

Proposition 24:

Protecting California Consumers by Expanding Protections, Ensuring Governmental Oversight, and Safeguarding the Law from Special Interests

Initiative Statute

By

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I. EXECUTIVE SUMMARY

A **YES** vote on this measure expands California’s privacy protections to better safeguard children and Californians’ sensitive information. Proposition 24 would expand consumer protections—beyond the collection and sale of personal information—to include the sharing of personal information. The proposition would also make it easier for consumers to opt out of data collection, sharing, and sale by allowing them to communicate their privacy preferences through a “Do Not Track” signal in their internet browsers. This proposition would reduce the impact of California’s privacy laws on small businesses by increasing the threshold for impacted businesses from one that buys, collects, sells, or shares 50,000 consumers’ information to 100,000. Last, Proposition 24 authorizes \$5 million for the current fiscal year and \$10 million annually thereafter to create a regulatory agency that would enforce California’s privacy laws.

A **NO** vote on this measure would result in no changes to California’s consumer privacy protections. The law would not change; it would still require businesses to respond to consumer privacy requests and take reasonable steps to protect the information they collect. California’s Department of Justice (“DOJ”) would maintain responsibility for developing and enforcing consumer privacy regulations. The DOJ would still spend its budgeted \$4.739 million on regulating and enforcing California’s privacy laws. Interest groups would still be able to lobby the Legislature to change privacy laws without voter approval and without an assurance that the changes were in furtherance of consumer protection.

II. THE LAW

A. Background

There are no provisions in the United States Constitution that expressly guarantee or protect a right to privacy.¹ Since the United States Constitution does not explicitly delegate to or give the federal government the right to regulate privacy, the Tenth Amendment permits states to create privacy laws.² However, the federal government has not been totally silent on the issue of privacy. In 1961, the Supreme Court declared that the right to privacy is “no less important than any other right” and is “basic to a free society.”³

1. Federal Law

While the federal government has left privacy largely to the states, it has created privacy laws on several occasions. Congress enacted the Fair Credit Reporting Act in 1970, which focused on protecting consumer privacy with respect to credit reporting agencies.⁴ Next, Congress enacted the Privacy Act of 1974, but that law has a limited scope; it only

¹ See generally U.S. CONST. (containing no provisions that discuss privacy).

² U.S. CONST. amend. X.

³ *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

⁴ 15 U.S.C. § 1681 (2020).

applies to government records.⁵ Congress enacted the Children’s Online Privacy Protection Act (“COPPA”) in 1998, which protects children under the age of thirteen from sharing their personal information without parental consent.⁶ Most recently, Congress enacted the Gramm–Leach–Bliley Act in 1999 to codify consumer privacy rules for financial institutions.⁷

Today, the Federal Trade Commission (“FTC”) is the federal agency that regulates consumer privacy. As part of its work, “the FTC conducts case studies, holds workshops, and issues reports” to inform people about consumer privacy and data security issues; however, there are no laws protecting consumer information otherwise.⁸ The FTC employs forty people who work specifically on consumer privacy.⁹ The federal government’s lack of consumer privacy laws, taken in conjunction with the Tenth Amendment, is why states may regulate privacy.¹⁰

2. Europe’s General Data Protection Regulation

The European Union (“EU”) is the global leader in consumer privacy protection. In 2014, its highest court issued a monumental judgment against the technology industry when it ruled an individual may request that a business remove his or her information from the Internet.¹¹ This decision established that people have a fundamental right to their privacy and personal information.

Following that decision, the EU adopted the General Data Protection Regulation (“GDPR”).¹² This regulation gives every EU citizen complete control over his or her personal information and imposes restrictions on what a business may do with that information.¹³ Most notably, the GDPR protects personal data, holds businesses accountable for how they collect and maintain personal data, and requires a business to receive consent before it

⁵ 5 U.S.C. § 552(a) (2020).

⁶ 15 U.S.C. § 6501 (2020).

⁷ 15 U.S.C. § 6801 (2020).

⁸ *FTC Policy Work*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy-security/ftc-policy-work> (last visited Sept. 5, 2020).

⁹ *Compare* FED. TRADE COMM’N, FISCAL YEAR 2021 CONGRESSIONAL BUDGET JUSTIFICATION, 121 https://www.ftc.gov/system/files/documents/reports/fy-2021-congressional-budget-justification/fy_2021_cbj_final.pdf (last visited Sept. 5, 2020) (noting that the FTC employs 61 employees in Privacy and Identity Protection), *with* Telephone Interview with Alastair Mactaggart, Chair, Californians for Consumer Privacy (Sept. 1, 2020) [Mactaggart Interview] (notes on file with the *California Initiative Review*) (stating that only 40 FTC employees work specifically on consumer privacy).

¹⁰ *See* U.S. CONST. amend. X (reserving powers that the Constitution does not delegate to the states).

¹¹ Court of Justice of the European Union, Judgment in Case C-131/12, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González*, (2014), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140070en.pdf>.

¹² Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119/1) 1.

¹³ *Id.* at 32.

can collect personal data.¹⁴ The GDPR created a blueprint for nations and states to follow when enacting consumer privacy protection laws.

3. California’s Current Consumer Privacy Laws

a. Overview

Most of California’s current consumer privacy laws come from the California Consumer Protection Act of 2018 (“CCPA”). While the CCPA is not as strict as the GDPR, it still provides some protections for California consumers. See Figure 1 below for a comparison of the GDPR, the CCPA, and Proposition 24.¹⁵

Figure 1: A Comparison of the GDPR, the CCPA, and Proposition 24¹⁶

Protection	GDPR	CCPA	Prop. 24
Right to know what information a business has collected about you	✓	✓	✓
Right to say no to the sale of your information	✓	✓	✓
Right to delete your information	✓	✓	✓
Requires businesses to keep your information safe	✓	✓	✓
Right to access your information in a portable format	✓	✓	✓
Special protection for minors	✓	✓	✓
Requires an easy “Do Not Sell My Information” button for consumers	✗	✓	✓
Provides ability to browse with no pop-ups or sale of your information	✗	✗	✓
Penalties if your email and password are stolen due to negligence	✓	✗	✓

¹⁴ *Id.* at 36.

¹⁵ *How Prop 24 Gets California On Par with Europe’s Broad Privacy Rights*, CALIFORNIANS FOR CONSUMER PRIVACY (Aug. 17, 2020), <https://www.caprivacy.org/how-prop-24-gets-california-on-par-with-europes-broad-privacy-rights/>.

¹⁶ In this table, green check marks communicate the types of protections each body of law offers. The GDPR has the strictest applicability of all three laws because it applies to any company or entity that processes personal information as part of its activities in the EU. The CCPA is less strict than the GDPR because it applies only to businesses that collect or sell 50,000 or more consumers’ information. Proposition 24 relaxes the law further away from the GDPR’s rigorous standard by applying only to businesses that collect, sell, or share 100,000 or more consumers’ information. However, that standard is stricter than the CCPA because it includes the “or share” language.

CAL. CIV. CODE § 1798.140(d)(1)(B) (West 2020). Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119/1) 32. Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.140(d)(1)(B)).

