

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
Protecting the Privacy of Customers of ) WC Dkt. No. 16-106  
Broadband and Other Telecommunications Services )

**SUPPLEMENTAL WHITE PAPER: A RESPONSE TO ARGUMENTS  
THAT THE COMMISSION’S PROPOSED BROADBAND PRIVACY  
RULES WOULD BE CONSISTENT WITH THE FIRST AMENDMENT**

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We previously submitted a White Paper to the Commission in this proceeding at the request of CTIA, the National Cable & Telecommunications Association (“NCTA”), and United States Telecom Association (“USTelecom”). The White Paper explained that the FCC’s proposed broadband privacy rules would violate the First Amendment by imposing on ISPs a significant and unjustified burden on speech, primarily in the form of a sweeping and discriminatory opt-in consent requirement for using customer information for protected expression. More specifically, we concluded:

- The FCC’s proposed rules would effectively prevent ISPs from using customer information to develop and express important communications with consumers. This would preclude the kind of targeted speech that consumers find most valuable and useful, as well as other lawful communications that they have routinely received for many years under the FTC’s privacy framework that previously applied to ISPs and that will continue to apply to all non-ISPs going forward. For example, the proposed new rules could prohibit an ISP from using information about its own customer (including non-sensitive information) to offer a discounted bundle of its own services to that customer or to offer accessories that are compatible with her devices without her prior opt-in consent. The FCC’s proposal thus also ignores the important social role of the First Amendment in advancing the *rights of the audience* to receive useful information.
- The proposed rules run afoul of fundamental First Amendment limits on the Commission’s authority to regulate customer information, as recognized in *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011), *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980), and *U.S. West Communications, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), among other cases. Technological and market developments since the *U.S. West* decision in 1999 make the proposed rules even *more constitutionally problematic* than the voice CPNI regulations invalidated by the Tenth Circuit. The proposed rules would impose a *much larger* burden on speech and are far *less* tailored to any substantial governmental interest.
- Further, the speaker-specific nature of the FCC’s proposal – the singling out of broadband ISPs for extremely burdensome regulation, while ignoring that much of the same information is available to and routinely used by social media companies, web browsers, search engines, data brokers, and other digital platforms in the Internet ecosystem – raises separate concerns under First Amendment equal protection principles. ISPs are new entrants that could introduce more competition into the highly concentrated online advertising space. They could drive down advertising rates, improve services for consumers and businesses, big and small alike, which increasingly use

online marketing. While the FCC muzzles ISPs, these other non-ISPs are subject to a much more flexible and nuanced regulatory regime. The Supreme Court has frequently condemned such discrimination among different users of the same medium for expression. And it is no answer under applicable Supreme Court precedent for the FCC to claim that it lacks jurisdiction over edge service providers. This deficiency alone demonstrates that the NPRM will not directly advance the FCC's purported interest, but rather is anti-competitive, anti-consumer, and anti-First Amendment.

- The FCC's proposal suffers from additional profound mis-matches, because: (1) the proposal is not keyed to the sensitivity of consumer information, unlike the FTC's existing privacy regime and the Administration's Consumer Privacy Bill of Rights; (2) the FCC's asserted interests arise from the *sharing* of information between an ISP and unaffiliated third parties, but its proposal seeks to over-regulate how an ISP itself or its affiliates can *use* information – for example, by targeting online advertising to the consumers for whom it is most relevant; and (3) the proposal raises content- and speaker-based distinctions that are arbitrary and impermissible under the First Amendment. For example, the proposal would require opt-in consent when the ISP seeks to use customer information to market what the FCC calls *non-communication-related* services like home security, music, and energy management services to its customers. It thus draws an unjustifiable content-based line between communications-related services and non-communications-related services.
- The FTC, which is the nation's chief privacy policy and enforcement agency, has adopted and successfully enforced a more tailored approach that is less speech-suppressing, technology-neutral, speaker-neutral, and fair. The FTC's proven privacy framework provides an obvious, constitutionally-sound alternative to imposing the NPRM's onerous and unsound proposed rules on broadband ISPs alone.
- The FTC's privacy framework is based primarily on an opt-out regime, reserving opt-in for sensitive data, and draws lines in accord with sensible criteria. In contrast, the FCC's proposal flips the pro-speech presumption on its head – imposing an unprecedented and far-reaching opt-in consent regime targeted solely at ISPs and covering all data, not just sensitive data.
- Because the Commission's proposed rules would violate the First Amendment and, at minimum, would raise a host of grave constitutional questions, they should not be adopted.

