. STAT. § 6-1-1303(7), (17)–(19) (2022) (defining "controller," "personal data," "process," and "processor"); Utah Consumer Privacy Act, S.B. 227, 2022 Gen. Sess. § 2 (Utah 2022) (to be codified in several sections of UTAH CODE ANN. §§ 13-2-1, 13-61) (same); VA. CODE ANN. § 59.1-575 (2021) (same); GDPR, *supra* note 22, at 33–35 (same). *But see* CAL. CIV. CODE §§ 1798.100, .140 (effective Jan. 1, 2023) (defining "business" and imposing privacy obligations on businesses).

rights and protect the consumers' personal information.[131] The Colorado legislature's findings specifically mention that technological innovation has allowed personal information collection, storage, and analysis to explode.[132] Recognizing the risks to individuals' privacy that such innovation has brought, Colorado, to minimize these risks, enacted its law to grant individuals rights in their personal information.[133] These rights, similar to those granted in the Virginia and Utah laws, allow consumers to access, delete, and move their stored personal information.[134] These laws, like the CPRA, establish general data privacy rights; the primary difference between the Virginia, Colorado, and Utah approach and the CPRA's approach is the terminology that the statutes use.[135]

C. Sorrell v. IMS Health Inc.*: Privacy and Speech Collide*

Because the First Amendment protects the sharing of information, data protection legislation, that by its very nature limits how people and businesses can use personal information, raises First Amendment concerns.[136] In *Sorrell*, the U.S. Supreme Court struck down a Vermont law that prohibited the sale, disclosure, and use of pharmacy records that show the prescribing habits of physicians for marketing purposes as a violation of the First Amendment.[137] As

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[131] *See* COLO. REV. STAT. § 6-1-1302 (discussing the Colorado legislature's findings with respect to the privacy of personal information in the digital age); VA. CODE ANN. §§ 59.1-577, -578 (establishing consumer rights in their personal data and imposing obligations on controllers when processing personal data); Duball, *supra* note 129 (quoting Utah State Senator Kirk Cullimore stating that the purpose of the Utah law is to guarantee Utah's consumers' rights in their information without proving overly burdensome on businesses' use of information).

[132] COLO. REV. STAT. § 6-1-1302(1)(a)(III), (IV). Notably, the Colorado legislative findings also highlight that states are enacting their own data privacy legislation due to the lack of a federal privacy law. *Id.* § 6-1-302(1)(b)(II). This Note discusses only Colorado's legislative findings because neither Virginia nor Utah codified their legislative findings when passing their privacy laws. *Compare id.* § 6-1-1302 (detailing Colorado's findings concerning the processing of personal data), *with* Utah Consumer Privacy Act, Utah S.B. 227 § 1(failing to codify legislative findings concerning personal data processing), *and* Virginia Consumer Data Protection Act, VA. CODE ANN. §§ 59.1-575 to -585(same).

[133] COLO. REV. STAT. § 6-1-1302(a)(IV), (c)(II)(A)–(B).

[134] *See id.* § 6-1-1306(1)(b)–(d) (granting consumers access, deletion, and data portability rights in their personal information); VA. CODE ANN. § 59.1-577(A)(1)–(5) (same); Utah Consumer Privacy Act, Utah S.B. 227 § 5 (same).

[135] *Compare* COLO. REV. STAT. § 6-1-1304(1) (stating that the Colorado law applies to "controller[s]"), *and* Utah Consumer Privacy Act, Utah S.B. 227 § 3 (stating that the Utah law applies to "controller[s] or processor[s]"), *and* VA. CODE ANN. § 59.1-576(A) (stating that the Virginia law applies to those who "control or process personal data"), *and* GDPR, *supra* note 22, at 47–60 (imposing obligations under the GDPR on controllers and processors), *with* CAL. CIV. CODE § 1798.100 (effective Jan. 1, 2023) (imposing the CPRA's obligations on "business[es] that control[] the collection of a consumer's personal information" (emphasis omitted)).

[136] *See* GDPR, *supra* note 22, at 35–36 (providing limitations on how personal data can be processed); Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011) (stating that information is speech).

[137] 564 U.S. at 557. Companies and researchers use data mining to identify patterns in massive data sets to help anticipate future results. *Data Mining: What It Is & Why It Matters*, SAS, https://www.sas.com/en_us/insights/analytics/data-mining.html [https://perma.cc/N9G8-E4C2]. For example,

state and federal governments look to pass comprehensive data protection legislation, lawmakers must avoid the perils of the Vermont law.[138] Subsection 1 of this Section examines the construction of the Vermont law.[139] Subsection 2 of this Section provides the procedural history and facts of *Sorrell*.[140] Subsection 3 of this Section discusses the Court's reasoning in *Sorrell*.[141]

1. The Vermont Law at Issue in *Sorrell*

Vermont enacted the law at issue in *Sorrell* to limit data mining that supports the pharmaceutical industry's practice of detailing to promote their drugs.[142] As provided in the statutory text, the law furthers the state's interests in safeguarding public health, maintaining prescriber privacy, and keeping drug prices down.[143] Nevertheless, the session law's legislative findings implicitly emphasize another purpose: limiting the effectiveness of data-mining-supported detailing because the Vermont legislature believed these marketing practices were too persuasive to prescribers and have consequently led to an increase in healthcare costs.[144]

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banks use data mining to understand their customers' spending and detect fraud, and manufacturers use data mining to predict when assembly line machines will need maintenance. *Id.*

[138] *See Sorrell*, 564 U.S. at 572–73, 578 (holding that the Vermont law was unconstitutional because it failed to serve its purported interests and was targeted to restrict persuasive marketing practices).

[139] *See infra* notes 142–147 and accompanying text.

[140] *See infra* notes 148–156 and accompanying text.

[141] *See infra* notes 157–169 and accompanying text.

[142] *Sorrell*, 564 U.S. at 557–59. "Detailing" means an in-person meeting between a pharmaceutical sales representative and a healthcare professional to provide the details about a drug to encourage the healthcare professional to prescribe it. *Id.* at 557–58. To help promote their drugs, pharmaceutical companies purchase prescriber information from data miners like IMS Health, who aggregate prescriber information from pharmacies. IMS Health Inc. v. Ayotte, 490 F. Supp. 2d 163, 165–66 (D.N.H. 2007), *rev'd and vacated*, 550 F.3d 42 (1st Cir. 2008). Prescriber information is useful for detailing in several notable ways. *See id.* at 170 (outlining the ways that prescriber information helps detailing). First, it helps pharmaceutical companies target healthcare professionals for detailing to ensure the company's resources are used effectively. *Id.* For example, aggregate prescriber information can show which healthcare professionals are so-called "early adopters" who have previously shown a willingness to prescribe new drugs. *Id.* Second, prescriber information can help tailor the promotional pitch to the particular health care professional. *Id.* For example, a detailer can highlight that the drug it is promoting does not have a side effect that a drug the healthcare professional is prescribing to treat the same ailment does have. *Id.* Lastly, pharmaceutical companies can use prescriber information to evaluate the effectiveness of a promotion campaign by looking at how often the visited healthcare professionals are actually prescribing the promoted drugs. *Id.*

[143] VT. STAT. ANN. tit. 18 § 4631(a) (2007); IMS Health Inc. v. Sorrell (*IMS Health II*), 630 F.3d 263, 269 (2d. Cir. 2010), *aff'd* 564 U.S. 552.

[144] *Sorrell*, 564 U.S. at 565; *see* 2007 Vt. Acts & Resolves 635, 635 (stating that marketing programs go against the goals of the state). For more of the Vermont legislature's findings, see 2007 Vt. Acts & Resolves 635, 636–37 (proclaiming that one of the main reasons that drug spending has increased is due to prescribers increasingly expensive treatments that offer virtually no benefit compared to existing, cheaper or generic medications); *id.* at 637 (stating that detailing is mainly done to promote high-profit drugs); *id.* at 639 (recognizing that spending on detailing has increased tremendously since the rise of data mining prescribing behavior, and acknowledging that prescribers more

The law explicitly prohibited any entity that would transmit or receive the prescription for purposes of filling and/or paying for it from using the prescriber's information in service of pharmaceutical marketing unless the prescriber consented to such dissemination.[145] The statute also provided a method for prescribers to consent to the sharing of their prescribing records for use in marketing programs.[146] In addition, the law contained a myriad of exceptions, most notably allowing: (1) any uses needed to provide or administer healthcare, including providing the actual medication, transmitting the prescription from prescriber to pharmacy, and health insurance administration; and (2) uses for healthcare research.[147]

2. Procedural History of *Sorrell*

The Vermont legislature passed the aforementioned law in 2007 around the same time that Maine and New Hampshire adopted similar legislation.[148] The U.S. District Courts for the Districts of Maine and New Hampshire invalidated the Maine and New Hampshire laws as violating the First Amendment.[149] The states both appealed the decisions to the U.S. Court of Appeals for the First Circuit.[150] In 2008, while *IMS Health Inc. v. Sorrell* (*IMS Health I*) was pending in the U.S. District Court for the District of Vermont, the First Circuit reversed the District of New Hampshire's decision in *IMS Health Inc. v. Ayotte*, holding that the New Hampshire law regulated conduct, not speech, and therefore the First Amendment posed no bar to the legislation.[151] The First Circuit panel also held that even if the statute regulated commercial speech, it

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likely prescribe drugs if they receive free samples of the drug); *id.* at 638 (stating explicitly that "[p]rescriber-identified data increase[s] the effect of detailing programs" because it allows detailers to deliver custom presentations based on the prescriber's behavior). Taken together, these findings demonstrate that Vermont believed that the increase in effective data-mining-supported detailing had led Vermont prescribers to unwittingly succumb to detailers' data-driven, persuasive promotion tactics by prescribing the higher-cost medications promoted by the detailers *See* 2007 Vt. Acts & Resolves 635–39 (outlining the Vermont government's findings about the use of data mining to support detailing and its effect on prescribing habits).

