Boston University School of Law
Scholarly Commons at Boston University School of Law

Faculty Scholarship

12-2023

Brief of Amici Curiae Privacy and First Amendment Law Professors in Support of Defendant-Appellant and Reversal

G. S. Hans
Cornell Law School

Hannah Bloch-Wehba
Texas A&M University School of Law

Danielle K. Citron

Julie E. Cohen
Georgetown University Law Center

Mary Anne Franks

See next page for additional authors

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship

 Part of the Courts Commons, Legislation Commons, and the Privacy Law Commons

Recommended Citation

G. S. Hans, Hannah Bloch-Wehba, Danielle K. Citron, Julie E. Cohen, Mary Anne Franks, Woodrow Hartzog, Margot E. Kaminski, Gregory P. Magarian, Frank Pasquale, Neil Richards & Daniel J. Solove, *Brief of Amici Curiae Privacy and First Amendment Law Professors in Support of Defendant-Appellant and Reversal* (2023).
Available at: https://scholarship.law.bu.edu/faculty_scholarship/3709

This Brief is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact lawlessa@bu.edu.

BOSTON UNIVERSITY

Authors

G. S. Hans, Hannah Bloch-Wehba, Danielle K. Citron, Julie E. Cohen, Mary Anne Franks, Woodrow Hartzog, Margot E. Kaminski, Gregory P. Magarian, Frank Pasquale, Neil Richards, and Daniel J. Solove

This brief is available at Scholarly Commons at Boston University School of Law: https://scholarship.law.bu.edu/faculty_scholarship/3709

No. 23-2969

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NETCHOICE, LLC,

Plaintiff-Appellee,

v.

ROB BONTA, in his official capacity as Attorney General of the State of California,

Defendant-Appellant.

Appeal from the Judgment of the United States District Court
For the Northern District of California
District Court No. 5:22-cv-08861-BLF
Honorable Beth Labson Freeman

BRIEF OF AMICI CURIAE PRIVACY AND FIRST AMENDMENT LAW PROFESSORS IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL

G.S. Hans
CORNELL LAW SCHOOL
Myron Taylor Hall
Ithaca, N.Y. 14853
Telephone: 607-254-5994
Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

INTRODUCTION 2

ARGUMENT 3

I. The Supreme Court Has Evaluated Data Privacy Laws on a Case-by-Case Basis Rather than Categorically Invalidating Such Laws. 3

II. Data Privacy Laws Like the CAADCA Do Not Automatically Trigger First Amendment Scrutiny 5

III. Even if the CAADCA Triggers First Amendment Scrutiny, The District Court Improperly Analyzed Its Provisions. 8

A. Commercial Speech Scrutiny, Rather than Strict Scrutiny, Applies to Data Privacy Regulations that Implicated the First Amendment 8

B. The District Court Misapplied the *Central Hudson* Test 10

CONCLUSION 12

APPENDIX: LIST OF SIGNATORIES 13

CERTIFICATE OF COMPLIANCE 15

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

Page(s)

Federal Cases

ACA Connects – Am's Commcn's Ass'n v. Frey,
471 F.Supp.3d 318 (D. Me. 2020) 7, 8, 9

Bartnicki v. Vopper,
532 U.S. 514 (2001) 4

Central Hudson Gas & Electric Corp. v. Public Service Commission,
447 U.S. 557 (1980) 8

Contest Promotions, LLC v. City and County of San Francisco,
874 F.3d. 597 (9th Cir. 2017) 11

Giboney v. Empire Storage & Ice Co.,
336 U.S. 490 (1949) 6

Glickman v. Wileman Bros. & Elliott, Inc.,
521 U.S. 457 (1997) 7

King v. Gen. Inf. Services,
903 F.Supp.2d 303 (E.D. Pa. 2012) 8

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992) 4

Retail Digital Network, LLC. v. Prieto,
861 F.3d. 839 (9th Cir.) 4, 11

Sorrell v. IMS Health, Inc.,
385 U.S. 374 (1967) 5, 6

Time, Inc. v. Hill,
385 U.S. 374 (1967) 4

United States v. Hansen,
599 U.S. 762 (2023) 10

United States v. O'Brien,
391 U.S. 367 (1968) 5

State Cases

Am. Civil Liberties Union v. Clearview AI, Inc.,
2021 WL 4164452 (Cir. Ct. of Ill.) (Aug. 27, 2021) 7, 9

