December 6, 2019


**Via E-Mail**

Privacy Regulations Coordinator
California Office of the Attorney General
300 South Spring Street, First Floor
Los Angeles, CA 90013
PrivacyRegulations@doj.ca.gov

**Re: Proposed California Consumer Privacy Act Regulations**

To whom it may concern:

On behalf of the undersigned organizations, we appreciate the opportunity to comment on the California Attorney General's ("AG") proposed California Consumer Privacy Act ("CCPA" or "the Act") Regulations. As discussed below, we believe that although consumer data privacy is an important subject that should be addressed at the national level, the U.S. Constitution categorically bars individual states from seeking to regulate the Internet on a national level, as California has sought to do here. The Internet is a subject requiring national uniformity that can only be regulated by the federal government, as opposed to through a burdensome and conflicting patchwork of flatly unconstitutional extraterritorial state laws like the CCPA.

In January 2019, a coalition of privacy experts warned the California Legislature about the CCPA's fatal constitutional flaw: "The CCPA's purported application to activity outside of California raises substantial Constitutional concerns and potentially exposes the state to expensive and distracting litigation."[1] They urged the California Legislature to "clarify the CCPA's applicability to activities outside of California."[2] The California Legislature has not heeded these privacy experts' clarion call for amendments to the CCPA to bring it in line with constitutional limits on the scope of California's regulatory authority.

The CCPA specifically directs the AG to adopt regulations "[e]stablishing any exceptions [to the CCPA]

[1] Letter from Professor Eric Goldman *et al.* to The Honorable Toni Atkins *et al.*, 3 (Jan. 17, 2019), http://bit.ly/2DgP0by.

[2] *Id.*

necessary to comply with state or federal law,"[3] which includes the federal Constitution. Accordingly, we urge you to amend the CCPA regulations to formally, and permanently, disavow any intention of bringing enforcement actions under the CCPA outside of California, due to the statute's blatant unconstitutionality,[4] as well as permanently prohibit private parties from any attempt to sue companies outside California for alleged violations of the CCPA. Businesses and California's sister States should not be forced to sue in federal court to protect their federal constitutional rights.

## I. EXECUTIVE SUMMARY

The CCPA is California's misguided attempt to regulate privacy on a national level to impose its vision of public policy on the entire country. As the California Department of Justice has acknowledged in connection with this rulemaking: "California standards often become national standards because, given the size of the California economy, companies find it easier to adopt a uniform approach rather than differentiating their offerings."[5] So too here.

The Act imposes draconian compliance obligations on a host of companies, has a sweeping extraterritorial effect, subjects businesses to an inconsistent patchwork of regulations, and threatens to stifle not only technology and innovation but also free speech. The CCPA is also unconstitutional. *First*, the CCPA is invalid because it has the practical effect of regulating wholly out-of-state conduct and burdening interstate commerce in violation of the dormant Commerce Clause. *Second*, the CCPA's restrictions on free speech violate the First Amendment. *Third*, the CCPA violates due process for failure to give fair notice of prohibited or required conduct.

## II. STATUTORY AND REGULATORY BACKGROUND

### A. Overview of CCPA

In 2018, pursuant to a deal struck with the California real estate developer responsible for the ballot initiative, California enacted Assembly Bill 375 (AB 375), now known as the CCPA. In return, the developer pulled the ballot initiative.[6]

The CCPA is an unprecedented state privacy law that will impose sweeping restrictions on the handling of California residents' data that will affect most businesses with any online presence, imposing draconian compliance costs.[7] As the Standardized Regulatory Impact Assessment

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[3] Cal. Civ. Code § 1798.185(a)(3).

[4] *Cf. Lockyer v. City & Cnty. of S.F.*, 95 P.3d 459, 501–02 (2004) (Moreno, J., concurring) (arguing "there are at least three types of situations in which a local government's disobedience of a[n] unconstitutional statute would be reasonable").

[5] Cal. Dep't of Justice, Notice of Proposed Rulemaking Action [hereinafter "NPRA"], at 13 (Oct. 11, 2019), *available at* http://bit.ly/33jGZxl; *accord* Cal. Dep't of Justice, Office of the Attorney General, Standardized Regulatory Impact Assessment: California Consumer Privacy Act of 2018 Regulations [hereinafter "SRIA"], at 32 (Aug. 2019) ("Given the size of the California economy, previous legislation that was unique to California has in turn set national standards[.]"), *available at* http://bit.ly/2qItKJ2.

[6] *See* SRIA at 7 ("Before reaching the ballot however, the California legislature offered AB 375 in exchange for the withdrawal of the ballot measure.").