[145] VT. STAT. ANN. tit.18 § 4631(d).

[146] *Id.* § 4631(c).

[147] *Id.* § 4631(e).

[148] *IMS Health II*, 630 F.3d at 268–69.

[149] IMS Health Inc. v. Sorrell (*IMS Health I*), 631 F. Supp. 2d 434, 442–43 (D. Vt. 2009) (first citing IMS Health Corp. v. Rowe, 532 F. Supp. 2d 153, 183 (D. Me. 2008); and then citing IMS Health Inc. v. Ayotte, 490 F. Supp. 2d 163, 183 (D.N.H. 2007)).

[150] *Id.* at 443. The First Circuit Court of Appeals stayed the appeal of the Maine decision while the First Circuit decided the New Hampshire appeal. *Id.*

[151] *IMS Health II*, 630 F.3d at 269 (citing IMS Health Inc. v. Ayotte (*Ayotte*), 550 F.3d 42, 50–60, 64 (1st Cir. 2008)).

satisfied intermediate scrutiny under the *Central Hudson* test and was therefore constitutional.[152]

In 2009, in *IMS Health I*, the District of Vermont, applying the *Central Hudson* test, held that the Vermont prescriber privacy law was a constitutional restriction of commercial speech.[153] On appeal to the U.S. Court of Appeals for the Second Circuit, the appellants argued that the Vermont law did not survive intermediate scrutiny.[154] In 2010, in *IMS Health Inc. v. Sorrell (IMS Health II)*, the Second Circuit held that the Vermont law was an unconstitutional regulation of commercial speech that failed to satisfy the *Central Hudson* test.[155] This created a circuit split for which the U.S. Supreme Court granted certiorari to resolve.[156]

3. Forget *Central Hudson*: This Law's Purpose Is to Suppress Speech

The U.S. Supreme Court in *Sorrell* relied heavily on the idea that the Vermont law was both a content-based and a viewpoint-based regulation of speech.[157] Furthermore, the Court, relying on the legislative findings, held that the Vermont law's purpose was to inhibit this specific type of expression, and

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[152] *Id.* (citing *Ayotte*, 550 F.3d at 54–60); *see supra* notes 78–85 and accompanying text (outlining the *Central Hudson* test for commercial speech regulations).

[153] *IMS Health II*, 630 F.3d at 271 (citing *IMS Health I*, 631 F. Supp. 2d at 455). This case consolidated two suits: one where several Vermont data miners sued and another where a group of pharmaceutical manufacturers that produce brand-name medications sued. *IMS Health I*, 631 F. Supp. 2d at 444. *See generally* Complaint for Declaratory & Injunctive Relief, IMS Health Inc. v. Sorrell (*IMS Health I*), No. 1:07-CV-188 (D. Vt. Aug. 29, 2007) (outlining the data miners' claims); Complaint for Declaratory & Injunctive Relief, Pharm. Rsch. & Mfrs. of Am., No. 1:07-CV-220 (D. Vt. Oct. 22, 2007) (outlining the pharmaceutical manufacturers' claims). In 2009, in *IMS Health Inc. v. Sorrell* (*IMS Health I*), the U.S. District Court for the District of Vermont also held that the Vermont law regulated speech, not conduct, and that the Vermont law did not regulate activity outside of the state in violation of the Commerce Clause. 631 F. Supp. 2d at 445–47, 456–59. In 2010 in *IMS Health Inc. v. Sorrell* (*IMS Health II*), the Second Circuit Court of Appeals upheld the district court's decision on these two points. 630 F. 3d at 271, 297.

[154] *IMS Health II*, 630 F.3d at 271. Appellants also argued that the court should apply strict scrutiny to the Vermont law. *Id.* The Second Circuit did not reach a definitive conclusion on this point because the court held that the Vermont law did not satisfy intermediate scrutiny. *Id.* at 275.

[155] *Id.* at 267.

[156] Sorrell v. IMS Health Inc., 564 U.S. 552, 562 (2011). *Compare IMS Health II*, 630 F.3d at 267 (holding that the Vermont prescriber information privacy law did not survive intermediate scrutiny as a regulation of commercial speech), *with Ayotte*, 550 F.3d at 54–60 (holding that the New Hampshire prescriber information privacy law satisfies intermediate scrutiny).

[157] 564 U.S. at 563–64. The law is content-based because it specifically disfavors speakers using the information for marketing, a particular type of content, but allows speakers to use the information for other purposes, like educational messages. *Id.* at 564 (citing VT. STAT. ANN. tit. 18 § 4631(e)(4) (2007)). The law is viewpoint-based because, as specified in the legislative findings, detailers' interests conflict with the state's interests such that the Vermont law targets detailers and their messages promoting higher-priced drugs. *Id.* at 565 (quoting 2007 Vt. Acts & Resolves 635, 635).

therefore the Court must apply heightened judicial scrutiny to the law.[158] The Court explained that even though it normally would apply the *Central Hudson* test's lower burden to commercial speech regulations, when a pretextual rationale to suppress the underlying message supports such regulations, the Court must apply heightened scrutiny.[159]

In its argument to the Court, Vermont attempted to avoid First Amendment scrutiny by claiming it regulated conduct, not speech.[160] The Court disagreed because the synthesis and sharing of information constitutes speech under the First Amendment.[161] Because facts are normally at the heart of speech, prescriber information is likely First Amendment-protected speech.[162]

Vermont also argued that even if the law burdened speech, it only burdened commercial speech that is subject to a lower level of judicial scrutiny.[163] The Court stated that the distinction was irrelevant for the analysis because the Vermont law failed to satisfy even commercial speech's lower bar.[164] The Court employed a modified version of the *Central Hudson* test by focusing primarily on the directness and excessiveness prongs.[165] The Court rejected the government's purported interests in protecting medical privacy and fostering public health

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[158] *Id.* Heightened scrutiny is necessary when the government regulates speech because it opposes its underlying message. *Id.* at 566 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[159] *Id.* (citing City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)). Therefore, a neutral justification must justify a commercial speech regulation. *See id.* (stating that commercial speech regulations motivated by a state's disagreement with the message are not content neutral).

[160] *Id.* at 570. The State argued that selling, transferring, and using prescriber information was conduct rather than speech. *Id.* The U.S. Court of Appeals for the First Circuit agreed with this proposition by seeing prescriber information as a commodity being traded in commerce. *Id.* (citing *Ayotte*, 550 F.3d at 52–53).

[161] *Id.*

[162] *Id.* ("Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes."). The First Amendment protects facts for the same reason that it protects commercial speech: because facts help people make informed decisions. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 763–65 (1976) (stating that the First Amendment protects commercial speech because it serves the public good by fostering an informed citizenry). The *Sorrell* Court stopped short of reaching a definitive conclusion on whether prescriber information is speech because the law regulated the content of speech, specifically marketing that used the prescriber information. 564 U.S. at 571; STEPHEN P. MULLIGAN & CHRIS D. LINEBAUGH, CONG. RSCH. SERV., R45631, DATA PROTECTION LAW: AN OVERVIEW 67 (2019).

[163] *Sorrell*, 564 U.S. at 571.

[164] *Id.*

[165] *Id.* at 572 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y. (*Central Hudson*), 447 U.S. 557, 566 (1980)); *see supra* notes 82–83 and accompanying text (outlining the *Central Hudson* test's third and fourth prongs). The test that the Court used in *Sorrell* only required that the government regulation directly serve a substantial government interest (*Central Hudson*'s third prong) and that it is drawn to serve that interest (implying *Central Hudson's* fourth prong: that a regulation is no more extensive to serve that interest). *Sorrell*, 564 U.S. at 572 (first citing Bd. of the State of Univ. of N.Y. v. Fox, 492 U.S. 469, 480–81 (1989); and then citing *Central Hudson*, 447 U.S. at 566); *see Central Hudson*, 447 U.S. at 566 (outlining the four-prong *Central Hudson* test).

through lower healthcare costs.[166] Ultimately, the Court, relying on the legislative findings, believed that the true motivation behind the Vermont law was to suppress speech by preventing pharmaceutical companies from employing a successful, convincing marketing strategy.[167] In addition, the Court held that the Vermont law failed to serve its purported privacy interest by allowing the use of prescriber information for all purposes except marketing.[168] The Court stated that a privacy regulation that allows the sale or disclosure of information in only limited, well-supported situations would not suffer this same shortcoming, thus leaving the door open for the government to pass comprehensive privacy laws.[169]

II. Lessons From *Sorrell*: Highlight the Privacy Interest and Apply the *Central Hudson* Test

In 2011, in *Sorrell v. IMS Health Inc.*, the U.S. Supreme Court addressed important questions regarding whether content-based commercial speech regulations are subject to heightened judicial scrutiny.[170] If they are, the First Amendment would impede future data protection legislation.[171] In *Sorrell*, the Court held that a Vermont law restricting the use of prescriber information for marketing purposes violated the First Amendment.[172] Section A of this Part

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[166] *Sorrell*, 564 U.S. at 572–73, 576–77.