We are now writing to respond to certain commenters that dispute the White Paper's analysis and insist that the Commission's proposed approach is consistent with the First Amendment. Those criticisms either misstate the White Paper's reasoning or fail to acknowledge the force of governing First Amendment precedent.

- Certain commenters maintain that the Commission’s proposed rules would not regulate speech at all and therefore would not trigger any degree of First Amendment scrutiny. (Consumer Federal of California 7; Free Press 12-15.) But like the Tenth and D.C. Circuits,<sup>1</sup> the Commission itself has long acknowledged that such rules trigger at least *Central Hudson* scrutiny,<sup>2</sup> and for good reason: a long series of Supreme Court decisions treats opt-in requirements as restrictions on speech. The series includes *Martin v. Struthers*, 319 U.S. 141, 148 (1943) (invalidating a city ordinance that effectively operated as an “opt-in” consent requirement by preventing those distributing religious handbills from reaching audiences that did not affirmatively seek them out), *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) (requiring Americans to make an affirmative request to the post office in order to receive literature from designated foreign sources), *Denver Area Educational Telecom Consortium, Inc. v. FCC*, 518 U.S. 727, 753-60 (1996) (striking down a “segregate and block” system for receiving certain indecent cable shows on the ground that its opt-in system would suppress speech), and of course *Sorrell*. More broadly, the Supreme Court has recognized that the “distinction between laws burdening and laws banning speech is but a matter of degree.” *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 812 (2000). Hence, an opt-in consent requirement that “merely” burdens (rather than explicitly prohibits) speech remains subject to heightened constitutional scrutiny.

- Several commenters insist that the Commission’s proposed rules do not resemble the Vermont law struck down in *Sorrell* and do not raise any of the same First Amendment issues. (ACLU 1-2; Free Press 15-16; Open Technology Institute 18-21.) These attempts to distinguish

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<sup>1</sup> See, e.g., *U.S. West, Inc. v. FCC*, 183 F.3d 1224, 1232-34 (10th Cir. 1999); *National Cable & Telecomms. Ass’n v. FCC*, 555 F.3d 996, 1000 (D.C. Cir. 2009).

<sup>2</sup> See, e.g., Report & Order, *Implementation of the Telecomms. Act of 1996*, 22 FCC Rcd 6927, 6949 ¶ 44 (2007); Third Report & Order, *Implementation of the Telecomms. Act of 1996*, 17 FCC Rcd 14860, 14874-75 ¶¶ 31-32 (2002).

*Sorrell* fail. In fact, that case is highly instructive here. *Sorrell* concerned “privacy” opt-in consent rules – the very same kind of regulations the Commission is currently considering. The case involved a Vermont statutory scheme that restricted the flow of relevant information by imposing an opt-in requirement mandating physician prescribers’ consent before the records would be released.

The Supreme Court held that this scheme was an unconstitutional abridgment of free speech, even though it did not ban communication outright, on the ground that gathering and analyzing customer data in preparation for marketing are activities protected by the First Amendment. The Court held that the law could not be categorized as a mere regulation of commerce and rejected the position that “heightened judicial scrutiny is unwarranted in this case because sales, transfer, and use of prescriber-identifying information are conduct, not speech.” 564 U.S. at 570. In its opinion, the Court made clear that “the creation and dissemination of information are speech within the meaning of the First Amendment. 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.” *Id.* Indeed, the Court recognized that a “consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.” *Id.* at 566 (internal quotation marks and citation omitted). The fact that the scheme operated through an opt-in consent requirement rather than a formal ban on speech did not excuse the burden on expression. The Court explained that “[l]awmakers may no more silence unwanted speech by burdening its utterance than by censoring its content.” *Id.* at 565-66.

The key factor that led to the ruling in *Sorrell* was that the information in the records in question provided the necessary raw material to enable more targeted and effective marketing of

potentially valuable medications that could work to the benefit of patients and doctors alike. More specifically, the information at issue was data that would allow drug manufacturers to effectively and efficiently locate those doctors treating the patients who might be most in need of a new drug and identify those doctors who were early adopters and likely to be the most willing to prescribe the drug in question. Deterring that activity by using an opt-in consent requirement and thereby reducing the efficiency of provider outreach is closely parallel to what the FCC is proposing to do here – employing an opt-in consent requirement to restrict uses of customer data to help ISPs identify those customers most likely to want offers for discounted and innovative products and services.

- Certain commenters argue that *Sorrell* is inapplicable to the Commission’s proposed privacy rules because the distinction the Commission is drawing depends on the service the ISP is marketing and therefore (supposedly) is not a “content-based” or “viewpoint-based” distinction. (ACLU 4-5; Public Knowledge 9-11; Center for Democracy and Technology 9-10). In fact, the Commission’s proposed rules suffer from the same kind of speaker- *and* content-based distinctions the Court found to be constitutionally impermissible in *Sorrell*.