Federal Statutes

Fair Credit Reporting Act, 15 U.S.C. § 1681(c) 4

Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320(d)-2 4

State Statutes

Cal. Civ. Code. § 1798.99.31(a) 7

Cal. Civ. Code. § 1798.99.31(b) 7

STATEMENT OF INTEREST

Amici curiae are law professors and scholars of data privacy, constitutional law, and the First Amendment. Amici write to provide the court with scholarly expertise on the complexities of data privacy law and its intersection with the First Amendment. Amici have collectively written scores of academic articles and multiple books on data privacy, technology, the First Amendment, and constitutional challenges to state and federal privacy regulation.

Amici submit this brief pursuant to Fed. Rule App. P. 29(a) and do not repeat arguments made by the parties. No party's counsel authored this brief, or any part of it. No party's counsel contributed money to fund any part of the preparation or filing of this brief. Amici file this brief with the consent of the parties.

INTRODUCTION

Amici urge this court to reverse and remand the district court's ruling, which threatens data privacy laws beyond the California Age Appropriate Design Code Act (CAADCA). The district court's ruling misstates relevant First Amendment doctrine and needlessly endangers the constitutionality of several data privacy laws beyond the CAADCA. It may even forestall any future data privacy proposals contemplated by California, other states, or Congress.

Contrary to the district court ruling, data privacy laws are constitutional under the First Amendment. The district court's reasoning imperils federal and state laws, some of which date back a half century. The Federal Trade Commission has enacted notice-and-choice regulation since the 1990s. And the Commission has regulated unfair and deceptive trade acts and practices since its founding over a century ago. If this court does not correct the district court's analysis, it will upend much, if not all, of data privacy law.

In the absence of Congressional action, several state legislatures across the political spectrum have passed data privacy laws to govern one of our most fast changing and economically significant sectors. The district court's ruling threatens that trajectory, potentially stopping the momentum of democratically elected branches of government. This court should thus reject the lower court's reasoning

and adopt the perspectives of other courts that have recently considered and rejected First Amendment challenges to data privacy regulations.

Part I provides a brief overview of the Supreme Court's approach to data privacy regulations and how those regulations, throughout their long history, have promoted speech interests. Part II describes how most data privacy regulations fail to trigger any First Amendment scrutiny, as they function as economic regulations that only incidentally burden speech. Part III contends that, even if this court determines that the CAADCA implicates First Amendment review, it at most only qualifies as behavior antecedent to commercial speech, thus warranting intermediate scrutiny under Supreme Court precedent that California easily satisfies.

ARGUMENT

I. THE SUPREME COURT HAS EVALUATED DATA PRIVACY LAWS ON A CASE-BY-CASE BASIS RATHER THAN CATEGORICALLY INVALIDATING SUCH LAWS.

The district court's ruling in this case endangers the entire category of data privacy laws beyond the CAADCA. 1-ER-13 ("[T]he Act's prohibitions—which restrict covered business from '[c]ollect[ing], sell[ing], shar[ing], or retain[ing] any personal information' for most purposes, *see, e.g.,* CAADCA § 31(b)(3)—limit the 'availability and use' of information by certain speakers and for certain purposes and thus regulate protected speech."). This description of the CAADCA implicates

nearly all data privacy laws, many of which regulate collection and use of information. *See, e.g.,* Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320(d)–2; Fair Credit Reporting Act, 15 U.S.C. § 1681(c).

Such a categorical decree flies in the face of the Supreme Court's jurisprudence. The Court has declined to invalidate data privacy law generally, instead choosing to evaluate such laws on a case-by-case basis. *See, e.g., Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Bartnicki v. Vopper*, 532 U.S. 514 (2001). When determining whether a specific data privacy law violates the First Amendment, the Supreme Court has cautiously evaluated each law's provisions rather than broadly opining on the concepts of data privacy laws more generally. This court should follow that example rather than ratify the district court's heedless approach.