[167] *Id.* at 577–78. The Court also found that the law impermissibly served its interest in lowering healthcare costs by suppressing marketplace information. *Id.* at 576–77. Vermont reasoned that restricting access to prescriber-identifying information for marketing would lower healthcare costs because doctors would be less likely to prescribe pricier, branded drugs if marketers were unable to rely on such information to inform their sales pitches. *Id.*

[168] *Id.* at 572–73. The Court then pointed to HIPAA as an example of a law that legitimately serves a privacy interest. *Id.* at 573. The Court distinguished the Vermont law from a regulation like HIPAA because the Vermont law generally permitted use of the allegedly private information while laws like HIPAA generally prohibit disclosure except in specific, narrow situations. *Id.*; *see* 45 C.F.R. § 164.502 (2021) (establishing a general rule that prohibits disclosure of protected health information except in statutorily designated circumstances).

[169] *Sorrell*, 564 U.S. at 573 (first citing 42 U.S.C. § 1320d-2; and then citing 45 C.F.R. pts. 160, 164 (2021)). Furthermore, the Court conceded that privacy regulations do not need to avoid making content-based distinctions. *Id.* at 574. In fact, the Court recognized that protecting consumers from marketplace harms is one of the reasons that the government can regulate commercial speech more than other types of speech. *Id.* at 579. Thus, the Vermont law was unconstitutional, not because it made a content-based distinction, but rather because it failed to actually serve its privacy interest by generally allowing the use and dissemination of the purportedly private information. *Id.* at 573–74.

[170] *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 565–66 (2011) (stating that a Vermont privacy law imposes content-based restrictions on speech and thus heightened judicial scrutiny applies to it). In 2011, in *Sorrell v. IMS Health Inc.*, the U.S. Supreme Court rejected the Vermont government's privacy justification for a law because it allowed for the use of prescriber information for any purpose except marketing. *Id.* at 572–73.

[171] *See id.* at 557 (holding a Vermont privacy law unconstitutional under the First Amendment).

[172] *Id.* The Court, in holding the law unconstitutional, concluded that the law failed to satisfy intermediate scrutiny under a commercial speech inquiry. *Id.* at 571–72.

examines cases after *Sorrell* to determine how courts treat commercial speech regulations in light of *Sorrell*.[173] Section B of this Part discusses post-*Sorrell* cases that address whether privacy regulations survive First Amendment scrutiny.[174] Finally, Section C of this Part explores scholarly opinions on *Sorrell*'s impact on commercial speech doctrine.[175]

A. Central Hudson *Survives* Sorrell

Sorrell did not explicitly apply the test from the Supreme Court's 1980 case, *Central Hudson Gas & Electric Corp. v. Public Service Commission* (*Central Hudson*), for commercial speech regulations.[176] Instead, the *Sorrell* Court stated that the Vermont law is subject to "heightened judicial scrutiny" because the law creates content-based restrictions on speech even though it regulates commercial speech.[177] The Court further stipulated that even for commercial speech regulations, to survive judicial scrutiny, the government must have a neutral justification for the regulation the purpose of which is not to suppress speech.[178] This raised questions about the continuing validity of the *Central Hudson* test.[179] Nevertheless, in the aftermath of *Sorrell*, most courts have continued to apply *Central Hudson* to commercial speech regulations, even when such regulations are content-based.[180]

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[173] *See infra* notes 176–188 and accompanying text.

[174] *See infra* notes 189–202 and accompanying text.

[175] *See infra* notes 203–214 and accompanying text.

[176] *See Sorrell*, 564 U.S. at 571–72 (2011) (stating that to sustain the Vermont law's content-based restrictions on speech, Vermont must demonstrate that the law advances a substantial governmental interest and is drawn to serve that interest); *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y. (*Central Hudson*), 447 U.S. 557, 566 (1980) (creating the four-prong *Central Hudson* test); *supra* notes 78–85 and accompanying text (explaining the *Central Hudson* test); *supra* note 165 and accompanying text (discussing how the *Sorrell* Court's *Central Hudson* analysis focused on the third and fourth prongs).

[177] 564 U.S. at 565.

[178] *Id.* at 565–66 (citing Cincinnati v. Discovery Network, Inc. 507 U.S. 410, 429–30 (1993)). A court will deem a facially neutral law to be content-based if: (1) it "cannot be justified without reference to the content of the regulated speech"; or (2) it was "adopted by the government because of disagreement with the message [the speech] conveys." Reed v. Town of Gilbert, 576 U.S. 155, 164 (2015) (internal quotations omitted) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[179] *See* MULLIGAN & LINEBAUGH, *supra* note 162, at 68 (describing how courts have differed in determining whether the test from the 1980 U.S. Supreme Court case, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, applies to content-based commercial speech regulations following *Sorrell*).

[180] *Id.* (first citing Retail Digit. Network, LLC v. Prieto (*RDN III*), 861 F.3d 839, 849–50 (9th Cir. 2017) (en banc); then citing 1-800-411-Pain Referral Serv., LLC v. Otto, 744 F.3d 1045, 1055 (8th Cir. 2014); then citing Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 533 (6th Cir. 2012); and then citing Vugo, Inc. v. City of Chicago, 273 F. Supp. 3d 910, 916 n.4 (N.D. Ill. 2017)); *see also Sorrell*, 564 U.S. at 565 (holding that Vermont's privacy law imposes content-based restrictions); *Central Hudson*, 447 U.S. at 566 (creating a test of constitutionality for commercial speech regulations). *But see* United States v. Caronia, 703 F.3d 149, 163–64 (2d Cir. 2012) (stating

For example, in 2017, in *Retail Digital Network, LLC v. Prieto* (*RDN III*), the U.S. Court of Appeals for the Ninth Circuit, applying the *Central Hudson* test, upheld a California law that prohibits alcohol manufacturers and wholesalers from paying retailers to advertise their products.[181] Following the Supreme Court's decision in *Sorrell*, Retail Digital Network challenged the California law as presumptively unconstitutional under the theory that *Sorrell* amended the *Central Hudson* test to require that content-based commercial speech regulations must satisfy heightened scrutiny rather than the intermediate scrutiny that *Central Hudson* requires.[182] The Ninth Circuit, sitting en banc, rejected Retail Digital Network's challenge, holding that *Central Hudson* remains the test for commercial speech regulations.[183]

To reach this conclusion, the *RDN III* court recognized that *Sorrell*'s discussion of heightened scrutiny responded to Vermont's argument that the prescriber privacy law did not regulate speech.[184] Therefore, in that context, heightened scrutiny refers to the scrutiny that courts apply to speech, as opposed to the rational basis review that courts apply to nonspeech regulations.[185]

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that *Sorrell* created a new two-step test to determine whether a court must apply heightened scrutiny to a regulation).

[181] *RDN III*, 861 F.3d at 841–42.

[182] Retail Digit. Network, LLC v. Applesmith (*RDN I*), 945 F. Supp. 2d 1119, 1124 (C.D. Cal. 2013), *rev'd and remanded*, 810 F.3d 638 (9th Cir. 2016), *aff'd on reh'g en banc sub nom. RDN III*, 861 F.3d 839; *see Sorrell*, 564 U.S. at 565–66 (stating that because the Vermont law imposes a content-based restriction, the Court must apply heightened scrutiny); *Central Hudson*, 447 U.S. at 566 (outlining the *Central Hudson* test lower burden). Previously, in 1986, in *Actmedia, Inc. v. Stroh*, the U.S. Court of Appeals for the Ninth Circuit, applying the *Central Hudson* test, upheld the same California law. Actmedia, Inc. v. Stroh, 830 F.2d 957, 962 (9th Cir. 1986). Retail Digital Network brought suit because it believed that the *Sorrell* Court altered the *Central Hudson* test, thereby invalidating the Ninth Circuit's previous decision in *Actmedia, Inc. RDN I*, 945 F. Supp. 2d at 1125.

[183] *RDN III*, 861 F.3d at 846–49. In 2013, in *Retail Digital Network, LLC v. Applesmith* (*RDN I*), the U.S. District Court for the Central District of California reached the same conclusion as the Ninth Circuit sitting en banc: *Central Hudson* remained the test for commercial speech regulations. 945 F. Supp. 2d at 1125; *see RDN III*, 861 F.3d at 846–49 (holding that *Sorrell* did not alter the applicability of the *Central Hudson* test). On appeal, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit reversed the district court, agreeing with Retail Digital Network that *Sorrell* requires heightened scrutiny for content-based commercial speech regulations. Retail Digit. Network, LLC v. Applesmith, 810 F.3d 638, 641–42 (9th Cir. 2016), *aff'd on reh'g en banc sub nom. RDN III*, 861 F.3d 839; *see Sorrell*, 564 U.S. at 565–66 (stating that the court must apply heightened scrutiny to the Vermont privacy law at issue because it was content-based). After the panel issued its decision, a majority of Ninth Circuit judges voted to rehear the case en banc. *RDN III*, 861 F.3d at 842–43 (citing Retail Digit. Network, LLC v. Gorsuch, 842 F.3d 1092, 1092 (9th Cir. 2016)).

[184] *RDN III*, 861 F.3d at 847 (citing *Sorrell*, 564 U.S. at 563–71). The U.S. Court of Appeals for the Ninth Circuit, in its 2017 decision in *Retail Digital Network, LLC v. Prieto* (*RDN III*), also pointed out that this was not the first time that the Supreme Court referred to intermediate scrutiny as heightened scrutiny. *Id.* (citing Clark v. Jeter, 486 U.S. 456, 463, 465 (1988)).