First, *Sorrell* explained that Vermont’s scheme was particularly problematic because it applied to only certain speakers. The Court observed that “many speakers can obtain and use the information. But detailers cannot.” 564 U.S. at 571. The Court cited this “singling out” aspect of the Vermont scheme as an important reason that it was invalid: “The explicit structure of the statute allows the information to be studied and used by all but a narrow class of disfavored speakers. Given the information’s widespread availability and many permissible uses, the State’s asserted interest in physician confidentiality does not justify the burden that [Vermont law] places on protected expression.” *Id.* at 573.

By the same token, the Commission’s proposed privacy rules apply to only certain speakers – broadband ISPs. The proposed rules therefore suffer from the same “singling out” feature that doomed Vermont’s scheme. There is a striking regulatory asymmetry between the treatment of ISPs and major non-ISP digital platforms: the FCC’s proposed rules essentially block ISP entry into the online advertising market and target new entrants in the online advertising space for regulatory obstacles more stringent than those applicable to the established market leaders, even though these market leaders pose a “threat” to privacy concerns that is no less than what is posed by the new ISP entrants. The FCC’s proposal suffers from the same flaw as the discriminatory statutory scheme in *Sorrell*. And as we explained in our original White Paper, it is no answer for the FCC to claim that it lacks authority to impose its new privacy rules on edge service providers because they are not “telecommunications carriers” and thus are beyond the scope of Section 222. That argument misses the point: the question is not why the FCC is refraining from regulating edge providers, but why it is imposing especially burdensome rules on broadband ISPs when (i) ISPs have been under the FTC rules for many years without a problem, (ii) large non-ISP companies remain subject to the FTC regime, and (iii) nothing has changed in the marketplace or otherwise that would justify this radical departure from the FTC’s privacy framework. The FCC has no valid answer to these points, and the Supreme Court in *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173 (1999), and *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995), among other cases, has not endorsed statutory limits on regulatory authority or jurisdiction as a justification for discriminatory speech rules like those in the FCC’s NPRM.<sup>3</sup>

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<sup>3</sup> Stated another way, the FCC’s proposal is contrary to one of the salutary pillars of the FTC’s framework – the pillar of technology neutrality. The FTC applies the same rules to all, without singling entities out based on the particular technology they use. The FTC concluded in its 2012 privacy report that any privacy framework should be technology-neutral, and the Administration agreed in its 2012 Consumer Privacy Bill of Rights. Rules with such serious implications for constitutional rights ought not be tied to a

Second, *Sorrell* opined that restrictions on the availability and use of prescriber-identifying information were “content-based” because they applied only to marketing speech. *See* 564 U.S. at 571 (“So long as they do not engage in marketing, many speakers can obtain and use the information.”). The Commission’s proposal is content-based in a very similar way: it allows broadband providers to use customer data to market what it calls “communications-related services” (subject only to an opt-out consent requirement), but not to market non-communications-related services without prior opt-in consent. Thus, the restriction on speech turns in significant part on what the speaker says – whether the marketing relates to a “communications-related service” (such as voice) or a “non-communications-related service” (such as home security, music, or energy management services) – further compounding the serious First Amendment problems with the Commission’s proposed approach.

- Numerous commenters contend that the Commission’s proposed rules are a necessary and tailored approach to protecting the privacy of customer information and therefore meet the *Central Hudson* test. (ACLU Comments 1-2; Center for Democracy and Technology 4-7; Consumer Federation of California 7-8; EPIC 14-17; Public Knowledge 14-19; Open Technology Institute 16-38; Free Press 13-27.) These arguments are likewise incorrect, for several reasons.

As an initial matter, the Commission’s proposed privacy rules cannot be constitutionally sustained based on the conclusory statements and unsupported assertions from commenters. The Supreme Court has made clear that the government’s burden under intermediate First Amendment scrutiny “is not satisfied by mere speculation and conjecture,” *Edenfield v. Fane*, 507 U.S. 761, 770 (1993), or by “anecdotal evidence and educated guesses.” *Rubin v. Coors Brewing Co.*, 514

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particular state of technology in an era of rapid change, where different technologies merge and intersect in various ways.

U.S. 476, 490 (1995). Restrictions on speech are invalid in the absence of a thoroughly documented record demonstrating that the harms the Commission “recites are real and that its restriction will in fact alleviate them to a material degree.” *Edenfield*, 507 U.S. at 770-71. The record here falls far short of this requirement.