Protection	GDPR	CCPA	Prop. 24
Right to restrict a business's use of your sensitive personal information	✓	✗	✓
Right to correct your data	✓	✗	✓
Right to prevent companies from storing your information longer than necessary	✓	✗	✓
Right to prevent companies from collecting more information than necessary	✓	✗	✓
Right to opt out of advertisers using your precise geolocation (within 1/3 of a mile)	✓	✗	✓
Ability to override your privacy protections if you face the threat of injury or death	✓	✗	✓
Provides transparency around "profiling" (e.g., racial profiling) and "automated decision making"	✓	✗	✓
Establishes an agency dedicated to protecting consumers and their personal information	✓	✗	✓
Restricts onward transfer to protect consumer information	✓	✗	✓
Requires high-risk data processors to perform regular cybersecurity audits	✓	✗	✓
Requires high-risk data processors to perform regular risk assessments	✓	✗	✓
Appoints a Chief Auditor with the power to audit business data practices	✓	✗	✓
Protects California's privacy laws from being weakened in the Legislature	N/A	✗	✓

b. Consumer Protections and Opting Out

The CCPA prohibits a business from retaliating against a consumer who opts out of data collection.¹⁷ The statute defines retaliation as denying goods or services to the consumer, charging different prices/rates, providing a different level of quality, or insinuating there is a difference in quality if the consumer opts out.¹⁸ Rather, a business may provide incentives for consumers to disclose information.¹⁹ These incentives may come in the form of compensation or a different quality of service if that quality is reasonably related to the value of the consumer's data.²⁰

¹⁷ CAL. CIV. CODE §§ 1798.125(a)(1)(A)-(D) (West 2020).

¹⁸ *Id.*

¹⁹ *Id.* § 1798.125(a)(2).

²⁰ *Id.*

Today, Californians may exercise their right to opt out of data collection by clicking a link on a business’s website or calling the business directly.²¹ It is a consumer’s responsibility to tell a business not to collect or sell his or her information, but the consumer must communicate that preference to each individual business.²² While some web browsers already have a Do Not Track signal, businesses need only to acknowledge that signal—they do not have to comply with it.²³ Under current law, a business can simply acknowledge the signal’s existence and respond that it does not comply with the request.²⁴

c. Business Obligations

As of January 1, 2020, the CCPA applies to businesses that satisfy one or more of the following criteria.²⁵ First, the business has annual gross revenue exceeding \$25 million.²⁶ Second, it buys or sells personal information for at least 50,000 consumers.²⁷ Finally, it derives at least 50% of its annual revenue from selling consumer data.²⁸

The CCPA places multiple restrictions on businesses within the meaning of the statute. First, a business that satisfies the statutory definition cannot have a consumer waive CCPA protections.²⁹ Second, the CCPA requires that a business—at the consumer’s request—provide, disclose, and deliver any information the business has collected about the consumer to the consumer free of charge.³⁰ The CCPA also requires that businesses give consumers two methods to request information, and it imposes a forty-five day timeframe in which a business must respond to those requests.³¹

d. Exceptions

While businesses cannot opt out of the CCPA, there are several exceptions that allow a business to deviate from the statute.³² The CCPA explicitly does not impair a business’s ability to comply with a federal, state, or local law.³³ Further, it does not prevent a business from responding to a summons or participating in a civil, criminal, or regulatory investigation.³⁴ The CCPA also does not prevent a business from exercising or defending

²¹ *Id.* §§ 1798.130, 1798.135.

²² *Id.* § 1798.120.

²³ CAL. BUS. & PROF. CODE § 22575 (West 2020); ASSEMBLY COMMITTEE ON PRIVACY & CONSUMER PROTECTION, COMMITTEE ANALYSIS OF AB 2182, at 2 (Apr. 17, 2018). CAL. DEP’T OF JUST., MAKING YOUR PRIVACY PRACTICES PUBLIC 7 (May 2014), available at https://oag.ca.gov/sites/all/files/agweb/pdfs/cybersecurity/making_your_privacy_practices_public.pdf.

²⁴ CAL. DEP’T OF JUST., *supra* note 23, at 7.

²⁵ CAL. CIV. CODE § 1798.198(a) (West 2020).

²⁶ *Id.* § 1798.140(d)(1)(A).

²⁷ *Id.* § 1798.140(d)(1)(B).

²⁸ *Id.* § 1798.140(d)(1)(C).

²⁹ *Id.* § 1798.192.

³⁰ *Id.* § 1798.100.

³¹ *Id.* § 1798.130.

³² *Id.* § 1798.145.

³³ *Id.* § 1798.145(a)(1).

³⁴ *Id.* § 1798.145(a)(2).

legal claims.³⁵ Finally, because the CCPA is California law, businesses may still collect or sell consumer information when every aspect of the collection takes place wholly outside of California.³⁶

e. Regulating Consumer Privacy

Currently, the CCPA's primary enforcement mechanism is the DOJ; however, the law also creates a limited private right of action.³⁷ A twenty-three person team within the DOJ regulates consumer privacy and enforces the CCPA at an annual cost that ranges from \$4.25 million to \$4.739 million.³⁸ Beyond the DOJ enforcing the CCPA, a consumer has the limited ability to bring a lawsuit against a business that negligently violated the consumer's data privacy.³⁹ An affected consumer may institute an action for \$100–\$750 per incident or actual damages (whichever is greater), injunctive relief, declaratory relief, or any other relief the court deems proper.⁴⁰ The statute does not create any other private right of action.

On August 14, 2020, the DOJ officially promulgated privacy regulations.⁴¹ These regulations provide clarification regarding the CCPA.⁴² One such clarification pertains to service providers.⁴³ It specifies that a service provider (e.g., a business that charges a fee for storage space on the Internet) is not bound by the CCPA.⁴⁴ Rather, if a service provider receives a consumer request to opt out of data collection or sale, the service provider may tell the consumer that the request cannot be fulfilled because that business is a service provider.⁴⁵ In essence, a business that operates as a service provider is exempt from the CCPA in that capacity.

4. Attempts to Weaken Existing Law in 2019

There were seven failed attempts to gut massive sections of the CCPA the year after California enacted those laws.⁴⁶ These bills did not address flaws in the CCPA; rather, they

³⁵ *Id.* § 1798.145(a)(4).

³⁶ *Id.* § 1798.145(a)(6).

³⁷ *Id.* §§ 1798.150, 1798.185.

³⁸ CAL. DEP'T OF FIN., 2019–20 BUDGET CHANGE PROPOSAL: DEPARTMENT OF JUSTICE, https://esd.dof.ca.gov/Documents/bcp/1920/FY1920_ORG0820_BCP2916.pdf (last visited Sept. 21, 2020).

³⁹ *See* CIV. § 1798.150 (permitting a consumer whose information was compromised to institute an action against a business that stored that information without encryption or redaction).

⁴⁰ *Id.*

⁴¹ CAL. CODE REGS. tit. 11, §§ 999.300–337 (2020) (promulgated Aug. 14, 2020).

⁴² *See, e.g., id.* § 999.313 (providing guidance on requests to know and requests to delete consumer information).

⁴³ *Id.* § 999.314(a).

⁴⁴ *Id.*

⁴⁵ *Id.* § 999.314(e).