[185] *Id.* Rational basis review is a highly deferential standard of judicial scrutiny. Raphael Holoszyc-Pimentel, Note, *Reconciling Rational Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2074 (2015). A law satisfies rational basis review "if it is 'rationally related to a legiti-

Furthermore, the *RDN III* court reasoned that the *Sorrell* Court's classification of the Vermont law as content-based similarly meant to highlight that the law burdened speech and was subject to some level of judicial scrutiny beyond rational basis review.[186] Lastly, the *RDN III* court points out that the Second, Fourth, Sixth, and Eighth Circuits have continued to apply *Central Hudson* to commercial speech regulations since the Supreme Court's decision in *Sorrell*.[187] Thus, the *RDN III* court concluded that *Central Hudson* remains the test for commercial speech regulations.[188]

*B. Data Protection and the First Amendment Collide in a Post-*Sorrell *World*

It is challenging to gauge *Sorrell*'s specific impact on data protection regulations because a limited number of cases address these concerns.[189] Nevertheless, these cases make clear that any data protection regulation must still satisfy the *Central Hudson* test.[190] For example, in 2016, in *Boelter v. Hearst Communications, Inc.*, the U.S. District Court for the Southern District of New York, applying *Central Hudson*, held that the Michigan Video Rental Privacy

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mate state interest.'" *Id.* (quoting City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curium)).

[186] Holoszyc-Pimentel, *supra* note 185, at 2074; *Sorrell*, 564 U.S. at 565–66. As stated by Judge Debra Ann Livingston of the U.S. Court of Appeals for the Second Circuit in her dissent in 2012 in *United States v. Caronia*, "*Every* commercial speech case, by its very nature, involves both content- and speaker-based speech restrictions." 703 F.3d 149, 180 (2d Cir. 2012) (Livingston, J., dissenting). The *Sorrell* court itself recognized that a content-based distinction does not make a regulation presumptively invalid. *See* 564 U.S. at 574 (stating that privacy regulations do not need to forego making content-based distinctions). Therefore, it follows that regulating commercial speech based on content does not warrant any higher level of judicial scrutiny beyond the *Central Hudson* test. *See RDN III*, 861 F.3d at 847–48 (recognizing that *Sorrell*'s discussion of content-based restrictions highlights that courts should subject such regulations to some level of judicial scrutiny beyond rational basis review).

[187] *RDN III*, 861 F.3d at 849–50 (first citing 1-800-411-Pain Referral Serv., LLC v. Otto, 744 F.3d 1045, 1055 (8th Cir. 2014); then citing Educ. Media Co. at Va. Tech., Inc. v. Insley, 731 F.3d 291, 298 (4th Cir. 2013); then citing *Caronia*, 703 F.3d at 164; and then citing Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 533 (6th Cir. 2012)).

[188] *Id.* at 845–850.

[189] *See* MULLIGAN & LINEBAUGH, *supra* note 162, at 68 (first citing Chamber of Com. for Greater Phila. v. City of Philadelphia, 319 F. Supp. 3d 778, 784-85 (E.D. Pa. 2018); then citing Boelter v. Hearst Commc'ns, Inc., 192 F. Supp. 3d 427, 447 (S.D.N.Y. 2016); and then citing King v. Gen. Info. Servs., 903 F. Supp. 2d 303, 311–13 (E.D. Pa. 2012)) (stating that few courts have addressed the implications of *Sorrell*); *see also Sorrell*, 564 U.S. at 572 (stating that Vermont's privacy justification for the law at issue does not survive judicial scrutiny).

[190] *See, e.g.*, ACA Connects - Am.'s Commc'ns Ass'n v. Frey, 471 F. Supp. 3d 318, 326–29 (D. Me. 2020) (applying *Central Hudson* to reject a summary judgment challenge to a Maine Internet service provider privacy law); *Boelter*, 192 F. Supp. 3d at 447–51 (holding that a Michigan law that generally prohibits disclosure of an individual's video rental history satisfies the *Central Hudson* test); *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y. (*Central Hudson*), 447 U.S. 557, 566 (1980) (establishing a test for commercial speech regulations).

Act (VRPA) did not violate the First Amendment.[191] At the time the plaintiff filed suit, the Michigan VRPA generally prohibited any business that sells, rents, or lends writings, sound recordings, or videos from disclosing any customer's purchase or rental history.[192] The court held that the VRPA regulated commercial speech because the VRPA restricts the dissemination of information concerning an individual's commercial decisions that if shared, could facilitate additional commercial transactions.[193]

Moving to the four-part *Central Hudson* test, neither party disputed that the VRPA does not regulate misleading commercial speech.[194] Second, the court held that the government's asserted interest in protecting consumer privacy was a substantial governmental interest.[195] Third, the court held that the VRPA's consumer information disclosure restrictions directly advanced this interest because the VRPA generally prohibits disclosure by the party most likely in possession of the protected information.[196] Lastly, the court held that

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[191] *Boelter*, 192 F. Supp. 3d at 444–51 (citing *Central Hudson*, 447 U.S. 557, 561–63, 565–66). *See* Michigan Video Rental Privacy Act, MICH. COMP. LAWS § 445.1712 (2022) (protecting video rental privacy in Michigan). To reach this conclusion, the *Boelter* court held that the Michigan Video Rental Privacy Act (VRPA) regulated commercial speech. 192 F. Supp. 3d at 444–47. The *Boelter* court applied *Central Hudson* without addressing whether it was the proper test for commercial speech regulations, thereby implicitly endorsing the conclusion that *Sorrell* did not alter *Central Hudson*. *See id.* at 444–51 (applying the *Central Hudson* test after concluding that the VPRA regulates commercial speech); *Sorrell*, 564 U.S. at 565–66 (subjecting a Vermont privacy law to heightened judicial scrutiny); *Central Hudson*, 447 U.S. at 566 (creating a standard of judicial scrutiny for commercial speech).

[192] *Boelter*, 192 F. Supp. 3d at 434–35 (citing 1988 Mich. Pub. Acts 378 (West)). After the plaintiffs filed suit, Michigan amended the VRPA. *Id.* at 438 (citing S.B. 490, 98th Leg., Reg. Sess., P.A. No. 92 (Mich. 2016)). The court held that the amended law did not retroactively apply to the plaintiff's claims. *Id.*

[193] *Id.* at 444–47. To reach this conclusion, the *Boelter* court recognized that although advertising is the quintessential example of commercial speech, commercial speech is any speech related only to monetary interests. *Id.* at 445 (quoting Conn. Bar Ass'n v. United States, 620 F.3d 81, 94 (2d Cir. 2010)). The *Boelter* court also recognized that the sale or disclosure of personal data is principally a commercial endeavor. *Id.* Thus, the *Boelter* court concluded that the VRPA regulates commercial speech. *Id.* at 446–47.

[194] *Id.* at 447; *Central Hudson*, 447 U.S. at 566. The government has full authority to halt the sharing of false or misleading commercial speech. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 773 (1976) (stating that the government cannot fully proscribe the sharing of truthful commercial speech).

[195] *Boelter*, 192 F. Supp. 3d at 447–48. The court recognized the consumer privacy interest was substantial given that the state may want to prevent the unpermitted disclosure of consumer information, especially considering the widespread availability and collection of personal data. *Id.* at 448. Michigan enacted the VPRA in response to public outcry after news outlets published Supreme Court nominee Robert Bork's rental history during his confirmation hearing. *Id.* at 447. Eleven other states and the federal government have passed similar video rental privacy laws. *Id.* at 447 n.13. Michigan's law is unique among these laws because its privacy protections also apply to purveyors of written materials. *Id.*

[196] *Id.* at 448–49. The Michigan law generally prohibits disclosure of the protected information except in narrow circumstances. *Id.* at 449. Because the exceptions are narrow, they do not undermine the government's privacy interest. *Id.* In contrast, the Vermont law at issue in *Sorrell* generally al-

the VRPA was no more extensive than necessary to serve the state's interest to protect consumer privacy.[197]

In reaching the conclusion that the VRPA was no more extensive than necessary, the court pointed out that the VRPA did not suffer from the flaws of the Vermont law at issue in *Sorrell*.[198] Unlike the Vermont law, the VRPA restricts only those speakers most likely to reveal consumer information.[199] In addition, the VRPA provides a general prohibition on disclosure with limited, justified exceptions whereas the Vermont law generally permitted the use or disclosure except for marketing.[200] Lastly, no evidence suggests that the Michigan legislature enacted the VRPA to suppress speech.[201] In sum, *Boelter* suggests that *Sorrell* poses limited obstacles for data protection regulations that legitimately advance the government's interest in protecting consumer privacy.[202]

*C. Scholarly Opinions on Commercial Speech in a Post-*Sorrell *World*

Scholars disagree over the current state of commercial speech analysis.[203] Two prevailing opinions on commercial speech analysis exist in a post-*Sorrell* world: (1) that *Sorrell* modified the *Central Hudson* test; and (2) that *Sorrell* did not alter the *Central* Hudson test.[204]

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lowed disclosures except if the disclosure was for marketing purposes. 564 U.S. at 572–73. Therefore, the *Sorrell* court concluded that the Vermont law did not directly serve its stated privacy interest because people and businesses could generally still use and share the purportedly private information. *Id.*

[197] *Boelter*, 192 F. Supp. 3d at 449–51. The court also held that the state does not have to choose the least restrictive means to advance its substantial interest in order to satisfy *Central Hudson*. *Id.* at 450–51 (citing Trans Union Corp. v. F.T.C., 267 F.3d 1138, 1143 (D.C. Cir. 2001)).