[7] The Act grants California residents a number affirmative rights, which covered businesses must accommodate at their expense, including the right to request that a business that sells consumer information or discloses it for a business purpose discloses to the consumer the categories of information collected or disclosed, Cal. Civ. Code § 1798.115;

("SRIA") explains, the CCPA and its implementing regulations impose a diverse array of costly new obligations, including:

> 1. Legal: Costs associated with interpreting the law so that operational and technical plans can be made within a business.
>
> 2. Operational: Costs associated with establishing the non-technical infrastructure to comply with the law's requirements.
>
> 3. Technical: Costs associated with establishing technologies necessary to respond to consumer requests and other aspects of the law.
>
> 4. Business: Costs associated with other business decisions that will result from the law, such as renegotiating service provider contracts and changing business models to change the way personal information is handled or sold.[8]

The SRIA correctly recognizes that the legal "costs can be quite large"; the "[o]perational costs . . . can include substantial labor costs"; and that "[t]echnology costs, which cover the websites, forms, and other systems necessary to fulfill the CCPA compliance obligations, are also quite substantial due to passage of the CCPA."[9] "Small firms are likely to face a disproportionately higher share of compliance costs relative to larger enterprises. . . . Another significant risk to small businesses is uncertainty."[10]

Accordingly, as the California AG found, the CCPA and its implementing "regulations may have a significant, statewide adverse economic impact directly affecting business[.]"[11] "These businesses fall within most sectors of the California economy, including agriculture, mining, utilities, construction, manufacturing, wholesale trade, retail trade, transportation and warehousing, information, finance and insurance, real estate, professional services, management of companies and enterprises, administrate services, educational services, healthcare, arts, accommodation and food services, among others."[12] Worse still, the new law was designed to, and will apply, extraterritorially to businesses operating outside of California, so long as there is any nexus to California. Companies that are not prepared to comply with the Act's onerous requirements will face the threat of severe civil penalties and class action lawsuits.

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right to opt out of sale of "personal information," *id*. § 1798.120; *see also id*. § 1798.135; and right to deletion of "personal information." *id*. § 1798.105. The CCPA also affirmatively requires covered businesses to provide notice and disclosure of "personal information" they collect, *id*. § 1798.100(b), and effectively mandates an overhaul of consumer-facing websites, micromanaging the content, *id*. § 1798.135. The Act further specifies how businesses are supposed to receive and respond to various requests propounded by California residents and sets a timeline for response. *Id*. § 1798.130. This means that, as a practical matter, covered businesses must revise their websites and privacy policies, undertake the onerous process of determining what data they have about California consumers and where it is located, and pay for the compliance costs associated with responding to various California consumers' requests under the Act. The Act also imposes training requirements. *See id.* § 1798.130(a)(6).

[8] SRIA at 10.

[9] *See id.* at 10–11.

[10] *Id.* at 31.

[11] NPRA at 11.

[12] *Id.*

As discussed below, in addition to the CCPA's policy-related and practical problems, as drafted in its current form, the Act violates the federal Constitution in a several ways.

### B. Extraterritorial Scope of Compliance Obligations

The CCPA's onerous compliance obligations apply to a wide array of commercial entities that in any way "do[] business in the State of California," if certain threshold requirements are met.[13] Specifically, companies with any California nexus—regardless of whether they have any physical presence within California—must comply with the Act if any one of the following requirements are met: (A) "annual gross revenues in excess of twenty-five million ($25,000,000)," regardless of profit margin; (B) any company that "[a]lone or in combination, annually buys, receives for the business's commercial purposes, sells, or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more consumers, households, or devices[]"; or (C) "[d]erives 50 percent or more of its annual revenues from selling consumers' personal information."[14] As a practical matter, these definitions, particularly coupled with the Act's very broad definition of "[p]ersonal information,"[15] threaten to sweep in most companies operating in the United States with any significant online presence.

The Act purports to apply even to companies that do not have any nexus whatsoever with California (including those that do not have a single California customer), such as commonly branded parents and subsidiaries of covered businesses.[16] Thus, for example, a parent company based overseas and conducting no business whatsoever within the United States would be subject to the Act if a subsidiary without any physical presence in California was subject to the Act by virtue of any nexus with California coupled with meeting any of the threshold requirements. Indeed, the Act contains a provision that purports to extend globally to transactions that have no nexus whatsoever to California except for the possession of California residents' personal information, even if that information was originally received by some other entity located outside of California, by creating a legal fiction: that the out-of-state entity that somehow "received" the "personal information" from some other out-of-state entity that does business in California should be deemed to both do business with California and also "collect" the information.[17] Just as the CCPA applies broadly to a host of commercial enterprises, many of which have tenuous or nonexistent physical contacts with California, the CCPA contains a sweeping and vague definition of "personal information" to which it applies.[18]

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[13] *See* Cal. Civ. Code § 1798.140(c)(1).

[14] *Id*. § 1798.140(c)(1)(A)-(C).

[15] *Id*. § 1798.140(o).

[16] *Id*. § 1798.140(c)(2) (defining "business" to include "Any entity that controls or is controlled by a business, as defined in paragraph (1), and that shares common branding with the business").

[17] *Id*. § 1798.115(d) ("A third party shall not sell personal information about a consumer that has been sold to the third party by a business unless the consumer has received explicit notice and is provided an opportunity to exercise the right to opt-out[.]"); *Id*. § 1798.140(w) (broad definition of "third party"); *Id*. § 1798.140(t) (broad definition of "sell"). *See also* California Senate Judiciary Committee Report, AB 375, at 9 (June 25, 2018). *Cf.* Cal. Civ. Code § 1798.190.