Next, to sustain a restriction on speech under *Central Hudson*, “the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.” *Sorrell*, 564 U.S. at 572. “There must be a ‘fit between the legislature’s ends and the means chosen to accomplish those ends.’” *Id.* (citation omitted). *Sorrell* explained that, even if Vermont’s stated policy goals were proper, the law did “not advance them in a permissible way,” and the “state’s own explanation of how” the law “advances its interests cannot be said to be direct.” *Id.* at 577 (citation and internal quotation marks omitted).

The Commission’s proposed broadband privacy rules suffer from the same fatal mis-match of purported ends and means. First, the proposed rules are fatally *underinclusive* because they would apply only to broadband ISPs and not to the many other participants in the Internet ecosystem, which—facing no onerous opt-in requirements—will continue to track and use the same customer information that the proposed rules would restrict ISPs from using. Second, the proposed rules are also fatally *overinclusive* because they are not narrowly tailored to address the Commission’s stated interest in preventing the unauthorized *sharing* or *disclosure* of intimate personal information, such as “very sensitive and very personal information that could threaten a person’s financial security, reveal embarrassing or even harmful details of medical history, or disclose to prying eyes the intimate details of interests, physical presence, or fears.” (NPRM ¶ 2.) Instead, the Commission rules would extend burdensome opt-in requirements even to nonsensitive information.

In this respect, the Commission’s proposal is strikingly different from other privacy frameworks, such as the FTC’s privacy framework laid out in its 2012 report<sup>4</sup> and the Obama Administration’s Consumer Privacy Bill of Rights.<sup>5</sup> These frameworks focus on the difference between sensitive and non-sensitive data and create different consumer consent approaches for each. The FTC’s 2012 privacy report calls for opt-in consent only with respect to the very narrow category of sensitive data, such as information relating to children, health, finances, or geolocation. The FTC’s framework allows other uses by information providers regardless of who they are, subject to an opt-out consent mechanism that begins with a baseline of speech rather than a baseline of no speech.

In contrast, the Commission’s proposal makes no such distinction. It is the antithesis of a “tailored” restriction, because it would impose the same blunderbuss rules regardless of the sensitivity of the consumer information at issue. It uses the same speech-suppressing approach for *all* types of information – whether the data concerns private details of a customer’s life or not. For example, under the Commission’s proposed approach, an IP address, which is essentially public data widely available to many companies operating in the Internet ecosystem and used broadly as a key tool to deliver online advertising, is afforded the same privacy protection and is subject to the same unprecedented opt-in consent requirement imposed on ISPs as a customer’s social security number. Thus, the Commission’s proposed rules would prevent an ISP from using routine and non-sensitive information about its own customers to offer them a discounted bundle of

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<sup>4</sup> “Protecting Consumer Privacy in an Era of Rapid Change,” *available at* <https://www.ftc.gov/reports/protecting-consumer-privacy-era-rapid-change-recommendations-businesses-policymakers> (March 2012).

<sup>5</sup> White House Report, *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy* 36 (Feb. 2012), *available at* [www.whitehouse.gov/sites/default/files/privacy-final.pdf](http://www.whitehouse.gov/sites/default/files/privacy-final.pdf).

services or perhaps new accessories compatible with the devices they already own. The Commission promotes no “privacy” interest by preventing broadband providers from using information in their possession to provide more relevant marketing or advertising to consumers. To the contrary, the Commission acknowledges that “many consumers *want* targeted advertising that provides very useful information in a timely (sometimes immediate) manner.” (NPRM ¶ 12 (italics added).)

- Finally, Public Knowledge suggests that if the Commission thinks that it needs to avoid the possibility of introducing *Sorrell* into the analysis, the best approach would be to make all uses of customer information subject to opt-in so there is no difference based on the type of communication. (Public Knowledge 13-14). But such an approach would not cure the speaker-based defect of the proposed restriction – the fact that it singles out ISPs for a particularly burdensome rule. And, broadening the restriction to make all uses of customer information subject to the Commission’s sweeping opt-in rule would only *worsen* the speech-suppressing effects of the proposed rules, making the Commission’s approach even more burdensome and blunderbuss, and even more out of step with the FTC’s longstanding privacy framework that has successfully regulated the privacy practices of ISPs and non-ISPs alike for many years.

## **Conclusion**

As shown in our original White Paper, the Commission’s proposed rules would violate the First Amendment. At minimum, they raise a host of grave constitutional questions and should not be adopted. Comments from proponents of the rules are misplaced and do not address, much less cure, these grave constitutional defects.

Respectfully Submitted,

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