⁴⁶ Mactaggart Interview, *supra* note 9 (notes on file with the *California Initiative Review*). *See, e.g.,* SB 753, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as introduced on Feb. 22, 2019, but not enacted) (proposing an exemption from the right to opt out for surveillance-based ads), *and* AB 1416, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on May 6, 2019, but not enacted) (proposing legislation to amend the CCPA, which advanced out of its house of origin and would have allowed government entities—such as Immigration and Customs Enforcement—to obtain consumer location information).

would have undermined the CCPA’s purpose by creating exceptions from the right to opt out for things like web-based surveillance ads.⁴⁷ California Senator Robert Hertzberg explained that businesses are using deceptive naming to hide their identities and weaken California’s consumer privacy laws.⁴⁸ Businesses and special interest groups supported the bills that sought to weaken consumer privacy in favor of their own interests.⁴⁹

5. Creating Proposition 24

a. Soliciting Information from the Experts

Proposition 24’s main proponent, Alastair Mactaggart, sent out over 100 requests for input to businesses, academics, advocacy groups, etc.⁵⁰ He solicited businesses in addition to industry experts because he wanted to improve business operations without hindering consumer privacy.⁵¹ Not every group responded, but the drafters worked with the experts who did.⁵²

b. Attempting to Pass the Proposition 24 as Legislation

After soliciting information from industry experts, Mr. Mactaggart partnered with Senator Hertzberg to pass Proposition 24 as legislation.⁵³ However, the idea for bolstering consumer privacy did not garner much interest given the Legislature appeared more open to weakening the CCPA than expanding it.⁵⁴ The proponents tried to get buy-in from other legislators, but the idea did not get enough support.⁵⁵

Mr. Mactaggart realized his ideas would not work in the Legislature, so he pivoted the would-be legislation to Proposition 24.⁵⁶ All things considered, Mr. Mactaggart believed expanding privacy protections alone would be insufficient because the Legislature had seen so many attempts to weaken the law.⁵⁷ Therefore, he sought to shore up that vulnerability by requiring that future amendments comport with the purpose and intent of the proposition.⁵⁸

⁴⁷ *E.g.*, SB 753, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as introduced on Feb. 22, 2019, but not enacted).

⁴⁸ *Our Growing List of Supporters*, CALIFORNIANS FOR CONSUMER PRIVACY, <https://www.caprivacy.org/our-growing-list-of-supporters/> (last visited Aug. 27, 2020).

⁴⁹ ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION, COMMITTEE ANALYSIS OF SB 1416, at 14–15 (Apr. 26, 2019); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 753, at 9–11 (Apr. 4, 2019).

⁵⁰ Mactaggart Interview, *supra* note 9 (notes on file with the *California Initiative Review*).

⁵¹ *See id.* (noting that Alastair Mactaggart worked with Ashkan Soltani, former Chief Technology Officer for the Federal Trade Commission, when developing Proposition 24).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*; *see also, supra* Section II.A.4.

⁵⁵ Mactaggart Interview, *supra* note 9 (notes on file with the *California Initiative Review*).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

B. Proposed Changes to Existing Law

1. Expanding Californians' Privacy Rights

Proposition 24 would protect Californians from businesses that share consumer information in the same way that it protects them from businesses that collect and sell their information.⁵⁹ It extends the right to know what information businesses are collecting and selling to include the right to know what information businesses are sharing and with whom they share that information.⁶⁰ Under Proposition 24, Californians may tell a business not to share their personal information in the same way they currently may tell a business not to collect or sell that information.⁶¹ Proposition 24 also allows Californians to tell a business to correct inaccurate information about the consumer that the business possesses.⁶²

Beyond basic data collection, Proposition 24 recognizes that there are different types of information. Proposition 24 creates a new category of information called "Sensitive Personal Information," which includes things like race, ethnic origin, religion, sexual orientation, social security number, and precise geolocation.⁶³ If enacted, Proposition 24 would give Californians the right to limit a business's use and disclosure of Sensitive Personal Information.⁶⁴

Last, Proposition 24 compliments federal law by expanding state law protections for minors up to age sixteen.⁶⁵ It requires that businesses not sell or share information for consumers under the age of sixteen unless a parent or guardian has allowed that sharing.⁶⁶ The proposition also imposes strict penalties on businesses that intentionally violate a minor's privacy.⁶⁷

2. Attempting to Provide an Easier Way for Consumers to Opt Out

Unlike the current system, Californians may communicate their right to opt out by using the Do Not Track signal in their web browser.⁶⁸ This aspect of Proposition 24 potentially eases the opt out process because, if the business accepts that signal as communicating a consumer's preference, the consumer does not need to take additional

⁵⁹ See, e.g., Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.140(ah)) (defining "sharing" within the proposition), and *id.* (amending CAL. CIV. CODE § 1798.140(d)(1)) (expanding the definition of a business to include businesses that share consumer information).

⁶⁰ Cal. Proposition 24 (2020) (amending CAL. CIV. CODE §§ 1798.110, 1798.115).

⁶¹ *Id.* (amending CAL. CIV. CODE § 1798.120).

⁶² *Id.* (adding CAL. CIV. CODE § 1798.106).

⁶³ *Id.* (amending CAL. CIV. CODE § 1798.140(ae)).

⁶⁴ *Id.* (adding CAL. CIV. CODE § 1798.121).

⁶⁵ See 15 U.S.C. § 6501 (2020) (establishing protections for children thirteen and under), and Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.120) (expanding state law protections from age thirteen to sixteen, which would include all minors currently protected under federal law).

⁶⁶ Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.120).

⁶⁷ *Id.* (amending CAL. CIV. CODE § 1798.155(a)) (permitting triple damages for infractions involving minors).

⁶⁸ *Id.* (amending CAL. CIV. CODE § 1798.135(b)).

action. Rather, Californians can set that signal once and potentially reduce the amount of times they must opt out.

Beyond the Do Not Track signal, Proposition 24 lightens the burden on consumers who are manually opting out of data collection. Proposition 24 permits a business to collect only the minimum amount of information from a consumer that is necessary for the consumer to opt out of data collection.⁶⁹

3. Preventing Employer Retaliation

After California enacted the CCPA, there was confusion regarding whether an employee qualifies as a consumer.⁷⁰ The CCPA exempts a business from complying with a consumer's request to delete his or her data if that information is necessary to maintain the business-consumer relationship.⁷¹ It also prohibits businesses from retaliating against a consumer who opts out of data collection.⁷² However, it is not clear whether those protections extend to the employer-employee relationship when the employer qualifies as a business under the law.

Proposition 24 leaves the CCPA's business-consumer anti-retaliation protections in place.⁷³ It resolves the employer-employee confusion by expanding the business-consumer protections to safeguard employees and applicants from retaliation for opting out of an employer's data collection.⁷⁴ Under Proposition 24, an employer cannot retaliate or discriminate against an employee or applicant who exercises any rights under the statute.⁷⁵ That protection applies when the employer qualifies as a business under the statute.

4. Regulating Consumer Privacy

California already has the most robust consumer privacy laws in the United States; nevertheless, Proposition 24 would put California on par with Europe—which offers the strongest consumer privacy protections in the world.⁷⁶ While a division of the DOJ currently

⁶⁹ *Id.* (amending CAL. CIV. CODE § 1798.135(c)).

⁷⁰ Justine Phillips & Jessica Gross, *Employee Privacy by Design: Guidance for Employers Beginning to Comply with the California Consumer Privacy Act*, SHEPPARD MULLIN: LABOR & EMP'T L. BLOG (Sept. 19, 2019), <https://www.laboremploymentlawblog.com/2019/09/articles/privacy/employee-privacy-by-design-guidance-for-employers-beginning-to-comply-with-the-california-consumer-privacy-act/> (discussing the question "Are Employees "Consumers" Under CCPA?").

⁷¹ CAL. CIV. CODE § 1798.105(d)(1) (West 2020).

⁷² *Id.* § 1798.125(a)(1)(B).

⁷³ See Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.125) (refraining from modifying sections (a)(1)(A)–(D)).

⁷⁴ *Id.* (amending CAL. CIV. CODE § 1798.125(a)(1)(E)).