[18] *See* Cal. Civ. Code § 1798.140(o)(1) ("'personal information' means information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household" and providing a non-exhaustive list of examples); *see also id*. § 1798.80(e).

Businesses and service providers that are subject to the Act must take a number of affirmative actions or risk civil penalties and class action lawsuits.[19] Importantly, the Act's civil penalties provision is not limited to "businesses," as defined in the Act, and purports to broadly apply to a variety of third parties that have no nexus whatsoever with California.[20] Indeed, the Initial Statement of Reasons ("ISOR") admits that CCPA "regulations may be enforceable against businesses located in other states that have their own attorneys general."[21] Yet California refused even to attempt to assess the economic effects of its CCPA regulations on out-of-state entities.[22]

Perhaps recognizing the extraterritorial effect of the Act—and the attendant constitutional problems with said effect, discussed below—the Act attempts to bring itself within constitutional bounds through a provision that purports to exempt wholly out-of-state conduct from its purview.[23] Similarly, the CCPA only grants rights and privileges to natural persons who are "California residents . . . however identified, including by unique identifier."[24] However, these superficial bows to the U.S. Constitution are woefully insufficient.

## III. THE CCPA VIOLATES THE COMMERCE CLAUSE.

### A. The CCPA Has the Practical Effect of Regulating Wholly Out-of-State Conduct.

As described above, the CCPA regulates extraterritorially in violation of the dormant Commerce Clause.[25] "[S]tate regulation violates the dormant Commerce Clause . . . if it regulates conduct occurring entirely outside of a state's borders."[26] When a state statute directly regulates interstate commerce, whether facially or in practical effect, the Court generally has "struck down the statute without further inquiry."[27] The dormant Commerce Clause's bright-line *per se* bar against extraterritorial regulation is rooted in federalism. It is fundamental to our system of federalism that "[n]o state can legislate except with reference to its own jurisdiction."[28] A state's regulatory authority "is not only subordinate to the federal power over interstate commerce, but is

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[19] *See* Cal Civ Code § 1798.155(b) (civil penalties of up to $2,500 for each violation and $7,500 for each intentional violations); Cal Civ Code § 1798.150 (private right of action, including class action, for data breach).

[20] *See* Cal Civ Code § 1798.155(b) ("Any business, service provider, or other person that violates this title shall be subject to an injunction and liable for a civil penalty[.]" (emphasis added)); *see also* Cal Civ Code § 1798.140(v) (defining "service provider"); Cal Civ Code § 1798.140(w) (broad definition of "third party").

[21] ISOR at 3.

[22] *See* SRIA at 21.

[23] *See* Cal Civ Code § 1798.145(a)(6).

[24] *See* Cal Civ Code § 1798.140(g).

[25] *See also* Jeff Kosseff, *Hamiltonian Cybersecurity*, 54 Wake Forest L. Rev. 156, 193-203 (2019) (state regulation of the Internet may be vulnerable to constitutional challenges); Jennifer Huddleston and Ian Adams, "Potential Constitutional Conflicts in State and Local Data Privacy Regulations," at 6-9 (Dec. 2019), *at* http://bit.ly/2LiR1IK.

[26] *Am. Fuel &Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 911 (9th Cir. 2018); *see Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 445 (9th Cir. 2019) ("A per se violation of the dormant Commerce Clause occurs [w]hen a state statute directly regulates or discriminates against interstate commerce[.] . . . A local law directly regulates interstate commerce when it directly affects transactions that take place across state lines or entirely outside of the state's borders." (cleaned up)); *see also Legato Vapors, LLC v. Cook*, 847 F.3d 825, 830 (7th Cir. 2017). Courts have held that actual inconsistency between state regulations is not required; "the threat of inconsistent regulation, not inconsistent regulation in fact, is enough[.]" *Id.* at 834.

[27] *Brown-Forman Distillers Corp. v. New York State Liquor Auth*., 476 U.S. 573, 579 (1986).

[28] *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881).

also constrained by the need to respect the interests of other States."[29] The rule that one state has no power to project its legislation into another state embodies the Constitution's concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres.[30]

The CCPA violates this rule. Numerous state statutes regulating the Internet have been found unconstitutional on these grounds.[31] The CCPA is no different. The Act on its face and in practical effect regulates wholly out-of-state contractual relationships between out-of-state entities and wholly out-of-state sales. For example, the CCPA purports to reach the sale of "personal information" by a covered "business" located in New York to a service provider or third party located in Florida, or the use of "personal information" by a third party located in North Dakota or England that somehow receives it from a "business" located in New Jersey. The only nexus to California is the fact that "personal information" from California residents located in California was "collected" by one of the out-of-state entities involved. This California may not do under Ninth Circuit precedent because both parties to the contract are located out-of-state.[32]

"[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."[33] The Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[34] Thus, "States and localities may not attach restrictions to exports or imports in order to control commerce in other States."[35] "[T]he Commerce Clause [also] protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."[36] "[T]he practical effect of the statute must be evaluated not only by considering the

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[29] *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571-72 (1996) (citations omitted).