Data privacy laws generally contain restrictions on collection, use, and retention of data, in addition to transparency and disclosure requirements. All of these provisions further First Amendment values by promoting the formation of individual identity, autonomy, and democratic participation. Indeed, the Supreme Court has rejected the creation of an artificial conflict between privacy and speech, noting that privacy protections *promote* speech interests. *See, e.g., id.* at 533 ("The fear of public disclosure of private conversations might well have a chilling effect on private speech.").

The lower court and appellee have relied heavily upon the Supreme Court's decision in *Sorrell v. IMS Health* to support invalidating the CAADCA. Such reliance contravenes the singular facts and analysis in *Sorrell*. Justice Kennedy noted in his majority opinion in *Sorrell* that the Vermont law might have fared better if it were "a more coherent policy," implicitly comparing it to the better structured Health Insurance Portability and Accountability Act (HIPAA). *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 573 (2011). *Sorrell* shows the shortcomings of sweeping generalizations regarding the constitutionality of privacy laws, which courts should analyze on a case-by-case basis to preserve the interplay between privacy and speech. The district court's failure to heed that message from the Supreme Court warrants reversal and correction by this court.

II. DATA PRIVACY LAWS LIKE THE CAADCA DO NOT AUTOMATICALLY TRIGGER FIRST AMENDMENT SCRUTINY.

As an initial matter, courts must analyze whether a law challenged on First Amendment grounds regulates speech at all, or if it instead regulates conduct or only incidentally burdens speech. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968) (holding that not all conduct that an individual commits with an intent to communicate an idea constitutes speech); *Sorrell*, 565 U.S. at 567 ("It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech."). This Court should properly construe the CAADCA as an economic regulation that does not trigger

First Amendment scrutiny and at most incidentally burdens the speech of appellee and other regulated entities.

Despite appellee's contentions, regulations on the transfer of data do not *automatically* qualify as regulations of First Amendment-protected speech. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.").

The argument that *Sorrell* changed this bedrock First Amendment principle, at least with respect to regulations of data, assumes too much. *Sorrell* is best interpreted as a case concerning *viewpoint*-based economic regulations of data, while preserving other data regulations (like HIPAA) that do not discriminate on the basis of viewpoint. Any other interpretation renders a nullity Justice Kennedy's observation in *Sorrell* that other laws that regulate data more coherently can satisfy the First Amendment. *Sorrell* serves as an analogue to *R.A.V. v. City of St. Paul*, which held that viewpoint-based prohibitions even for unprotected speech violate the First Amendment. 505 U.S. 377, 383–86 (1992). The Vermont statute's fatal flaw in *Sorrell* was not that it regulated information, but rather that it did so *on the basis of viewpoint*. *Sorrell*, 564 U.S. at 565 ("In its practical operation, Vermont's

law goes even beyond mere content discrimination, to actual viewpoint discrimination.") (internal citations omitted).

Lower courts have relied upon this reading in finding other data privacy regulations constitutional by rejecting an expansive interpretation of *Sorrell*; this court should follow those precedents. *See, e.g.*, *ACA Connects – Am's Commcn's Ass'n v. Frey*, 471 F.Supp.3d 318 (D. Me. 2020) (declining to apply *Sorrell* to a First Amendment challenge to a Maine consumer privacy statute); *Am. Civil Liberties Union v. Clearview AI*, 2021 WL 4164452 (Cir. Ct. of Ill.) (Aug. 27. 2021) (declining to apply *Sorrell* to a First Amendment challenge to Illinois' Biometric Information Privacy Act). This court should adopt this appropriate reading of *Sorrell* and correct the district court's expansive interpretation. Fundamentally, data privacy regulations can and should be properly construed as comprehensive economic regulations that do not implicate the First Amendment, following Supreme Court precedent. *See Glickman v. Wileman Bros. & Elliott*, *Inc.*, 521 U.S. 457, 469–70 (1997) (finding that a regulatory scheme that incidentally burdened speech did not trigger First Amendment scrutiny).