⁷⁵ *Id.*

⁷⁶ See generally Thomas A. Gerhart, *AB 2182 and Chapter 55: Enacting Privacy Regulations in the Face of Legislative Complacency*, 50 U. PAC. L. REV. 177 (2018) available at <https://scholarlycommons.pacific.edu/uoplawreview/vol50/iss2/3> (last visited Sept. 20, 2020) (discussing how privacy rights had not materialized in the several states prior to California enacting its first internet/consumer privacy laws in 2018). See also *How Prop 24 Gets California On Par with Europe's Broad Privacy Rights*, *supra* note 15 (comparing Proposition 24 with California's and Europe's privacy laws).

enforces the CCPA, Proposition 24 would create a fifty-person agency called the California Privacy Protection Agency.⁷⁷ This agency would be the largest privacy regulatory body in the United States, and its sole responsibility would be to enforce California’s consumer privacy laws.⁷⁸

Proposition 24 allocates \$5 million from the General Fund for fiscal year 2020–2021 and \$10 million annually thereafter (adjusted for inflation) to support the new agency.⁷⁹ Initially, the DOJ’s staff will continue regulating privacy until the new agency is fully staffed.⁸⁰ The California Privacy Protection Agency will be responsible for enacting additional regulations that comport with the guidance provided by Proposition 24 on or before July 1, 2022.⁸¹ One example of a regulation that the new agency must create under Proposition 24 would prevent businesses from profiling a consumer by using that consumer’s Sensitive Personal Information.⁸²

5. Protecting Californians While Remaining Small-Business Friendly

Proposition 24’s primary goal is to protect Californians’ privacy from unwanted access, use, and distribution. To ensure the Legislature preserves that goal, Proposition 24 would build a floor under the law.⁸³ This floor would only permit modifications to the law if the proposed changes comport with Proposition 24’s purpose and intent.⁸⁴ Any amendments to the law would require a finding that the change does not interfere with Californians’ control over their personal information, a simple majority in both houses, and the governor’s signature.⁸⁵

Proposition 24 tries to simultaneously increase consumer privacy protection without hindering business. It takes steps to alleviate confusion under the CCPA by explicitly allowing businesses to offer loyalty programs—something that is neither currently prohibited nor clearly permitted.⁸⁶ The proposition explains that a business’s loyalty program must comport with the CCPA if the business falls within the statutory definition of a business.⁸⁷ Proposition 24 also provides guidance to service providers, ensuring the law protects consumers and informs businesses of their responsibilities.⁸⁸

⁷⁷ Cal. Proposition 24 (2020) (adding CAL. CIV. CODE § 1798.199.10).

⁷⁸ *Id.* (adding CAL. CIV. CODE § 1798.199.40).

⁷⁹ *Id.* (adding CAL. CIV. CODE § 1798.199.95); LEGISLATIVE ANALYST’S OFFICE, PROPOSITION 24, 7 <https://lao.ca.gov/ballot/2020/Prop24-110320.pdf> (last visited Sept. 13, 2020).

⁸⁰ Cal. Proposition 24 (2020) (adding CAL. CIV. CODE § 1798.199.95(c)).

⁸¹ *Id.* (reenacting CAL. CIV. CODE § 1798.185).

⁸² *Id.* (reenacting CAL. CIV. CODE § 1798.185(a)(16)). *See also* Mactaggart Interview, *supra* note 9 (notes on file with the *California Initiative Review*) (providing the example of an app-based ridesharing app that could use racial information to only assign drivers to customers with the same race or ethnicity).

⁸³ Mactaggart Interview, *supra* note 9 (notes on file with the *California Initiative Review*).

⁸⁴ Cal. Proposition 24 (2020) (Section 25).

⁸⁵ *Id.*

⁸⁶ Mactaggart Interview, *supra* note 9 (notes on file with the *California Initiative Review*).

⁸⁷ Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.125(a)(3)).

⁸⁸ *Id.* (amending CAL. CIV. CODE § 1798.105(c)(3)).

Additionally, Proposition 24 reduces its impact on businesses without compromising consumer privacy by increasing the threshold requirement for the term “business” within the statute. The CCPA regulates businesses that buy, collect, sell or share 50,000 consumers’ information, and Proposition 24 increases that threshold to 100,000.⁸⁹ While this change reduces the number of businesses that must comply with the CCPA, the businesses it excludes are very small and less likely to participate in the consumer information industry.⁹⁰ The current threshold is over-inclusive and harmful to small businesses because a website need only collect information from 137 visitors per day—which often happens automatically—to satisfy the 50,000 threshold.⁹¹ Therefore, Proposition 24 relaxes the CCPA by no longer applying to small businesses whose websites collect visitor and customer data.

There are two other important business exceptions that Proposition 24 creates. First, it creates an exception for businesses that collect data where the collection of that information serves consumer interests and aids the business in performing its job.⁹² The best illustration of this example would be a car dealership that needs to issue maintenance and recall notices to its customers. Second, Proposition 24 would waive the requirement for a business to provide consumers with the option to opt out by a telephone if that business operates solely online.⁹³ This change would reduce an online business’s expenses by not requiring it to have a phone number if its online operations do not normally require a telephone.

6. Effective Dates

If Californians adopt Proposition 24, it will take effect on January 1, 2023.⁹⁴ Until that date, all existing laws will remain in force.⁹⁵ The only nuance to the effective date is that a consumer’s right to access his or her information will only apply to information collected on or after January 1, 2022.⁹⁶

III. DRAFTING ISSUES

A. Severability

One of the statutory issues that can arise after voters approve an initiative is the issue of severability. This issue begins when a court finds that a portion of the law is

⁸⁹ *Id.* (amending CAL. CIV. CODE § 1798.140(d)(1)(B)).

⁹⁰ *Is Your Small Business Up-To-Date With The CCPA?*, SMALL BUS. RES. CTR., <https://sbrc.employers.com/small-business/operations/ccpa-explained> (last visited Sept. 27, 2020).

⁹¹ *Id.*

⁹² *See, e.g.*, Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.145(g)(1)) (creating an exception for car dealers who collect consumer information for the purpose of facilitating recalls and vehicle maintenance).

⁹³ *Id.* (amending CAL. CIV. CODE § 1798.130).

⁹⁴ *Id.* (Section 31).

⁹⁵ *Id.*

⁹⁶ *Id.*

unconstitutional.⁹⁷ If the unconstitutional portion is severable, a court would remove that part, and the rest of the law may remain in place.⁹⁸ Otherwise, the court must invalidate the entire statute.⁹⁹

Proposition 24 contains a severability clause that calls for all remaining provisions of the statute to remain in effect if a court severs any section.¹⁰⁰ The clause communicates the voters' desire that Proposition 24 should survive if a court invalidated individual provisions of the initiative.¹⁰¹

A severability clause alone does not guarantee that courts will sever the invalid portion.¹⁰² A court will only sever an invalid provision if it is mechanically and grammatically severable, functionally separable, and volitionally separable.¹⁰³ Mechanical and grammatical severability means a court can remove a provision without impacting other provisions of the initiative.¹⁰⁴ "Functionally separable" means the invalidated provision does not impact the remaining provisions' ability to perform their function.¹⁰⁵ Volitional separability means the voters would still want the remaining provisions to exist in the absence of the invalidated provision.¹⁰⁶

Proposition 24's severability clause satisfies the volitional prong because it clearly communicates the voters' intent that the remaining provisions survive a court invalidating any other portion of the initiative.¹⁰⁷ The remaining severability elements are more fact-specific to the challenged section(s). Currently, Proposition 24 is not facing any substantive challenges. However, if someone challenged an individual portion of the proposition, then a court would have to determine if the challenged section is mechanically, grammatically, and functionally severable.

B. Protecting the Purpose of California's Privacy Law

One of the benefits of passing an initiative is the ability to bypass the cumbersome legislative process. However, just because the voters pass an initiative does not mean the Legislature cannot amend the law, although to do so usually means another trip to the ballot.¹⁰⁸ The California Constitution states, "The Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors'

⁹⁷ *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 822 (1989).