[30] *See Healy v. Beer Inst.,* 491 U.S. 324, 335-36 (1989); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935); *see also N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (territorial constraint is an "obvious[]" and "necessary result of the Constitution"); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) ("The sovereignty of each State . . . . implie[s] a limitation on the sovereignty of all of its sister States" that is inherent in "the original scheme of the Constitution[.]").

[31] *See, e.g., Publius v. Boyer-Vine*, 237 F. Supp. 3d 997 (E.D. Cal. 2017) (O'Neil, J.) (finding First Amendment and dormant Commerce Clause extraterritoriality violations with respect to California statute regulating out-of-state posting of truthful personal information about California legislators on the Internet); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104-05 (2d Cir. 2003); *Backpage.com, LLC v. Hoffman*, No. 13-03952, 2013 U.S. Dist. LEXIS 119811, at *33 (D.N.J. Aug. 20, 2013) ("Because the internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate internet activities without project[ing] its legislation into other States. The Act is likely in violation of the dormant commerce clause, and thus cannot stand.").

[32] *See Sam Francis Found. v. Christies, Inc*., 784 F.3d 1320, 1322 (9th Cir. 2015) (en banc).

[33] *Healy*, 491 U.S. at 336; *see also BMW of N. Am. v. Gore*, 517 U.S. 559, 572 (1996) ("a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."). *Cf. C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 394 (1994) (even a regulation that does not expressly regulate interstate commerce may do so "nonetheless by its practical effect and design").

[34] *Healy*, 491 U.S. at 336 (internal citations omitted).

[35] *C & A Carbone*, 511 U.S. at 393 (citing *Baldwin*, 294 U.S. 511).

[36] *Healy*, 491 U.S. at 336-37.

consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation."[37]

"The mere fact that some nexus to a state exists will not justify regulation of wholly out-of-state transactions. For example, an attempt by California to regulate the terms and conditions of sales of artworks outside of California simply because the seller resided in California was a violation of the dormant Commerce Clause."[38] As the Ninth Circuit explained in *Sam Francis v. Christie's, Inc.*: "The Supreme Court has held that 'our cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following proposition[]: . . . the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'"[39]

Under controlling Ninth Circuit precedent, the CCPA violates the dormant Commerce Clause's ban on regulation of wholly out-of-state conduct. Just as in *Sam Francis*, the Act applies to sales and contracts that are wholly out-of-state. Unlike cases involving "products that are brought into or are otherwise within the borders of the State,"[40] the CCPA governs what businesses must do with "personal information" that has *left* California's borders and is physically stored in other states—even businesses that merely receive "personal information" from another out-of-state entity.[41] In *Daniels Sharpsmart v. Smith*, the Ninth Circuit addressed a similar circumstance: "we are faced with an attempt to reach beyond the borders of California and control transactions that occur wholly outside of the State after the material in question—medical waste—has been removed from the State."[42] The Ninth Circuit held the fact the medical waste originated in-state did not allow California to "regulate waste treatment" after it was transported outside the state.[43]

That is exactly what the CCPA does here as applied to certain out-of-state businesses. The mere fact that the "personal information" at issue originated from California is an insufficient nexus to justify California regulating wholly out-of-state conduct. The CCPA's downstream regulation of data processors and other third parties who contract with out-of-state businesses that "collect" the "personal information" of California residents is unconstitutional because it directly regulates wholly out-of-state commerce, including wholly out-of-state sales where the only contracts are between out-of-state entities. It is an insufficient jurisdictional hook to link this to

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[37] *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 614-15 (9th Cir. 2018) (cleaned up).

[38] *Id.* at 615 (*citing Sam Francis Found. v. Christies, Inc*., 784 F.3d 1320, 1322 (9th Cir. 2015) (en banc)); *Ass'n for Accessible Meds. v. Frosh*, 887 F.3d 664, 674 (4th Cir. 2018).

[39] *Sam Francis Found*., 784 F.3d at 1323-24 (quoting *Healy*, 491 U.S. at 336).

[40] *See Daniels Sharpsmart*, 889 F.3d at 615.

[41] The Act on its face also appears to regulate contractual agreements between wholly out-of-state entities. *See* Cal. Civ. Code § 1798.140(v). The CCPA also contains a provision that incentivizes covered "businesses" to include provisions in contracts with service providers effectively dictated by the Act. *See id*. § 1798.140(w)(2). It does this to bring these outside entities within the scope the statute by effectively mandating that these "service providers" agree to a contractual term that operates as a jurisdictional hook and ensures that these entities to will be held responsible for CCPA compliance.

[42] *Daniels Sharpsmart,* 889 F.3d at 615.

[43] *Id.* at 616. *Cf. Ass'n for Accessible Med.*, 887 F.3d at 672 (striking down Maryland statute that "effectively seeks to compel manufacturers and wholesalers to act in accordance with Maryland law outside of Maryland").

the mere fact that the truthful information came from a California resident who was at that time located in California when it was collected.