[198] *Id.* at 449–50; *see Sorrell*, 564 U.S. at 572–73 (recognizing that the Vermont law only restricted a narrow set of speakers while leaving most speakers unencumbered).

[199] *Boelter*, 192 F. Supp. 3d at 449–50. *Compare* Michigan Video Rental Privacy Act, MICH. COMP. LAWS § 445.1712 (2022) (generally prohibiting the use of video rental history in most circumstances), *with* 2007 Vt. Acts & Resolves 635 (only prohibiting the use of prescriber data for marketing).

[200] *Boelter*, 192 F. Supp. 3d at 450. *Compare* MICH. COMP. LAWS § 445.1712 (prohibiting most uses of video rental history), *with* 2007 Vt. Acts & Resolves 635 (prohibiting only marketing uses of prescriber data).The Vermont law in *Sorrell* allowed virtually all speakers besides pharmaceutical detailers from using the protected information. *Boelter*, 192 F. Supp. 3d at 450 (citing *Sorrell*, 564 U.S. at 564, 572–73).

[201] *Boelter*, 192 F. Supp. 3d at 450; *see Sorrell*, 564 U.S. at 576–79 (discussing how the Vermont law's purpose was to limit the effectiveness of otherwise persuasive marketing technique).

[202] *See Boelter*, 192 F. Supp. 3d at 449–51 (highlighting how the VRPA avoids the Vermont law's shortcomings in *Sorrell*); *Sorrell*, 564 U.S. at 576–79 (stating that the Vermont law's purpose was to suppress speech).

[203] *See infra* notes 204–214 and accompanying text (outlining the scholarly dispute over post-*Sorrell* commercial speech analysis).

[204] *See Sorrell*, 564 U.S. at 576–79 (applying the *Central Hudson* test to strike down a Vermont privacy law); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y. (*Central Hudson*), 447 U.S. 557, 566 (1980) (creating a four-prong test to determine the validity of commercial speech regulations). *Compare* Bastian Shah, *Commercial Free Speech Constraints on Data Privacy Statutes After* Sorrell v. IMS Health, 54 COLUM. J.L. & SOC. PROBS. 93, 109–14 (2020) (arguing that *Sorrell* in-

Some scholars argue that *Sorrell*'s mention of heightened scrutiny modified the *Central Hudson* test, thereby raising the level of scrutiny applied to content- and speaker-based commercial speech regulations.[205] To support this contention, they point to Justice Stephen Breyer's dissent in *Sorrell*.[206] Justice Breyer noted that the *Sorrell* majority opinion, by using the term "heightened scrutiny," suggests a more exacting standard of review than *Central Hudson* for content- and speaker-based commercial speech regulations.[207] Though these scholars agree that *Sorrell* modified commercial speech doctrine, they disagree on how *Sorrell* altered the doctrine.[208] Some argue that *Sorrell* abrogates the distinction between commercial and noncommercial speech.[209] Oth-

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creases the scrutiny applied to some types of commercial speech), *and* Hunter B. Thomson, *Whither* Central Hudson*? Commercial Speech in the Wake of* Sorrell v. IMS Health, 47 COLUM. J.L. & SOC. PROBS. 171, 200–01 (2013) (arguing that *Sorrell* added a new preliminary inquiry to the *Central Hudson* test), *with* Oleg Shik, *The* Central Hudson *Zombie: For Better or Worse, Intermediate Tier Review Survives* Sorrell v. IMS Health, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 561, 587–88 (2015) (arguing that until the Supreme Court clarifies its position, *Central Hudson* should remain the test for commercial speech regulations), *and* Lyle Denniston, *Opinion Analysis: Like Ships Passing in the Night . . .* , SCOTUSBLOG (June 23, 2011), https://www.scotusblog.com/2011/06/opinion-analysis-like-ships-passing-in-the-night/ [https://perma.cc/9BB5-W96U] (stating that the *Sorrell* Court struck down the Vermont law because of its improper statutory purpose). Another set of scholars, in light of the U.S. Supreme Court's 2015 decision in *Reed v. Town of Gilbert*, believe that all commercial speech regulations are presumptively unconstitutional content-based regulations. *See* Shanor, *supra* note 57, at 178–79 (describing how *Reed* could mean all content-based distinctions, including the commercial/noncommercial speech distinction, are presumptively unconstitutional); *see also* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (holding that content-based speech regulations are presumptively unconstitutional). *But see supra* note 57 (highlighting the shortcomings in the argument that *Reed* implicitly overturned longstanding commercial speech precedents).

[205] *See, e.g.*, Shah, *supra* note 204, at 110–11 n.119 (first citing Ashutosh Bhagwat, Sorrell v. IMS Health: *Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 858 (2012); then citing Marcia M. Boumil, Kaitlyn Dunn, Nancy Ryan & Katrina Clearwater, *Prescription Data Mining, Medical Privacy and the First Amendment: The U.S. Supreme Court in* Sorrell v. IMS Health Inc., 21 ANNALS HEALTH L. 447, 456 (2012); then citing Isabelle Bibet-Kalinyak, *A Critical Analysis of* Sorrell v. IMS Health, Inc.*: Pandora's Box at Best*, 67 FOOD & DRUG L.J. 191, 208 (2012); then citing Thomson, *supra* note 204, at 205–06; and then citing Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 IOWA L. REV. 1427, 1450 (2017)) (arguing that *Sorrell* rachets up commercial speech protections beyond *Central Hudson*); *see also Sorrell*, 564 U.S. at 566 (stating that laws regulating commercial speech must satisfy "heightened scrutiny"). Speaker-based restrictions regulate speech based on the identity of the speaker. *See Sorrell*, 564 U.S. at 563–64 (classifying a Vermont law that "prohibit[ed] pharmacies, health insurers, and similar entities from selling prescriber-identifying information" as speaker-based).

[206] *Sorrell*, 564 U.S. at 588 (Breyer, J., dissenting) (discussing the implications of the majority's use of heightened scrutiny); Shah, *supra* note 204, at 110–11.

[207] *Sorrell*, 564 U.S. at 588 (Breyer, J., dissenting); Shah, *supra* note 204, at 110–11.

[208] *See Sorrell*, 564 U.S. at 563–64, 571 (stating that the Vermont law imposed "content- and speaker-based restrictions"). *Compare* Shah, *supra* note 204, at 113–14 (asserting that *Sorrell* only requires heightened scrutiny for commercial speech regulations that are both content- and speaker-based), *with* Thomson, *supra* note 204, at 199–205 (positing that *Sorrell* eliminated "the distinction between commercial and noncommercial speech").

[209] Thomson, *supra* note 204, at 199–205 (arguing that *Sorrell* eliminated commercial speech as a distinct category of speech subject to lower First Amendment scrutiny).

ers believe that *Sorrell* only increased the level of scrutiny for commercial speech regulations that are both content- and speaker-based.[210]

Regardless, some scholars and most courts reject the notion that *Sorrell* altered the *Central Hudson* test.[211] They posit that *Sorrell* is a narrow holding because the Vermont law was clearly targeted at suppressing a particular type of speech.[212] They also reason that *Sorrell*'s heightened scrutiny means more scrutiny than a purely economic regulation that normally receives rational basis review.[213] Therefore, heightened scrutiny is synonymous with intermediate scrutiny.[214]

III. RUNNING THE *SORRELL* ANALYSIS

Following the 2011 U.S. Supreme Court case, *Sorrell v. IMS Health Inc.*, the *Central Hudson* test continues to act as the standard for regulations of commercial speech.[215] Recent cases suggest that data protection legislation that advances the government's interest in protecting consumer privacy does not

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[210] *E.g.*, Shah, *supra* note 204, at 113–14 (asserting that *Sorrell* only requires heightened scrutiny for commercial speech regulations that are both content- and speaker-based).

[211] *See, e.g.*, Denniston, *supra* note 204 (stating that *Sorrell* did not dissolve the distinction between commercial and noncommercial speech); Shik, *supra* note 204, at 587–88 (concluding that *Central Hudson* remains the test for commercial speech regulations until the Supreme Court says otherwise); *see also supra* notes 157–169, 176–202 and accompanying text (outlining how courts have continued to apply the *Central Hudson* test after *Sorrell* and that the law at issue in *Sorrell* was unconstitutional because the purpose of the law was to suppress commercial speech).

[212] *See* Denniston, *supra* note 204 (stating that Court struck down the Vermont law in *Sorrell* because the government enacted it to prevent pharmaceutical companies from engaging in persuasive marketing); *see also supra* notes 157–169, 176–202 and accompanying text (discussing post-*Sorrell* cases where courts continued to apply the *Central Hudson* test and describing how the true purpose of the law at issue in Sorrell was to suppress commercial speech).

[213] *See* Retail Digit. Network, LLC v. Prieto (*RDN III*), 861 F.3d 839, 846 (9th Cir. 2017) (en banc) (holding that *Sorrell* does not alter the *Central Hudson* test); Shah, *supra* note 204, at 109–10 (stating that the commonsense reading of *Sorrell* does not alter *Central Hudson* (citing *Heightened Scrutiny*, BLACK'S LAW DICTIONARY, *supra* note 27)); *see also Sorrell*, 564 U.S. at 563 (applying heightened scrutiny to the Vermont law at issue); supra notes 184–188 (discussing the court's reasoning in *RDN III*, where the en banc Ninth Circuit Court of Appeals found that *Central Hudson* remains the test for commercial speech regulations).