⁹⁸ *Id.*

⁹⁹ *See id.* (determining whether the court could sever the offending provision and implement the initiative in part).

¹⁰⁰ Cal. Proposition 24 (2020) (Section 26).

¹⁰¹ *Id.*

¹⁰² *Santa Barbara Sch. Dist. v. Superior Court*, 13 Cal. 3d 315, 331 (1975).

¹⁰³ *Gerken v. FPPC*, 6 Cal. 4th 707, 721–22 (1993) (citing *Calfarm Ins. Co.*, 48 Cal. 3d at 821–22).

¹⁰⁴ *Raven v. Deukmejian*, 52 Cal. 3d 336, 356 (1990).

¹⁰⁵ *Calfarm Ins. Co.*, 48 Cal. 3d at 822.

¹⁰⁶ *Raven*, 52 Cal. 3d at 356.

¹⁰⁷ Cal. Proposition 24 (2020) (Section 26).

¹⁰⁸ CAL. CONST. art. II § 10(c).

approval.”¹⁰⁹ Therefore, the Legislature may only amend an initiative statute in the manner and to the extent the proposition expressly permits.¹¹⁰

Proposition 24 specifies the means by which the Legislature may amend its provisions in the future.¹¹¹ While initiative statutes generally require voter approval to amend, Proposition 24 requires that the amendment be consistent with the purpose and intent of Proposition 24, the Legislature pass it with a simple majority, and the governor sign it into law.¹¹² This low vote threshold gives the Legislature the ability to amend Proposition 24 with relative ease. However, the condition that any amendment is consistent with the purpose and intent of Proposition 24 ensures future amendments protect Californians’ privacy. If the Legislature amends the law and litigation ensues, courts would determine whether that amendment comports with the purpose and intent of California’s privacy laws.

C. Deciphering the Purpose and Intent of California’s Privacy Laws

A fundamental issue with an initiative is determining its purpose and intent. Often, an initiative’s authors include a statement of intent within the initiative. While such statements help a court determine the law’s purpose, they are by no means dispositive.¹¹³ The California Supreme Court has found that—when discerning an initiative’s purpose—a court should use the initiative’s statement of purpose as a guide; however, that should not be the only thing the court considers.¹¹⁴ Evidence of an initiative’s purpose can be drawn from many sources, including its historical context and ballot arguments in its favor.¹¹⁵

Proposition 24’s has a statement of purpose that states, “it is the purpose and intent of the people of the State of California to further protect consumers’ rights, including the constitutional right of privacy.”¹¹⁶ Further, the voter information guide’s ballot argument in favor of Proposition 24 describes a scene where large corporations monitor children and sell Californians’ information.¹¹⁷ Against that backdrop, the proponents’ argument declares, “Consumers need stronger protections.”¹¹⁸ Considering both the statement of purpose and the voter information guide, a court would likely find the purpose and intent of Proposition 24 was to protect—not weaken—consumer privacy.

¹⁰⁹ *Id.*

¹¹⁰ *Amwest Surety Ins. Co. v. Wilson*, 11 Cal. 4th 1243, 1251 (1995) (“The voters have the power to decide whether or not the Legislature can amend or repeal initiative statutes. This power is absolute and includes the power to enable legislative amendment *subject to conditions attached by the voters.*”) (emphasis in original).

¹¹¹ Cal. Proposition 24 (2020) (Section 25).

¹¹² *Id.*

¹¹³ *Amwest Surety Ins. Co.*, 11 Cal. 4th at 1256.

¹¹⁴ *Id.*

¹¹⁵ *Howard Jarvis Taxpayers Ass’n v. Newsom*, 39 Cal. App. 5th 158, 170 (2019).

¹¹⁶ Cal. Proposition 24 (2020) (Section 3).

¹¹⁷ CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY NOVEMBER 3, 2020, at 70, available at <https://vig.cdn.sos.ca.gov/2020/general/pdf/complete-vig.pdf>.

¹¹⁸ *Id.*

IV. CONSTITUTIONAL ISSUES

A. Federal Constitutional Issues

1. Preemption and the Tenth Amendment

While the Constitution does not guarantee a right to privacy, it delegates specific powers to the federal government and reserves all remaining powers for the states.¹¹⁹ The Supremacy Clause establishes that federal law is the “supreme Law of the Land.”¹²⁰ The Supreme Court interpreted this clause to mean that federal law is superior to state law and prevails where the laws conflict.¹²¹ Courts have maintained this position since the Supreme Court’s earliest Supremacy Clause interpretations.¹²² Ultimately, federal law precludes state law where compliance with both state and federal law is impossible and state law impedes federal law.¹²³

The United States Supreme Court first discussed the right to privacy beginning in the 1960s, and Congress followed suit in the 1970s.¹²⁴ In total, Congress has enacted only four laws relating to data privacy—all taking effect before early 2000.¹²⁵ While these four laws deal with different facets of privacy, not one deals with every consumers’ privacy on the Internet.¹²⁶ The only quasi-relevant law is the COPPA, which takes steps to protect children under thirteen from sharing personal information without parental consent.¹²⁷

Proposition 24 focuses on protecting every Californians’ information from misuse.¹²⁸ It focuses on the ways that businesses collect information and takes steps to ensure Californians can limit what a business can do with that information.¹²⁹ Proposition 24 states that it supplements existing laws and that it does not conflict with the COPPA.¹³⁰ The proposition also harmonizes—not conflicts—with federal law because it would not relax the

¹¹⁹ See generally, U.S. CONST. (containing no provisions relating to privacy); see also *id.* amend X. (reserving non-delegated powers to the states).

¹²⁰ U.S. CONST. art. VI, cl. 2.

¹²¹ *E.g.*, *McCulloch v. Maryland*, 17 U.S. 316, 361 (1819).

¹²² *Id.*; *Edgar v. MITE Corp.*, 457 U.S. 624, 631 (1982).

¹²³ *Edgar*, 457 U.S. at 631.

¹²⁴ See 15 U.S.C. § 1681 (2020) (effective Oct. 26, 1970) (focusing on consumer privacy with respect to credit reporting agencies), and *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (becoming the first case where the Supreme Court discussed the importance of the right to privacy).

¹²⁵ 15 U.S.C. § 1681 (effective Oct. 26, 1970); 5 U.S.C. § 552(a) (2020) (effective Dec. 31, 1974); 15 U.S.C. § 6801 (2020) (effective Nov. 12, 1999); 15 U.S.C. § 6501 (2020) (effective Apr. 21, 2000).

¹²⁶ 15 U.S.C. § 1681 (protecting consumer information with respect to credit reporting agencies); 5 U.S.C. § 552(a) (creating laws to regulate government agency’s use of personal information); 15 U.S.C. § 6801 (regulating financial institutions collection and use of personal institution); 15 U.S.C. § 6501 (protecting children under thirteen while on the internet).

¹²⁷ 15 U.S.C. § 6501.

¹²⁸ Cal. Proposition 24 (2020) (Section 3).

¹²⁹ *Id.*

¹³⁰ *Id.* (Section 30).

COPPA’s protections.¹³¹ Additionally, Proposition 24 gives way to Title 15 of the United States Code, which houses the federal government’s consumer privacy laws.¹³² Therefore, it is highly unlikely that federal law prevents California from regulating privacy.