California "may not project its legislation into other states," and it may not control conduct beyond the boundaries of the State.[44] Such extraterritorial regulation categorically violates the dormant Commerce Clause.[45] California may not project its preferred law and policy outside of California to directly regulate the conduct and contractual arrangements between wholly out-of-state entities. California may not control the out-of-state use and sale of lawfully obtained information, regardless of whether the information was sent from California by a California resident. And California may not micromanage the training and record-retention practices of out-of-state entities, particularly those with tenuous, at best, contacts with the state.

### B. Only the Federal Government May Regulate the Internet.

The CCPA is also unconstitutional because the U.S. Constitution's Commerce Clause categorically bars state-level regulation of the Internet. The Supreme Court has long made clear that certain subjects require uniform national regulation.[46] This strand of case law, whether rooted in the very structure of the federal Constitution or the Commerce Clause, suggests that the power to regulate certain subjects is categorically reserved exclusively for the federal government, *i.e.*, state regulation of these subjects is categorically prohibited.[47] As numerous federal courts have explained, the Internet is the type of subject that, by necessity, must only be regulated by the federal government.[48] Put simply, "the unique nature of cyberspace necessitates uniform national treatment and bars the states from enacting inconsistent regulatory schemes."[49]

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[44] *Brown-Forman Distillers*, 476 U.S. at 582.

[45] *See Healy*, 491 U.S. at 336 (state statute is invalid per se if practical effect is extraterritorial). Strict scrutiny applies to any State attempt to "control conduct beyond the boundary of the state," *id*. at 336–37, "whether or not the commerce has effects within the State," *Edgar v. MITE Corp*., 457 U.S. 624, 642-43 (1982).

[46] *See Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319 (1852) ("Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."). *See generally South Dakota v. Wayfair, Inc*., 138 S. Ct. 2080, 2090 (2018) (discussing *Cooley*); *Korab v. Fink*, 797 F.3d 572, 594 (9th Cir. 2014) (Bybee, J., concurring).

[47] *See Cooley*, 53 U.S. (12 How.) at 319; *Japan Line, Ltd. v. Cnty. of L.A*., 441 U.S. 434, 457 (1979) ("The problems to which appellees refer are problems that admit only of a federal remedy. They do not admit of a unilateral solution by a State.") (cleaned up).

[48] *See, e.g.*, *Am. Booksellers Found.*, 342 F.3d at 104 ("We think it likely that the internet will soon be seen as falling within the class of subjects that are protected from State regulation because they imperatively demand a single uniform rule.") (cleaned up); *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 183 (S.D.N.Y. 1997) ("The Internet . . . requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations. . . . Haphazard and uncoordinated state regulation can only frustrate the growth of cyberspace. The need for uniformity in this unique sphere of commerce requires that New York's law be stricken as a violation of the Commerce Clause."); *ACLU v. Johnson*, 194 F.3d 1149, 1162 (10th Cir. 1999) ("[C]ertain types of commerce have been recognized as requiring national regulation. The Internet is surely such a medium." (citations omitted)).

[49] *Am. Libraries Ass'n*, 969 F. Supp. at 184; *see also* Huddleston & Adams, *supra* note 25, at 7-8, 12.

### C. CCPA's Burdens on Interstate Commerce Vastly Outweigh Putative Local Benefits.

As the Supreme Court recently reaffirmed: "States may not impose undue burdens on interstate commerce."[50] As explained below, even if the CCPA did not violate the dormant Commerce Clause's *per se* bar against extraterritorial regulations, it should be stricken because the concrete real-world burdens it places on interstate commerce are clearly excessive in relation to its putative local, purely speculative "privacy" benefits to California consumers.[51]

*1. The CCPA's Local Benefits Are Speculative and Illusory.*

Protecting citizens' privacy is, in the abstract, a legitimate state interest. But the extent to which the CCPA furthers that interest is unclear. To begin with, a host of state and federal statutes already address particularly important privacy-related matters. Examples of such laws include the Gramm-Leach Bliley Act ("GLBA"), Children's Online Privacy Protection Act ("COPPA"), Fair Credit Reporting Act ("FCRA"), Driver's Privacy Protection Act ("DPPA"), Health Insurance Portability and Accountability Act ("HIPPA"), the California Financial Information Privacy Act ("CFIPA"), Confidentiality in Medical Information Act ("CMIA"), Student Online Personal Information Protection Act ("SOPIPA"), and the Insurance Information Privacy Act ("IIPA"). In addition, the CCPA may actually facilitate privacy violations. As one commenter explained: "Consider an abusive relationship: A consumer's safety or confidentiality may be placed at risk if his/her personal information is revealed as part of another consumer's access request. . . . Scenarios for other compromises to consumer safety and protection are limitless."[52]

The CCPA's alleged local benefits are speculative and abstract. For instance, according to the Initial Statement of Reasons "Summary of Benefits":