The CAADCA, like other privacy statutes, creates limitations on the collection and use of data; levies transparency requirements; and creates compliance obligations. Cal. Civ. Code § 1798.99.31(b) (limiting collection, use, and retention of data); Cal. Civ. Code. § 1798.99.31(a) (mandating the creation of

Data Privacy Impact Assessments and the publication of policies, terms of service, and community standards). These elements have a long and venerable history in data privacy law, and in laws that have survived First Amendment challenges. *See, e.g.*, *King v. Gen. Inf. Services*, 903 F.Supp.2d 303 (E.D. Pa. 2012) (upholding Fair Credit Reporting Act in a post-*Sorrell* First Amendment challenge); *ACA Connects*, 471 F.Supp.3d 318. The CAADCA fits cleanly into the long history of data privacy regulations; this court should not invalidate the law based on common regulatory characteristics that other courts have found unobjectionable to the First Amendment.

III. EVEN IF THE CAADCA TRIGGERS FIRST AMENDMENT SCRUTINY, THE DISTRICT COURT IMPROPERLY ANALYZED ITS PROVISIONS.

A. Commercial Speech Scrutiny, Rather than Strict Scrutiny, Applies to Data Privacy Regulations that Implicate the First Amendment.

After finding that the CAADCA did regulate speech, the lower court properly analyzed the CAADCA as a commercial speech regulation subject to intermediate scrutiny under the test articulated by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). 1-ER-18. However, the lower court did not properly apply the *Central Hudson* test, warranting correction by this court.

Despite appellee's contentions, data does not constitute speech. It at most *facilitates* speech. As such, even if a data privacy law implicates the First Amendment, intermediate scrutiny — not strict — provides the appropriate standard of review. Only in the rare instance that a data privacy law discriminates on the basis of *viewpoint*, like the Vermont law at issue in *Sorrell*, should a court apply strict scrutiny. Indeed, the Ninth Circuit has previously held that *Sorrell* did not disrupt the *Central Hudson* analysis for commercial speech for content- or speaker-based restrictions. *Retail Digital Network, LLC v. Prieto*, 861 F.3d. 839, 847–51 (9th Cir. 2017).

Applying intermediate scrutiny also follows the lead of other courts that have evaluated data privacy laws challenged on First Amendment grounds in the years since *Sorrell* and found them constitutional under an intermediate scrutiny standard. *See, e.g.*, *ACA Connects – Am's Commcn's Ass'n v. Frey*, 471 F.Supp.3d 318, 327–29 (D. Me. 2020); *Am. Civil Liberties Union v. Clearview AI*, *Inc.*, 2021 WL 4164452 (Circ. Ct. of Ill.) (Aug. 27. 2021). As amici have argued, much of the CAADCA does not trigger First Amendment scrutiny; for the limited provisions that this Court holds that it does, the CAADCA can be analyzed on a provision-by-provision basis, applying commercial scrutiny to those limited provisions. The lower court's invocation of *Central Hudson* provides the correct constitutional basis for review, but this court need not apply *Central Hudson* to *every* provision

of the CAADCA. To do so would be to act bluntly where precision is needed. *See, e.g., United States v. Hansen*, 599 U.S. 762, 785 (2023) (declining to invalidate a statute because to do so would "throw out too much of the good based on a speculative shot at the bad").

B. The District Court Misapplied the *Central Hudson* Test.

Central Hudson provides a deferential, though still searching, standard of review towards regulations of commercial speech. The District Court's analysis fails to properly assess the state's interests in protecting the data privacy of consumers by criticizing the means-ends fit in the CAADCA.

The district court failed most obviously in its means-ends analysis, denigrating the requirement that terms of service, privacy policies, and community standards be published as unrelated to any kind of consumer protection argument. 1-ER-26–28. The court also criticized a standard limitation on collection and use of data as "greatly overinclusive or underinclusive," even though such limitations feature frequently in data privacy laws. *Id.* at 31. The court's approach generally evinces a hostility towards California's approach, assuming that the judiciary can evaluate the complexities of data privacy regulation better than a legislature can. This approach fails to respect the proper role of the judiciary, particularly when applying intermediate scrutiny. The Supreme Court has reminded us that even

strict scrutiny is not fatal in fact — yet the district court applied intermediate scrutiny with blunt force that proved deadly to the CAADCA.