2. Dormant Commerce Clause

The Commerce Clause gives Congress the power to regulate commerce among the states.¹³³ The Dormant Commerce Clause emerges from the interplay between the Commerce Clause and the Tenth Amendment. Essentially, under a Dormant Commerce Clause analysis, a state may not regulate commerce that crosses state lines.¹³⁴

An important aspect of Proposition 24 is how it modifies existing law. Current law uses the wrong word in a manner that could create a Dormant Commerce Clause issue.¹³⁵ Proposition 24 would change the wording of existing law to permit data collection in a way that would constitute interstate commerce.¹³⁶ In fact, the drafters made this change for the explicit purpose of avoiding constitutional violations.¹³⁷ Therefore, Proposition 24 would avoid—not create—a potential Dormant Commerce Clause violation.

3. Freedom of Press and First Amendment

The United States Constitution guarantees the right to both free speech and freedom of the press.¹³⁸ Multiple Supreme Court justices have discussed how the press must be free from government influence and how that is the basis of the First Amendment’s protection.¹³⁹

Proposition 24 takes steps to ensure it does not interfere with a free press. Its drafters were careful not to create an undue burden on a free press by drafting a statute that would require news companies to provide the news at no cost.¹⁴⁰ In essence,

¹³¹ Compare 15 U.S.C. § 6501 (establishing the age threshold for people protected by the statute at thirteen), with Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.120) (protecting children up to the age of sixteen, which includes every person that the COPA protects).

¹³² Cal. Proposition 24 (2020) (amending CAL. CIV. CODE 1798.145(d)(1)).

¹³³ U.S. CONST. art. I, § 8, cl. 3.

¹³⁴ Compare U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have power to . . . regulate commerce . . . among the several states”), with *id.* amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”).

¹³⁵ See CAL. CIV. CODE § 1798.145(a)(6) (West 2020) (“This paragraph shall not permit a business from storing, including on a device, personal information about a consumer when the consumer is in California and then collecting that personal information when the consumer and stored personal information is outside of California.”).

¹³⁶ Cal. Proposition 24 (2020) (amending CAL. CIV. CODE 1798.145(a)(7)) (changing the phrase “shall not permit” to “shall not prohibit” circumstances that would constitute a Dormant Commerce Clause violation).

¹³⁷ Mactaggart Interview, *supra* note 9 (notes on file with the *California Initiative Review*).

¹³⁸ U.S. CONST. amend. I.

¹³⁹ See, e.g., *Pennkamp v. Florida*, 328 U.S. 331, 354–55 (1946) (“Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society. The scope and nature of the constitutional protection of freedom of speech must be viewed in that light and in that light applied.”).

¹⁴⁰ Mactaggart Interview, *supra* note 9 (notes on file with the *California Initiative Review*).

Proposition 24 permits businesses that collect consumer information to charge a fee for their services.¹⁴¹ This provision maintains the status quo, while still holding businesses accountable to the other provisions of the statute.¹⁴² Without this explicit provision, the drafters feared news organizations would go out of business if they had to give away their services for free.¹⁴³ It is unlikely that Proposition 24 violates the First Amendment because it takes affirmative steps to preserve the free press.

B. State Constitutional Issue: The Single Subject Rule

Under the California Constitution, an initiative must adhere to the Single Subject Rule, which requires a ballot initiative to address only a single issue or subject.¹⁴⁴ The California Supreme Court found that an initiative does not violate the Single Subject Rule if its provisions are reasonably related to the same general purpose.¹⁴⁵ The law does not require that relatedness to apply to collateral effects.¹⁴⁶ In short, an initiative does not violate the Single Subject Rule if its provisions are reasonably related to a single purpose, but those provisions have an impact in an unrelated area of the law.

Proposition 24 would allow people to correct inaccurate personal information that businesses have collected.¹⁴⁷ It also expands protections specifically for Sensitive Personal Information and creates a consumer privacy regulatory body to enforce Proposition 24.¹⁴⁸ Every provision that Proposition 24 adds or amends is related to consumer privacy protection.¹⁴⁹ A court would likely find that Proposition 24 does not violate the Single Subject Rule because every part of the proposition is reasonably germane to consumer privacy.

V. PUBLIC POLICY ISSUES

A. Proponents

Proposition 24's supporters include politicians, consumer groups, trade associations, and civil liberties groups. The main proponent is Alastair Mactaggart, who played a pivotal role in enacting the CCPA.¹⁵⁰ Other supporters include Senator Hertzberg, former

¹⁴¹ Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.125(a)(3)).

¹⁴² *Id.*

¹⁴³ Mactaggart Interview, *supra* note 9 (notes on file with the *California Initiative Review*).

¹⁴⁴ CAL. CONST. art. II § 8(d).

¹⁴⁵ *Brosnahan v. Brown*, 32 Cal. 3d 236, 245 (1982) ("In determining whether a measure "embrac[es] more than one subject," we have previously held that "an initiative measure does not violate the single-subject requirement if, despite its varied collateral effects, all of its parts are 'reasonably germane' to each other," and to the general purpose or object of the initiative." (quoting *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 230 (1978))).

¹⁴⁶ *Id.*

¹⁴⁷ Cal. Proposition 24 (2020) (adding CAL. CIV. CODE § 1798.106(a)).

¹⁴⁸ *Id.* (adding CAL. CIV. CODE §§ 1798.121, 1798.199.10(a)).

¹⁴⁹ *See generally id.* (adding, amending, and reenacting sections all within the statutory framework of CAL. CIV. CODE §§ 1798.100–199).

¹⁵⁰ *About Us*, CALIFORNIANS FOR CONSUMER PRIVACY, <https://www.caprivacy.org/about-us/> (last visited Aug. 27, 2020).

presidential candidate Andrew Yang, the California Democratic Party, the National Association for the Advancement of Colored People (“NAACP”), the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”), Consumer Watchdog, California Professional Firefighters, and multiple labor unions.¹⁵¹

As an overarching theme to keep in mind with these policy arguments, Alastair Mactaggart was the proponent and champion of the CCPA. Mr. Mactaggart’s response to whether Proposition 24 would weaken consumer privacy protections was, “Why would I spend millions of dollars on the CCPA and then spend more money to weaken it?”¹⁵² Rather, he admired the creativity of businesses, but appreciates the value of regulations.¹⁵³ Consequently, his goal was to keep the law more powerful than companies and ensure California is at the forefront of consumer privacy protections.¹⁵⁴ He noted, if California enacts Proposition 24, it would set a standard for other states—and possibly the nation—to follow.¹⁵⁵

1. Makes it Easier for Consumers to Exercise their Right to Opt Out

Under current law, individual Californians shoulder the burden opting out of data collection.¹⁵⁶ Californians can set their browser’s Do Not Track signal; however, businesses need not respect that preference.¹⁵⁷ Proposition 24 would allow consumers to communicate their opt out preferences via that Do Not Track signal and would allow businesses to receive the consumer’s preference through that signal.¹⁵⁸

Proponents assert the initiative does not change the requirement that consumers communicate their preferences, but it provides them with an easier way to do so.¹⁵⁹ Consumers need only enable this feature in their browser once to uniformly communicate their preference.¹⁶⁰ Existing law takes over if a business informs the consumer that it does not accept preferences via the Do Not Track signal.¹⁶¹ Therefore, Proposition 24 potentially makes it easier—not harder—for Californians to opt out of data collection by allowing businesses to accept consumer preferences via the Do Not Track signal. Otherwise, the process remains the same as existing law.

¹⁵¹ *Our Growing List of Supporters*, *supra* note 48.

¹⁵² Mactaggart Interview, *supra* note 9 (notes on file with the *California Initiative Review*).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ CAL. CIV. CODE § 1798.135 (West 2020).