> Privacy is one of the inalienable rights conferred on Californians by the state Constitution. The CCPA enumerates specific privacy rights. In giving consumers greater control over their personal information, the CCPA, operationalized by these regulations, mitigates the asymmetry of knowledge and power between individuals and businesses. This benefits not only individuals, but society as a whole. The empowerment of individuals to exercise their rights is particularly important for a democracy, which values and depends on the autonomy of the individuals who constitute it.[53]

Indeed, the SRIA made no effort to quantify the value California *consumers* place on the privacy rights granted by the CCPA, instead attempting to estimate the value of the data to the companies that collected it using average revenue per user ("ARPU").[54] As the SRIA states:

> The CCPA's benefits to consumers derive from the privacy protections granted by the law. These protections . . . give consumers the right to assert control over the use of their personal information. The economic value to consumers of these

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[50] *Wayfair*, 138 S. Ct. at 2091 (citing *Pike v. Bruce Church, Inc*., 397 U. S. 137, 142 (1970)).

[51] *See Pike*, 397 U.S. at 142.

[52] Perkins Coie Comments (General Industry) at 8 (CCPA00000966).

[53] ISOR at 2.

[54] *See* SRIA at 12–15.

> protections can be measured as the total value of consumers' personal information, which they can choose to prevent the sale of or even delete. *Although the subjective value of this information to consumers is generally agreed to be great*, it is extremely difficult to quantify the precise value of consumers' personal information in the marketplace and estimates can vary substantially.[55]

Put different, the putative value of the claimed local benefits to the *consumers* who purportedly benefit from the law is entirely subjective and unsupported by empirical research or data. Nor is it even clear how many Californians will exercise their rights under the CCPA. And as the SRIA recognizes: "consumers only receive maximal benefits if they choose to exercise the privacy rights given to them and not everyone is likely to do so[.]"[56]

*2. The CCPA Substantially Burdens Interstate Commerce.*

Any putative privacy benefits flowing from the CCPA are inconsequential in relation to the severe burdens it imposes on interstate commerce. "Balanced against the limited local benefits resulting from the . . . [CCPA] is an extreme burden on interstate commerce. . . . [The CCPA] casts its net worldwide[.]"[57] The CCPA substantially burdens interstate (and indeed international) commerce in myriad ways, imposing draconian compliance costs on hundreds of thousands of in-state (and out-of-state) businesses and threatening thousands of jobs. Indeed, California's own Economic Impact Statement found that the CCPA will "eliminate[]" nearly 10,000 jobs in California alone.[58] As the SRIA found, "[s]ome industries will be forced to completely revise their business models" because of the CCPA.[59] As the Chief Economist for California's Department of Finance noted, "[t]he SRIA estimates that the initial cost of compliance may be up to $55 billion"[60]—and that staggering figure is for California alone. The SRIA did not even attempt to evaluate the CCPA's economic impact on out-of-state and overseas businesses.[61] "Small firms are likely to face a disproportionately higher share of compliance costs relative to larger enterprises."[62] The CCPA regulations also threaten to "creat[e] additional barriers to entry for future [out-of-state] competitors [with California companies] considering entering into the California market."[63]

As numerous comments have made clear, the practical compliance challenges are astronomical for both in-state *and* out-of-state businesses that meet the low compliance thresholds.[64] Even comparatively small businesses (such as convenience stores and restaurants)

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[55] *Id.* at 12.

[56] *Id.* at 15; *see* Huddleston & Adams, *supra* note 25, at 5 (explaining that "the potential benefits of . . . [state privacy] laws are not readily calculable as an empirical matter and are, as a result, more difficult to discern.").

[57] *See Am. Libraries Ass'n*, 969 F. Supp. at 179.

[58] Economic Impact Assessment, http://bit.ly/2OM3PIm.

[59] *See* SRIA at 30.

[60] Letter from Irena Asmundson, Chief Economist, Cal. Dep't of Fin., to Stacey Schesser, at 2 (Sept. 16, 2019) (Appendix B to ISOR), *available at* http://bit.ly/2QQozBq.

[61] SRIA at 21 ("The economic impact of the regulations on these businesses located outside of California is beyond the scope of the SRIA and therefore not estimated.").

[62] *Id.* at 31.

[63] *Id*. at 32 (Aug. 2019)

[64] *See, e.g.,* California Chamber of Commerce Comments (CCPA00000067-CCPA00000116); Toy Association Comment (CCPA00000185-CCPA00000196); BakerHostetler Comment (CCPA00000273-CCPA00000284); CTIA

with any significant online presence may be compelled to comply. Among other things, the CCPA creates perverse incentives for out-of-state companies that may potentially have any contact with a California consumer involving the collection of information to avoid expanding beyond the $25-million-per-year-in-gross-revenue threshold requiring CCPA compliance. Alternatively, CCPA incentivizes out-of-state companies to stop selling to California customers or, alternatively, block California customers from their websites. The CCPA threatens to deter and punish innovation as well, particularly with respect to small startups ill-equipped to bear its compliance costs.