[214] *See RDN III*, 861 F.3d at 846 (holding that *Sorrell* does not alter the *Central Hudson* test); Shah, *supra* note 204, at 109–10 (explaining that in many contexts "heightened scrutiny" means intermediate scrutiny (citing *Heightened Scrutiny*, BLACK'S LAW DICTIONARY, *supra* note 27)).

[215] *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011) (holding that a Vermont privacy law violated the First Amendment); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y. (*Central Hudson*), 447 U.S. 557, 566 (1980) (outlining the scrutiny that courts apply to commercial speech); *supra* notes 78–85 and accompanying text (providing an overview of the test that the U.S. Supreme Court articulated in the 1980 case, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* that determines whether a regulation of commercial speech is constitutional); *supra* notes 176–188 and accompanying text (describing how courts have interpreted the 2011 U.S. Supreme Court case, *Sorrell v. IMS Health Inc.*).

run afoul of the First Amendment.[216] This Part applies the *Central Hudson* test to notable privacy laws to illustrate the effects of *Sorrell* on broad data protection legislation.[217] Due to the various state law approaches to data privacy, Section A of this Part will apply the *Central Hudson* test to the California Privacy Rights Act (CPRA), and Section B will apply the test to the Colorado Privacy Act (CPA), as an example of how the law would treat similar laws in Virginia and Utah.[218] Section C applies the *Central Hudson* test to the EU GDPR.[219]

A. Applying the Central Hudson *Test to the California Privacy Rights Act*

Assuming that someone challenges the CPRA as an unconstitutional regulation of commercial speech, a court would apply the *Central Hudson* test to determine its validity.[220] The CPRA satisfies *Central Hudson*'s first prong because the commercial speech at issue—namely, the sharing of personal information—is lawful and not misleading.[221] The government's interest in protecting privacy would likely satisfy the second prong of the *Central Hudson* test because courts have previously recognized that the government's interest in protecting privacy is substantial.[222]

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[216] *E.g.*, Boelter v. Hearst Commc'ns, Inc., 192 F. Supp. 3d 427, 447 (S.D.N.Y. 2016) (holding that a video rental privacy law did not violate the First Amendment); *see supra* notes 189–202 and accompanying text (discussing how courts have applied *Sorrell* in cases challenging privacy laws on First Amendment grounds).

[217] *See infra* notes 220–266 and accompanying text.

[218] *See infra* notes 220–236 and accompanying text (applying the *Central Hudson* test to the CPRA); *infra* notes 237–251 and accompanying text (applying the *Central Hudson* test to the Colorado Privacy Rights Act (CPA)).

[219] *See infra* notes 252–266 and accompanying text.

[220] *See supra* notes 176–188 (describing why *Central Hudson* remains the test of constitutionality for regulations of commercial speech); *see also supra* notes 122–128 and accompanying text (outlining key provisions and the legislative purpose of the CPRA). *See generally* California Privacy Rights Act of 2020, 2020 Cal. Legis. Serv. Prop. 24 (West) (to be codified in scattered sections of CAL. CIV. CODE § 1798) (establishing data privacy rights in California); *Central Hudson*, 447 U.S. at 557 (discussing the standard of scrutiny courts apply to commercial speech).

[221] *See* CAL. CIV. CODE § 1798.140(v) (West 2022) (effective Jan. 1, 2023) (defining "personal information" under the CPRA); *Central Hudson*, 447 U.S. at 566 (stipulating that a commercial speech regulation must concern lawful activity and cannot be misleading to survive judicial scrutiny); *see also supra* note 80 and accompanying text (discussing the *Central Hudson* test's first prong, and providing examples of misleading commercial speech and commercial speech concerning unlawful activity). Generally, parties do not dispute this prong of the *Central Hudson* test. *See, e.g.*, *Central Hudson*, 447 U.S. at 566 (stating that neither party claims the expression at issue related to unlawful activity or is inaccurate); Boelter v. Hearst Commc'ns, Inc., 192 F. Supp. 3d 427, 447 (S.D.N.Y. 2016) (stating that no dispute existed regarding the first prong of the *Central Hudson* test).

[222] *See, e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552, 572 (2011) (recognizing that the government has a substantial government interest in protecting medical prescriber privacy); *Boelter*, 192 F. Supp. 3d at 447–48 (holding that the government has a substantial interest in protecting consumer privacy); *see also* California Privacy Rights Act of 2020, § 2(E)–(I) (discussing how the CPRA is

Central Hudson's third prong requires that the challenged regulation of commercial speech directly advance the government's substantial interest.[223] *Sorrell* stands for the proposition that a commercial speech regulation does not directly advance the government's substantial interest if the regulation's true purpose is to generally prevent organizations from engaging in persuasive marketing.[224] The CPRA's legislative findings indicate the that the unfettered sharing of personal information is problematic, not because it facilitates persuasive marketing, but rather because consumers do not fully understand how companies will use and share their information.[225] Furthermore, the CPRA's findings demonstrate that, absent legislation, consumers lack sufficient bargaining power to protect their rights in their personal information.[226] Therefore, the CPRA requires businesses that collect personal information to disclose the purposes for which they collect the consumers' information and whether they will share such information.[227] This directly serves the government's substantial interest in protecting privacy by ensuring that consumers understand how companies use their data.[228] The CPRA also directly serves its consumer privacy interest by giving consumers the ability to opt-out of the sale or sharing of their personal information.[229] This does not impermissibly suppress persuasive marketing because the CPRA does not generally prohibit the sharing and use of personal data for marketing.[230] Rather, the CPRA simply

meant to bolster privacy rights); *Central Hudson*, 447 U.S. at 566 (stating that the government must have a substantial justification for the regulation of commercial speech).

[223] 447 U.S. at 566.

[224] *See* 564 U.S. at 576–78 (holding that Vermont cannot generally prohibit a particular marketing practice because it is too persuasive).

[225] *See* California Privacy Rights Act of 2020, § 2(E)–(I) (outlining how prior to enactment, consumers do not necessarily understand how businesses use and share their personal information). In contrast, the Vermont law at issue in *Sorrell* attempted to indirectly decrease healthcare costs by limiting the effectiveness of persuasive pharmaceutical marketing techniques. *Sorrell*, 564 U.S. at 576–78.

[226] *See* California Privacy Rights Act of 2020, § 2(H)–(I) (stating that legislation is needed to address the unequal bargaining power between consumers and business). To address this, the CPRA, in the interest of transparency, establishes that consumers have a right to know how businesses will use their personal information. *Id.* § 2(G)–(H).

[227] *See* California Privacy Rights Act of 2020, § 3(B) (imposing responsibilities on businesses to ensure consumers are well-informed as to how businesses collect and use their personal information).

[228] *See* California Privacy Rights Act of 2020, § 3(B) (imposing responsibilities on businesses to inform consumers as to how businesses collect and use their personal information); *cf. Sorrell*, 564 U.S. at 576–77 (holding that Vermont advances its interest in reducing drug prices in indirect ways by suppressing the speech of pharmaceutical marketers).

[229] *See* CAL. CIV. CODE § 1798.120 (West 2022) (effective Jan. 1, 2023) (establishing a consumer right to opt-out to the sharing and disclosure of their personal information); California Privacy Rights Act of 2020, § 2(H)–(I) (recognizing that consumers lack the bargaining power needed to adequately protect their rights and understand how their information is being used).

[230] *Compare* CAL. CIV. CODE § 1798.120 (effective Jan. 1, 2023) (allowing consumers to choose whether a business can sell or share their personal information), *with* 2007 Vt. Acts & Resolves 635, 635 (stating that marketing programs go against the goals of the state), *and* VT. STAT. ANN. tit.18 § 4631(d) (2007) (prohibiting the use of prescriber information in marketing).

vests consumers with greater control of their information in direct service of the government's substantial interest.[231]

Under *Central Hudson*'s fourth prong, the court must then decide whether the restriction on speech is no more extensive than necessary to advance the government's interest.[232] The CPRA likely satisfies this prong because it primarily establishes a baseline level of consumer rights designed to protect consumer personal information.[233] In general, establishing these rights does not unduly burden companies' ability to collect and use personal information.[234] The CPRA merely requires businesses to be transparent in how they use personal information.[235] In conclusion, the CPRA likely satisfies *Central Hudson* without falling victim to *Sorrell*'s pitfalls.[236]

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[231] *Compare* CAL. CIV. CODE § 1798.120 (effective Jan. 1, 2023) (allowing consumers to opt-out of all sales of their personal information), *with* 2007 Vt. Acts & Resolves 635, 635 (stating that marketing programs go against the goals of the state), *and* VT. STAT. ANN. tit.18 § 4631(d) (prohibiting marketing uses of prescriber data).

[232] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y. (*Central Hudson*), 447 U.S. 557, 566 (1980). This does not mean that the regulation needs to be the least restrictive method to achieve the government's interest. Boelter v. Hearst Commc'ns, 192 F. Supp. 3d 427, 449 (S.D.N.Y. 2016) (citing Fla. Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995)). Instead, a regulation must simply be a reasonable way to achieve the government's interest and proportional in scope to the interest. *Id.* (citing Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989)).