¹⁵⁷ CAL. DEP’T OF JUST., *supra* note 23.

¹⁵⁸ Mactaggart Interview, *supra* note 9 (notes on file with the *California Initiative Review*).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.135(b)).

2. Does Not Foreclose a Future Private Right of Action

California’s current privacy laws do not guarantee a private right of action outside of a negligent data breach.¹⁶² A private right of action would allow individual Californians to file lawsuits against businesses who violate their privacy.¹⁶³ While a private right of action was part of Mr. Mactaggart’s early drafts of the CCPA in 2018—which the Legislature enacted instead of it going to the voters—that right was removed in exchange for granting consumers access to see the information businesses had collected.¹⁶⁴

Opponents have criticized Proposition 24 because it does not include a private right of action. While that statement is true, the proponents believe that view takes an all-or-nothing approach to privacy that sacrifices additional protections over a single right.¹⁶⁵ Proposition 24’s proponents argue that it better protects Californians than the CCPA and takes steps to ensure businesses cannot undermine the law.¹⁶⁶ While Proposition 24 will not create a new private right of action, it does not foreclose anyone from enacting such a right in the future.¹⁶⁷

3. Does Not Create Pay-for-Privacy Schemes that Disproportionately Affect Vulnerable Communities

This argument stems from the fact that Proposition 24 allows businesses to have loyalty programs. However, current law does not prohibit loyalty programs.¹⁶⁸ Businesses expressed concern that the CCPA left this open to interpretation.¹⁶⁹ Current law does not preclude a business from offering loyalty programs; however, those programs must comport the CCPA if the business meets the statutory definition of a business.¹⁷⁰

Proposition 24 expressly permits loyalty programs that are consistent with the CCPA.¹⁷¹ California’s privacy laws already allow businesses to provide incentives to consumers who give the business their personal information.¹⁷² However, businesses cannot penalize or discriminate against consumers who opt out of data collection.¹⁷³ Therefore, Proposition 24 does not permit pay-for-privacy schemes. This change is important because it addresses an industry concern that the CCPA forecloses loyalty programs.

¹⁶² CAL. CIV. CODE § 1798.135 (West 2020).

¹⁶³ Joseph Jerome, *Private right of action shouldn’t be a yes-no proposition in federal US privacy legislation*, IAPP (Oct. 3, 2019), <https://iapp.org/news/a/private-right-of-action-shouldnt-be-a-yes-no-proposition-in-federal-privacy-legislation/>.

¹⁶⁴ Mactaggart Interview, *supra* note 9 (notes on file with the *California Initiative Review*).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.125(a)).

¹⁶⁹ Mactaggart Interview, *supra* note 9 (notes on file with the *California Initiative Review*).

¹⁷⁰ CAL. CIV. CODE § 1798.140(c) (West 2020).

¹⁷¹ Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.125(a)(3)).

¹⁷² CAL. CIV. CODE § 1798.125(b) (West 2020).

¹⁷³ *Id.* § 1798.125(a).

4. Provides Greater Protection for Children

Both federal law and the CCPA impose strict protections for consumers who are thirteen years old or younger.¹⁷⁴ Proposition 24 would expand protections for minors up to age sixteen.¹⁷⁵ To accomplish this, Proposition 24 would impose stricter penalties on businesses that intentionally violate a minor's privacy.¹⁷⁶ Under Proposition 24, fines are tripled for any business that violates the privacy of a Californian age sixteen and younger.¹⁷⁷ This provision is beneficial because it is a very strong deterrent for businesses who mishandle consumer data. Ideally, this provision will prompt businesses to exercise additional caution with minors' data. This change creates better consumer privacy protections for California's youth.

5. Better Protects Sensitive Personal Information

Currently, California law treats all consumer information the same. However, Proposition 24's proponents recognize some information is so sensitive that businesses should not be able to use it.¹⁷⁸ Proposition 24 would classify certain types of information as Sensitive Personal Information.¹⁷⁹ Additionally, the proposition directs California's new consumer privacy regulatory agency to enact laws that would prohibit businesses from using Sensitive Personal Information to profile Californians.¹⁸⁰ Proponents feel change is very important for social justice because it limits business's ability to profile and commercialize Californians' most intimate data.

6. Creates the Largest Privacy Regulatory Body in the United States

The federal government employs only forty people to enforce consumer privacy laws across the United States.¹⁸¹ California currently has twenty-three employees within the DOJ who enforce the CCPA.¹⁸² The DOJ spends between \$4.25 million and \$4.739 million on regulating consumer privacy each year.¹⁸³ Proposition 24 recognizes that consumer privacy

¹⁷⁴ 15 U.S.C. § 6501 (2020); CAL. CIV. CODE § 1798.120(c) (West 2020).

¹⁷⁵ Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.155(a)).

¹⁷⁶ *Id.* (amending CAL. CIV. CODE §§ 1798.120(c), 1798.155(a)).

¹⁷⁷ *Common Sense Endorses Proposition 24, California Privacy Rights Act (CPRA), Citing New Protections For Families*, CALIFORNIANS FOR CONSUMER PRIVACY, <https://www.caprivacy.org/common-sense-endorses-november-2020-ballot-measure-california-privacy-rights-act-cpra-citing-new-protections-for-families/> (last visited Aug. 27, 2020).

¹⁷⁸ *A Look at the New Privacy Rights that Prop 24 Delivers*, CALIFORNIANS FOR CONSUMER PRIVACY (Aug. 26, 2020), <https://www.caprivacy.org/a-look-at-the-new-privacy-rights-that-prop-24-delivers/>.

¹⁷⁹ *Id.*

¹⁸⁰ Cal. Proposition 24 (2020) (reenacting CAL. CIV. CODE § 1798.185(a)(16)).

¹⁸¹ *Compare* FED. TRADE COMM'N, FISCAL YEAR 2021 CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 9, at 121 (showing that the FTC employs 61 people for both Privacy and Identity Protection), *with* Mactaggart Interview, *supra* note 9 (notes on file with the *California Initiative Review*) (explaining that the FTC has only 40 employees who work on consumer privacy).

¹⁸² CAL. DEP'T OF FIN., 2019-20 STATE BUDGET DEPARTMENT REPORT: DEPARTMENT OF JUSTICE, <http://www.ebudget.ca.gov/2019-20/pdf/Enacted/GovernorsBudget/0010/0820.pdf> (last visited Sept. 5, 2020).

¹⁸³ CAL. DEP'T OF FIN., 2019-20 BUDGET CHANGE PROPOSAL: DEPARTMENT OF JUSTICE, *supra* note 38.

is a developing field and that the law needs to develop alongside technology.¹⁸⁴ Proponents argue that California needs a dedicated regulatory body to examine and respond to new methods of data collection.¹⁸⁵ Therefore, Proposition 24 is the appropriate response because it would protect Californians by creating the most robust privacy regulatory agency in the nation that would grow alongside the fastest-developing technology ever.

7. Makes it Harder for Special Interests to Weaken the Law

Proposition 24's proponents believe an important step to protecting Californians is to ensure that special interests cannot weaken consumer privacy laws. The most important aspect of Proposition 24 is that it builds a floor under California's privacy laws that can grow with, but continue to protect, Californians.¹⁸⁶ Rather than requiring more votes to modify the law, Proposition 24 requires that modifications to California's privacy laws comport with the initiative's purpose and intent.¹⁸⁷ This requirement would prohibit legislators from modifying consumer privacy laws if those modifications were contrary to the initiative's purpose—which is to protect Californians from businesses exploiting their privacy.¹⁸⁸ Ultimately, this change ensures businesses cannot weaken privacy protections that Proposition 24 and the CCPA created.