The CCPA's burdens on interstate commerce are compounded by the Sisyphean practical challenges companies face in attempting to comply not only with the CCPA but also GDPR and other state privacy laws, which differ in salient respects from the CCPA. For instance, as the AG has been made aware, the CCPA diverges from GDPR in many material respects.[65] Indeed, the Initial Statement of Reasons itself highlights the "incompatibility" of CCPA with GDPR, noting that they "have different requirements, different definitions, and different scopes."[66] In addition, the CCPA is inconsistent with federal law such as COPPA, as commenters have previously explained.[67] Further, other states have followed in California's footsteps to add their own gloss on state-level Internet regulation.[68]

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Comment (CCPA00000393-CCPA00000409); AAF, ANA, IAB, and NAI Comment (CCPA00000432-CCPA00000442); ACRO Comment (CCPA00000444-CCPA00000446); Randall-Reilly Comment (CCPA00000483-CCPA00000484); Mayer Brown Comment (CCPA00000522-CCPA00000527); Mapbox Comment (CCPA00000535-CCPA00000540); Auto Alliance Comment (CCPA00000568-CCPA00000586); SIIA Comment (CCPA00000755-CCPA00000756); ESA Comments (CCPA00000741-CCPA00000747); HERE Comment (CCPA00000850-CCPA00000855); ITIF Comment (CCPA00000873-CCPA00000885); Perkins Coie Comments (Financial Services Industry) (CCPA00000927-CCPA00000951); Perkins Coie Comments (General Industry) (CCPA00000952-CCPA00000968); Engine Comment (CCPA00000991-CCPA00000995); U.S. Chamber of Commerce Comment (CCPA00001108-CCPA00001118); Orange County Business Council Comment (CCPA00001370-CCPA00001371); Software Alliance Comments (CCPA00001373-CCPA00001380); Innovative Lending Platform Association Comment (CCPA00001383-CCPA00001385).

[65] *See* Comparing Privacy Laws: GDPR vs. CCPA (CCPA00000782-CCPA00000823); *see also* Jehl & Friel, CCPA and GDPR Comparison Chart, *available at* http://bit.ly/34qefV2.

[66] ISOR at 44.

[67] *See* Toy Association Comment (CCPA00000185-CCPA00000196); *see also* ACRO Comment (CCPA00000444-CCPA00000446).

[68] *See* IAPP, State Comprehensive-Privacy Law Comparison, http://bit.ly/2OgTcyl; Akin Gump, Comparison Chart of Pending CCPA and GDPR-Like State Privacy Legislation (May 2019), *available at* http://bit.ly/2OavEv8.; *see also* Huddleston & Adams, *supra* note 25, at 8.

## IV. THE CCPA VIOLATES THE FIRST AMENDMENT.

The CCPA is also unconstitutional because, as First Amendment law scholars and practitioners have explained, some of the CCPA's provisions violate companies' First Amendment rights.[69] Their insightful commentary on the unconstitutionality of the CCPA under Supreme Court cases such as *Sorrell v. IMS Health Inc*.[70] is part of the record in this rulemaking.[71]

As these First Amendment experts point out, the CCPA "violates settled First Amendment principles by restricting the dissemination of accurate, publicly available information"[72]:

> The CCPA's provisions restricting the dissemination of publicly available information are unconstitutional for three independent reasons. First, these limitations are content-based restrictions on speech that are not justified by a sufficiently weighty governmental interest to satisfy strict scrutiny, or even intermediate scrutiny. Second, the regulation limiting dissemination of information publicly disclosed by government agencies is unconstitutionally vague. Third, the CCPA's restrictions unconstitutionally distinguish among speakers and among different types of speech.[73]

To date, the California Legislature has refused to legislatively remedy the Act's myriad constitutional shortcomings.

Among other constitutional flaws, "[t]he CCPA on its face favors some speakers and some uses of information while disfavoring others. It also allows consumers to use the power of the State to suppress particular speakers and facts. And it does so in a frankly content-based way[.]"[74] As these constitutional experts explain: "[T]he law's practical effect is to enable California residents to suppress the communication of particular facts. Moreover, the Act authorizes consumers to ban speech selectively, allowing some businesses to speak about them while silencing others. . . . Indeed, the Act appears designed to encourage . . . [content and viewpoint] censorship."[75] "This creates the potential for groups of consumers to burden disproportionately the speech of unpopular speakers, effectively censoring their communications in a manner that violates First Amendment principles."[76]

As discussed above, the CCPA's purported local privacy benefits are highly abstract and uncertain, at best, and greatly outweighed by the excessive burdens on interstate commerce that California's extraterritorial Internet regulation imposes. Nor can these putative privacy benefits justify the CCPA's unconstitutional restrictions on truthful speech. As First Amendment experts

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[69] *See* Andrew Pincus, Miriam Nemetz, & Eugene Volokh, Invalidity Under the First Amendment of the Restrictions on Dissemination of Accurate Publicly Available Information Contained in the California Consumer Privacy Act of 2018 (Jan. 24, 2019) [hereinafter "Mayer Brown Memo"].

[70] 564 U.S. 552 (2011).

[71] *See* CCPA00000757-CCPA00000769.