In its brief, Appellant explained specifically how the district court erred in its analysis of specific provisions of the CAADCA. Appellant's Opening Brief at 40–49. But in its general approach, the district court overstepped its bounds by effectively second-guessing the legislature and usurping its role. Intermediate scrutiny does not give any court the license to micromanage legislative determinations. *See Contest Promotions, LLC v. City and County of San Francisco*, 874 F.3d. 597, 604 (9th Cir. 2017) ("[A] law need not deal perfectly and fully with an identified problem to survive intermediate scrutiny."). The district court's analysis, though nominally applying intermediate scrutiny, in actuality resembles strict scrutiny analysis in its hostile approach to the government's arguments. And the Ninth Circuit has previously rejected the argument that *Sorrell* transformed *Central Hudson* into a standard higher than intermediate scrutiny. *Retail Digital Network v. Prieto*, 861 F.3d 839 (9th Cir. 2017).

Amici support Appellant's analysis of the challenged provisions of the CAADCA. Importantly, other courts that have evaluated data privacy laws post-*Sorrell* have both applied intermediate scrutiny and found those laws constitutional. *See supra* Part III.A. Amici are unaware of any court that has invalidated a data privacy law after applying intermediate scrutiny post-*Sorrell*.

While that does not require this court to uphold the CAADCA under intermediate scrutiny review, it does demonstrate the pattern of judicial deference to legislative determinations of the need for specific data privacy regulations, even when those regulations trigger First Amendment scrutiny. This court should similarly uphold the CAADCA and reverse the district court's ruling.

CONCLUSION

For the foregoing reasons, amici respectfully urge this court to reverse and remand the district court's ruling.

Date: December 20, 2023

Respectfully submitted,

/s/ G.S. Hans
G.S. Hans
CORNELL LAW SCHOOL
Myron Taylor Hall
Ithaca, N.Y. 14853
Telephone: 607-254-5994

Counsel for Amici Curiae

APPENDIX: LIST OF SIGNATORIES[1]

Hannah Bloch-Wehba
Associate Professor of Law
Texas A&M University School of Law

Danielle Keats Citron
Jefferson Scholars Foundation Schenck Distinguished Professor of Law
Caddell and Chapman Professor of Law
University of Virginia School of Law

Julie E. Cohen
Mark Claster Mamolen Professor of Law and Technology
Georgetown University Law Center

Mary Anne Franks
Eugene L. and Barbara A. Bernard Professor in Intellectual Property, Technology, and Civil Rights Law
George Washington University Law School

Woodrow Hartzog
Professor of Law
Boston University School of Law

Margot E. Kaminski
Professor of Law
University of Colorado Law School

Gregory P. Magarian
Thomas and Karole Green Professor of Law
Washington University in St. Louis School of Law

Frank Pasquale
Professor of Law
Cornell Law School and Cornell Tech

[1] Amici's law school affiliations are stated for purposes of identification only. The views expressed herein represent the views of the individual signatories and should not be taken as the views of their universities.

Neil Richards
Koch Distinguished Professor in Law
Washington University in St. Louis School of Law

Daniel J. Solove
Eugene L. and Barbara A. Bernard Professor in Intellectual Property and Technology Law
George Washington University Law School

CERTIFICATE OF COMPLIANCE

I am the attorney or self-represented party.

This brief contains 2611 words, excluding the items exempted by Fed. R. App. P. 23(f). The brief's type size and typeface comply with Fed. R. App. P. 23(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[X] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:

[ ] it is a joint brief submitted by separately represented parties;
[ ] a party or parties are filing a single brief in response to multiple briefs; or
[ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature: */s/ G.S. Hans* **Date:** December 20, 2023

CERTIFICATE OF SERVICE

I certify that on December 20, 2023, this brief was e-filed through the CM/ECF System of the U.S. Court of Appeals for the Ninth Circuit. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: December 20, 2023

Respectfully submitted,

/s/ G.S. Hans

G.S. Hans
CORNELL LAW SCHOOL
Myron Taylor Hall
Ithaca, N.Y. 14853
Telephone: 607-254-5994

Counsel for Amici Curiae