[233] *See, e.g.*, CAL. CIV. CODE § 1798.105 (effective Jan. 1, 2023) (granting consumers a right to have their personal information deleted); *id.* § 1798.106 (effective Jan. 1, 2023) (giving consumers a right to modify inaccuracies in their personal information); *id.* § 1798.110 (effective Jan. 1, 2023) (granting consumers a right to know what personal information businesses collect about them and a right to access that information); *id.* § 1798.115 (effective Jan. 1, 2023) (endowing consumers with a right to know what personal information businesses share about them and with whom the businesses share it); *id.* § 1798.120 (effective Jan. 1, 2023) (giving consumers a right to opt-out of the sale or sharing of their personal information).

[234] *See* California Privacy Rights Act of 2020, § 3(C)(1) (stating that the CPRA's privacy protections should be implemented to strengthen consumer privacy while allowing business to continue to innovate); *see also Boelter*, 192 F. Supp. 3d at 449 (holding that the VRPA satisfied the fourth prong of *Central Hudson* because the law, while limiting disclosure, allowed businesses to continue to use the protected information for their legitimate business purposes). For example, allowing consumers to correct inaccurate information would actually benefit businesses because businesses have a more complete understandings of consumers' preferences when they rely on accurate information. *See* CAL. CIV. CODE § 1798.106 (effective Jan. 1, 2023) (establishing a consumer right to correct inaccuracies); *see also Boelter*, 192 F. Supp. 3d at 449 (describing how the VRPA satisfies the fourth prong of *Central Hudson* because the law, while limiting disclosure, allowed businesses to continue to use customer information for business purposes, including advertising).

[235] *See* California Privacy Rights Act of 2020, § 3(A)–(B) (stating that the CPRA's purpose is to protect consumers' rights, and imposing responsibilities on businesses to ensure that they provide consumers a baseline level of rights in their personal information).

[236] *See supra* notes 220–235 and accompanying text (applying the *Central Hudson* test to the CPRA); *see also* Sorrell v. IMS Health Inc., 564 U.S. 552, 580 (2011) (concluding that Vermont enacted the law at issue to suppress speech).

B. Illustrative Example: Applying the Central Hudson *Test to the Colorado Privacy Act*

If someone challenges the CPA, or similar laws in Virginia and Utah, as an unconstitutional commercial speech regulation, a court would determine its validity by employing the *Central Hudson* test.[237] The CPA, like the CPRA, establishes consumer data privacy rights, but it differs in how it defines its applicability.[238] The CPA satisfies *Central Hudson*'s first prong because the sharing of personal information is neither unlawful nor misleading.[239] On the second prong of *Central Hudson*, the court would likely hold that the government has a substantial interest in protecting consumer privacy because courts have repeatedly recognized that the government has a substantial interest in protecting individuals' privacy.[240]

Under *Central Hudson*'s third prong, the challenged regulation must directly advance the government's substantial interest.[241] Pursuant to *Sorrell*, a commercial speech regulation does not directly advance the government's substantial interest if the regulation's actual purpose is to suppress persuasive marketing.[242] The CPA, by balancing its competing interests in bolstering individual privacy and facilitating the use of personal information, likely satisfies this prong.[243] The CPA directly advances its privacy interest by broadly limiting processing, establishing individual rights for consumers, and making con-

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[237] *See supra* notes 176–188 (discussing how even after *Sorrell*, *Central Hudson* remains the constitutionality test for commercial speech regulations); *see also supra* notes 129–135 and accompanying text (outlining key provisions and the legislative purpose of the CPA and similar laws in Virginia and Utah). *See generally* Colorado Privacy Act, 2021 Colo. Sess. Laws 3445 (establishing data privacy rights in Colorado); Utah Consumer Privacy Act, S.B. 227, 2022 Gen. Sess. (Utah 2022) (to be codified in several sections of UTAH CODE ANN. §§ 13-2-1, 13-61) (establishing data privacy rights in Utah); Virginia Consumer Data Protection Act, VA. CODE ANN. §§ 59.1-575 to -585 (2021) (establishing data privacy rights in Virginia).

[238] *Compare* COLO. REV. STAT. § 6-1-1305 (2022) (imposing obligations on "controllers" and "processors"), *with* CAL. CIV. CODE § 1798.100 (effective Jan. 1, 2023) (imposing obligations on "businesses").

[239] *See* COLO. REV. STAT. § 6-1-1303(17) (defining "personal data" under the CPA); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y. (*Central Hudson*), 447 U.S. 557, 566 (1980) (stating that to implicate the First Amendment, a commercial speech regulation must concern lawful activity and cannot be misleading). Typically, the parties do not dispute *Central Hudson*'s first prong. *See, e.g.*, 447 U.S. at 566 (stating that no one disputes *Central Hudson*'s first prong); *Boelter*, 192 F. Supp. 3d at 447 (same).

[240] *See* § 6-1-1302(1)(c) (discussing how the CPA is meant to bolster privacy rights); *Central Hudson*, 447 U.S. at 566 (requiring a substantial governmental interest to justify a commercial speech regulation); *see, e.g.*, *Sorrell*, 564 U.S. at 572 (recognizing that the government has a substantial interest in protecting privacy); *Boelter*, 192 F. Supp. 3d at 447–48 (same).

[241] *Central Hudson*, 447 U.S. at 566.

[242] *See Sorrell*, 564 U.S. at 576–78 (holding that the government cannot generally prohibit a particular marketing practice due to its persuasiveness).

[243] *See* §§ 6-1-1301 to -1313 (establishing basic consumer data privacy rights while empowering controllers and processors to process personal data so long as they respect those rights).

trollers and processors responsible for safeguarding personal information.[244] These provisions—like those at issue in the 2016 case from the U.S. District Court for the Southern District of New York, *Boelter v. Hearst Communications, Inc.*—reduce the likelihood that controllers and processors will misuse or publicize personal information, thus directly serving the government's privacy interest.[245] Also, the CPA's limited exceptions, like the exemptions to the VRPA in *Boelter*, do not undermine the government's privacy interest because they are narrow and sensible.[246] For example, the CPA does not apply to certain types of information that other privacy laws already protect.[247] Furthermore, the CPA directly serves its interest in promoting the free flow of personal information by generally permitting processing so long as controllers inform consumers how they will use their information.[248]

Under *Central Hudson*'s fourth prong, the challenged regulation cannot be more extensive than necessary to advance the government's interest.[249] By

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[244] *See* §§ 6-1-1304 to -1306, -1308 (establishing principles governing personal data processing that controllers and processors must follow).

[245] *See* §§ 6-1-1304 to -1306, -1308 (establishing obligations that controllers and processors owe to consumers with respect to the processing of their personal data); *Boelter*, 192 F. Supp. 3d at 448–49 (recognizing that broad prohibitions on the disclosure of personal information directly serve the government's privacy interest); *cf. Sorrell*, 564 U.S. at 572–73 (stating that Vermont did not advance its stated privacy interest because the law at issue allowed all uses of prescriber information except for marketing).

[246] *See* § 6-1-1304(2), (3) (creating limited exceptions to the CPA's broad scope that primarily exempts data processing that other state or federal law regulates); *Sorrell*, 564 U.S. at 573 (stating that the government fails to serve a purported privacy interest when its regulation generally allows disclosure of the protected information except in narrow circumstances); *Boelter*, 192 F. Supp. 3d at 448–49 (recognizing that limited exceptions to broad privacy protections do not undermine the government's substantial interest in protecting consumer privacy).

[247] *See* § 6-1-1304(2) (exempting certain personal data that other privacy laws protect from the CPA's requirements). For example, the CPA exempts "protected health information . . . processed by a covered entity or its business associates" because HIPAA already protects that information. *See* § 6-1-1304(2)(a) (exempting the protected health information from the CPA); 45 C.F.R. pts. 160, 164 (2021) (detailing the privacy requirements for protected health information). Also, drafting the law in this way allows Colorado to avoid possible federal preemption. *See* U.S. CONST. art. VI., § 1, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

[248] *See* § 6-1-1308(1) (imposing a duty of transparency on controllers); *Boelter*, 192 F. Supp. 3d at 448 (stating that a regulation directly advances its stated government interest when it provides "material" support for the government's purpose to ameliorate the targeted harm (quoting Rubin v. Coors Brewing Co., 514 U.S. 476, 486–87 (1995))); *cf. Sorrell*, 564 U.S. at 573 (stating that a law like HIPAA advances privacy interests by allowing the sharing of protected information in only narrow circumstances).

[249] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y. (*Central Hudson*), 447 U.S. 557, 566 (1980). *Central Hudson* does not mandate that the regulation be the least restrictive method to achieve the government's interest. *Boelter*, 192 F. Supp. 3d at 449 (citing Fla. Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995)). Rather, a regulation must reasonably achieve the government's interest, and the scope of the regulation must be proportional to the government's interest. *Id.* (quoting Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989)).

establishing consumer privacy rights while enabling processing, the CPA likely satisfies this prong because it appropriately balances its competing interests in protecting personal data and facilitating the processing of personal data.[250] In conclusion, the CPA and other similar laws in Virginia and Utah likely comport with *Central Hudson* and avoid the shortcomings of the Vermont law at issue in *Sorrell*.[251]

C. Applying the Central Hudson *Test to the European General Data Protection Regulation*

Assuming that the United States enacts a version of the EU GDPR and someone challenges the law as an unconstitutional regulation of commercial speech, a court would apply the *Central Hudson* test to determine its validity.[252] The GDPR comports with *Central Hudson*'s first prong because the speech at issue—the sharing of personal information—is lawful and not misleading.[253] On the second prong of *Central Hudson*, the court would likely hold that the government has substantial interests in protecting a consumer's personal data and facilitating the free flow of information.[254] Courts have previously found that the government has a substantial interest in protecting privacy, so there is no question that the GDPR's interest in safeguarding consumer's information is substan-

[250] *Compare* § 6-1-1308 (allowing the free flow of personal information by generally permitting controllers to process personal data so long as they adhere to several enumerated duties to consumers), *with* § 6-1-1306 (granting consumers specific rights in their personal data).