[72] Mayer Brown Memo at 1.

[73] *Id.* at 4.

[74] *Id.* at 11.

[75] *Id.* at 12.

[76] *Id.* at 13.

have explained: "The government cannot defend a speech restriction 'by merely asserting a broad interest in privacy.' '[P]rivacy may only constitute a substantial state interest if the government specifically articulates and properly justifies it.' "[77] California has utterly failed to do so here.[78]

## V. THE CCPA VIOLATES DUE PROCESS FOR FAILURE TO GIVE FAIR NOTICE OF PROHIBITED OR REQUIRED CONDUCT.

Businesses have a due-process right to fair notice of the CCPA's requirements.[79] The AG bears the responsibility to promulgate clear, unambiguous standards.[80] To provide sufficient notice, a statute or regulation must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly."[81] Due-process requirements are heightened where, as here, civil penalties may be imposed. Corporations should not be subject to civil penalties that are not clearly applicable by either statute or by regulation.[82]

The CCPA and its implementing regulations fail this test. To begin with, it is impossible for many companies to predict whether they are even subject to the CCPA. For example, how is a company that currently has an annual gross revenue of $24 million in 2019 supposed to predict or know whether its annual gross revenue in 2020 will exceed $25 million, thereby triggering CCPA compliance obligations? Similarly, how are small businesses supposed to reliably determine whether they have received "personal information" from "50,000 or more consumers, households, or devices" on an annual basis and thus must comply with the CCPA? Indeed, as one commenter aptly pointed out:

> Without access to geolocation data a business cannot determine if information collected via mobile phone or a portable personal computer was collected while the individual was in California. If an individual in California attempts to shield their location from the business (ex. through use of a virtual private network (VPN)), and the business has no other indication the individual is in California, will the business be in violation of the law if it collects or sells that information? This also raises questions over whether it is constitutionally permissible for California to regulate business that occurs in other states or as part of interstate commerce.[83]

These problems are exacerbated by the fact that neither the statute nor the regulations define "doing business" in California, leaving companies in the dark as to whether they must meet the CCPA's onerous compliance requirements or risk enforcement actions. That is flatly unconstitutional.

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[77] *Id.* at 6 (quoting *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1235 (10th Cir. 1999)).

[78] *See id.* at 6-9.

[79] *See Fed. Commc'ns Comm'n v. Fox TV Stations, Inc*., 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); *Christopher v. SmithKline Beecham Corp*., 132 S. Ct. 2156, 2167 (2012).

[80] *See Marshall v. Anaconda Co*., 596 F.2d 370, 377 n.6 (9th Cir. 1979); *see also Ga. Pac. Corp. v. OSHRC*, 25 F.3d 999, 1005–06 (11th Cir. 1994) (ascertainable certainty standard); *Gen. Elec. Co. v. Envtl. Protection Agency*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (same).

[81] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see Connally v. Gen. Constr. Co*., 269 U.S. 385, 391 (1926).

[82] *See, e.g.*, *United States v. Trident Seafoods Corp*., 60 F.3d 556, 559 (9th Cir. 1995).

[83] AFSA Comment at CCPA00000005.

## VI. THE CCPA, IF ENFORCED, WILL IRREPARABLY HARM COVERED BUSINESSES, CONTRARY TO THE PUBLIC INTEREST

The CCPA, if enforced, will cause irreparable harm to businesses, as recognized under equity. *First*, covered businesses will suffer irreparable harm in the form of un-recoupable compliance costs.[84] *Second*, the CCPA's violations of the dormant Commerce Clause and businesses' First Amendment rights is also irreparable harm.[85] "[E]nforcement of an unconstitutional law is always contrary to the public interest."[86] The AG should thus refuse to enforce the CCPA.

For the foregoing reasons, we respectfully submit that the AG should revise the CCPA regulations to comply with statutory and constitutional limits on its authority. If you have any questions about this request, please contact me at mpepson@afphq.org. Thank you for your attention to this matter.

Sincerely,

Americans for Prosperity Foundation
Cardinal Institute for West Virginia Policy
Christopher Koopman
Freedom Foundation of Minnesota
James Madison Institute
Libertas Institute of Utah
Mississippi Center for Public Policy
Mississippi Justice Institute
Pelican Institute
Washington Policy Center

[84] *See Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 381 (1992) (holding that a plaintiff would suffer "irreparable harm" if forced to choose to incur either the civil enforcement liability of violating a preempted state law or the costs of complying with the law during the pendency of the proceedings); *see also Chamber of Commerce v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010) ("Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury.").

[85] *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that deprivation of constitutional rights "unquestionably constitutes irreparable harm"); *see Am. Libraries Ass'n,* 969 F. Supp. at 168 ("Deprivation of the rights guaranteed under the Commerce Clause constitutes irreparable injury.").

[86] *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013); *see also Legend Night Club v. Miller*, 637 F.3d 291, 302–03 (4th Cir. 2011) (state "is in no way harmed by issuance of an injunction that prevents the state from enforcing unconstitutional restrictions.").