[251] *See Sorrell*, 564 U.S. at 577–78 (highlighting that a Vermont law is unconstitutional because its purpose was to suppress speech); *Central Hudson*, 447 U.S. at 566 (announcing the four-prong *Central Hudson* test); *supra* notes 237–250 and accompanying text (applying the *Central Hudson* test to the CPA).

[252] *See supra* notes 176–188 and accompanying text (describing why, even after *Sorrell*, *Central Hudson* applies to commercial speech regulations); *see also supra* notes 107–118 and accompanying text (outlining key provisions and the legislative purpose of the GDPR). *See generally* GDPR, *supra* note 22 (enacting data protection legislation in the EU to protect individuals' privacy rights while simultaneously enabling the processing of personal data for the benefit of humanity).

[253] *See* GDPR, *supra* note 22, at 1 (stating that the GDPR concerns the processing of personal information); *Central Hudson*, 447 U.S. at 566 (stating that the First Amendment only protects commercial speech that concerns lawful activity and is not misleading). Generally, the parties do not contest the first prong of the *Central Hudson* test. *See, e.g.*, *Central Hudson*, 447 U.S. at 566 (stating that no one argues that the speech at issue concerns unlawful activity or is misleading); *Boelter*, 192 F. Supp. 3d at 447 (stating that no one disputed *Central Hudson*'s first prong).

[254] *See* GDPR, *supra* note 22, at 32 (indicating that the drafters of the GDPR designed it to facilitate the free flow of information while simultaneously protecting individuals' fundamental right to data protection); *Sorrell*, 564 U.S. at 572 (stating that the government's interest in protecting prescriber privacy is substantial); *Boelter*, 192 F. Supp. 3d at 447–48 (holding that the government has a substantial interest in protecting consumer privacy); *see also* GDPR, *supra* note 22, at 32 (indicating that the GDPR facilitates the free flow of information while simultaneously protecting individuals' fundamental right to data protection).

tial.[255] In addition, the GDPR's interest in promoting the free flow of information is likely also substantial as courts have shown general deference to the government's opinion that a particular interest is substantial.[256]

In accordance with *Central Hudson*'s third prong, a challenged regulation must directly advance the government's substantial interest.[257] The GDPR likely satisfies this prong by balancing its competing interests.[258] The GDPR directly advances its interest in safeguarding consumer information by limiting processing except in six enumerated circumstances, establishing exercisable individual privacy rights, and requiring controllers and processors to safeguard personal data.[259] These provisions, like those in *Boelter*, reduce the likelihood that personal information will be misused or made public, thereby directly serving the government's data protection interest.[260] In addition, the GDPR's four enumerated exceptions to its broad material scope, like the limited VRPA disclosure exceptions in *Boelter*, do not undermine the government's interest because they are narrow and sensible.[261] For example, the personal and household processing exception does not undermine the GDPR's data protection interest because personal and household processing present far lower risks to individuals' privacy than businesses' large scale processing activities.[262] Also,

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[255] *See* GDPR, *supra* note 22, at 32 (indicating that the GDPR promotes the free flow of information while safeguarding individuals' privacy rights); *Sorrell*, 564 U.S. at 572 (recognizing that the government has a substantial government interest to protect prescriber privacy); *Boelter*, 192 F. Supp. 3d at 447–48 (holding that the protection of consumer privacy is a substantial governmental interest).

[256] *See Sorrell*, 564 U.S. at 572, 577 (accepting implicitly that the government's asserted interests in protecting medical privacy and promoting public health were substantial before proceeding to the directness prong of *Central Hudson*); Retail Digit. Network, LLC v. Prieto (*RDN III*), 861 F.3d 839, 850 (9th Cir. 2017) (en banc) (recognizing that the government had a substantial interest in maintaining the triple-tiered distribution scheme for alcohol); GDPR, *supra* note 22, at 32 (indicating that the GDPR promotes processing while protecting personal information through the establishment of consumer rights).

[257] *Central Hudson*, 447 U.S. at 566.

[258] *See* GDPR, *supra* note 22, at 32–47 (creating principles for the processing of personal data and data subject rights and providing several lawful bases for the processing of personal data).

[259] *See id.* at 32–60 (imposing obligations regarding processing upon controllers and processors by establishing principles governing personal data processing).

[260] *See id.* (establishing principles governing the processing of personal data and individual rights of data subjects); *Boelter*, 192 F. Supp. 3d at 448–49 (recognizing that a general prohibition on the disclosure of consumer data directly serves the government's stated interest in protecting consumer privacy); *cf. Sorrell*, 564 U.S. at 572–73 (holding that the Vermont law did not directly advance the government's stated privacy interest because the law generally allowed use of prescriber information except for marketing).

[261] *See* GDPR, *supra* note 22, at 32 (creating four limited exceptions to the GDPR's broad material scope); *Sorrell*, 564 U.S. at 573 (recognizing that a regulation that generally allows disclosure of prescriber information except in narrow circumstances does not serve a privacy interest); *Boelter*, 192 F. Supp. 3d at 448–49 (recognizing that narrow exceptions to general restrictions that advance consumer privacy do not undermine the government's substantial interest).

[262] *See* GDPR, *supra* note 22, at 2 (recognizing that technological development presents new risks to individuals' right to privacy because companies can better process personal information); *id.* at 32 (exempting personal and household processing activities).

the GDPR directly serves its interest in facilitating the processing of personal information by providing multiple lawful bases for processing.[263]

Central Hudson's fourth prong requires that the regulation of commercial speech be no more extensive than necessary to advance the government's interest.[264] By granting individuals exercisable rights in their personal information while simultaneously providing multiple lawful bases for processing, the GDPR likely satisfies this prong because it adequately balances its competing interests to protect individuals' personal data and to facilitate the free flow of personal information.[265] In conclusion, the GDPR likely comports with *Central Hudson* and avoids the shortcomings of the Vermont law at issue in *Sorrell*.[266]

CONCLUSION

Consumers overwhelmingly believe that companies do not do enough to protect their personal data. As Congress looks to pass federal data protection legislation, it must ensure that any proposed legislation comports with the First Amendment. In 2011, in *Sorrell v. IMS Health Inc.*, the U.S. Supreme Court struck down a Vermont privacy law that prohibited the use of prescriber information for marketing. The Court held that the law violated the First Amendment because its true purpose was to hamstring the persuasive marketing efforts of pharmaceutical companies rather than protect consumers' privacy. Since *Sorrell*, courts have made clear that the *Central Hudson* test for commercial speech regulations survives and applies in First Amendment challenges to privacy laws. Legislatures must consider the lessons from *Sorrell* to avoid potential First Amendment challenges. First, to avoid the shortcomings of the law at issue in *Sorrell*, data protection legislation must generally restrict the use of protected information to limited, well-supported circumstances. Second,

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[263] *See* GDPR, *supra* note 22, at 36 (providing six lawful bases for processing); *Boelter*, 192 F. Supp. 3d at 448 (stating that a regulation advances the government's interest when it materially supports the government's purpose in ameliorating the targeted harm (quoting Rubin v. Coors Brewing Co., 514 U.S. 476, 486–87 (1995)); *cf. Sorrell*, 564 U.S. at 573 (recognizing that a law like HIPAA advances its privacy interests by generally prohibiting the dissemination of protected information except in narrow circumstance).

[264] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y. (*Central Hudson*), 447 U.S. 557, 566 (1980). Under *Central Hudson,* the regulation does not need to be the least restrictive method to achieve the government's substantial interest. *Boelter*, 192 F. Supp. 3d at 449 (citing Fla. Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995)). Instead, a regulation only needs to be: (1) reasonable to achieve the government's interest; and (2) proportional to the government's interest. *Id.* (citing Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989)).

[265] *Compare* GDPR, *supra* note 22, at36 (allowing the free flow of personal information by stipulating multiple lawful bases for processing), *with id.* at 35–36 (implementing principles to guide the processing of personal information in the interests of individual data subjects).

[266] *See Sorrell*, 564 U.S. at 577–78 (holding the Vermont law unconstitutional because its purpose is to suppress speech); *Central Hudson*, 447 U.S. at 566 (establishing a four-prong test to determine whether a commercial speech regulation violates the First Amendment); *supra* notes 252–265 and accompanying text (applying the *Central Hudson* test to the GDPR).

the legislation cannot be explicitly targeted to inhibit particular marketing practices. Lastly, comprehensive data protection legislation is not necessarily immune to these pitfalls if the legislative record shows that the law is meant to prohibit companies from engaging in data-powered advertising. The California Privacy Rights Act, the Colorado Privacy Act and similar laws in Utah and Virginia, and the European General Data Protection Regulation likely avoid these pitfalls and would satisfy the *Central Hudson* test for commercial speech regulations.

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