B. Opponents

1. Makes it Harder for Consumers to Exercise their Right to Opt Out

Opponents argue that Proposition 24 makes it harder for consumers to exercise their right to opt out of data collection and sale. The American Civil Liberties Union ("ACLU") asserts that "Prop 24 puts the burden on people to protect themselves by paying for their privacy rights or by filling out forms and hoping companies listen. People do not have time or money to pay for their privacy."¹⁸⁹ Here, the ACLU is referring to the Do Not Track signal that consumers must select on a business's website in order to opt out of that site's data collection plan.¹⁹⁰ Opponents fear this provision will render much of the law's protections moot because the average consumer does not have the time, nor potentially the knowledge, to opt out of every website's data collection program.¹⁹¹

¹⁸⁴ Mactaggart Interview, *supra* note 9 (notes on file with the *California Initiative Review*).

¹⁸⁵ *Our Growing List of Supporters*, *supra* note 48.

¹⁸⁶ Mactaggart Interview, *supra* note 9 (notes on file with the *California Initiative Review*).

¹⁸⁷ Cal. Proposition 24 (2020) (Section 3).

¹⁸⁸ *Id.*

¹⁸⁹ Telephone Interview with Jacob Snow, Technology & Civil Liberties Attorney, American Civil Liberties Union (Aug. 31, 2020) [Snow Interview] (notes on file with the *California Initiative Review*).

¹⁹⁰ Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.135(b)). *See also* CAL. DEP'T OF JUST., *supra* note 23 (indicating that a Do Not Track signal is a browser function that operates in the background after the user activates this feature; it is not part of the individual website).

¹⁹¹ Snow Interview, *supra* note 189 (notes on file with the *California Initiative Review*).

2. Does Not Guarantee a Private Right of Action

Another concern is that Proposition 24 contains no guaranteed private right of action.¹⁹² Without a private right of action, affected citizens cannot sue a business that violates their privacy under California law.¹⁹³ To receive a remedy, a consumer would need to go through the government, which could then punish the business on behalf of the consumer.¹⁹⁴ The Electronic Frontier Foundation (“EFF”)—which neither supports nor opposes Proposition 24—states, “Consumers need a private right of action, so they can do the job when regulators can’t—or won’t.”¹⁹⁵ The EFF fears the law does not empower consumers to sue when a business violates their privacy.¹⁹⁶ Further, opponents assert it will not be possible for regulators to address all privacy violations because every violation goes through one agency.¹⁹⁷ Therefore, Proposition 24’s opponents believe that the law should guarantee a private right of action, and are disinclined to support a change to the law that does not include that right.

3. Enables Pay-for-Privacy Schemes

The EFF also believes Proposition 24 permits pay-for-privacy schemes.¹⁹⁸ Proposition 24 permits businesses to offer loyalty programs that are consistent with the statute’s other provisions.¹⁹⁹ Opponents, like the EFF, assert this provision effectively allows businesses to withhold discounts unless the consumer consents to having his or her data collected and used.²⁰⁰ Opponents fear that allowing a business to provide incentives in exchange for data mining will undermine the purpose of the law and render it far less effective.²⁰¹

4. Disproportionately Impacts Vulnerable Communities

The ACLU contends that Proposition 24 disproportionately impacts vulnerable communities.²⁰² An attorney for the ACLU argues, “Disadvantaged communities do not have time and money to go through the laborious process of opting out of all these programs.”²⁰³

¹⁹² Lee Tien, Adam Schwartz & Hayley Tsukayama, *Why EFF Doesn’t Support California Proposition 24*, ELEC. FRONTIER FOUND. (July 29, 2020), <https://www.eff.org/deeplinks/2020/07/why-eff-doesnt-support-cal-prop-24>.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.125(a)(3)).

²⁰⁰ *But see* CAL. CIV. CODE § 1798.125(a)(1)(B) (West 2020) (prohibiting businesses retaliating against consumers who opt out of data collection by charging different rates). Tien, Schwartz & Tsukayama, *supra* note 192; Geoffrey A. Fowler, *The Technology 202: Privacy advocates battle each other over whether California’s Proposition 24 better protects consumers*, WASHINGTON POST, (Aug. 4, 2020, 5:35 AM) <https://www.washingtonpost.com/politics/2020/08/04/technology-202-privacy-advocates-battle-each-other-over-whether-california-proposition-24-better-protects-consumers/>.

²⁰¹ Tien, Schwartz & Tsukayama, *supra* note 192.

²⁰² Snow Interview, *supra* note 189 (notes on file with the *California Initiative Review*).

²⁰³ *Id.*

The ACLU contends Proposition 24’s opt out system disproportionately impacts communities that both lack the time and resources to effectively exercise their right to opt out.²⁰⁴ Opting out requires time to sort through each business’s website and opt out of data collection.²⁰⁵ With the amount of time required to complete this task, the ACLU contends that disadvantaged communities will not be able to exercise their rights because they must focus on more immediate concerns unrelated to businesses using their personal data.²⁰⁶

5. Contains Too Many Loopholes

Last, opponents argue Proposition 24 contains too many loopholes.²⁰⁷ The ACLU claims Proposition 24 eliminates the requirement that phones include a setting to allow consumers to opt out of having their information sold.²⁰⁸ Instead, they claim Proposition 24 requires people to go through a complicated process and go to each app, site, or data broker to prevent their information from being sold.²⁰⁹ The ACLU contends this loophole places an undue burden on consumers who want to prevent a business from using their data.²¹⁰

Another loophole opponents frequently cite is the border exception.²¹¹ This exception dictates that—regardless of one’s preferences—once a person leaves California, all data on a device brought out of state can be collected and sold.²¹² The ACLU believes that, because of these loopholes, Proposition 24 does not adequately protect consumers and their data.²¹³

VI. CONCLUSION

Currently, there are three big problems with the CCPA. First, it allows businesses to easily attack and undercut California’s current privacy protections. Second, it exposes the current privacy laws to potential constitutional violations. Third, it does not offer the flexibility to develop alongside technology. Proposition 24 will remedy these problems and align California’s privacy laws with Europe’s top-tier privacy system. Proposition 24 aims to

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See generally Cal. Proposition 24 (2020) (modifying no section of existing law that impact a person’s ability to opt out using their phone).

²⁰⁹ But see CAL. CIV. CODE § 1798.120 (West 2020) (placing the burden of opting out on individual consumers), and Cal. Proposition 24 (2020) (amending CAL. CIV. CODE § 1798.135(b)(1)) (creating an additional way for consumers to opt out of data collection by setting a Do Not Track signal in their web browser). Snow Interview, *supra* note 189 (notes on file with the *California Initiative Review*).

²¹⁰ Snow Interview, *supra* note 189 (notes on file with the *California Initiative Review*).

²¹¹ *Id.*

²¹² *Id.*; but see *Oregon Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 98 (1994) (“Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a “negative” aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.”).

²¹³ Snow Interview, *supra* note 189 (notes on file with the *California Initiative Review*).

better serve Californians by expanding consumer privacy protections and insulating those protections from special interests.

Proposition 24's opponents argue that it weakens existing privacy laws, makes it harder to opt out of data collection, and encourages pay-to-play schemes that disproportionately impact vulnerable communities.²¹⁴ However, some of the provisions they cite are already part of California's consumer privacy laws.²¹⁵ Proposition 24's main proponent asks why would he spend millions of dollars undoing something that he spent millions of dollars creating.²¹⁶ Additionally, proponents argue Proposition 24 enhances California's privacy laws to give Californians maximum protection and is necessary to ensure special interests cannot weaken the state's consumer privacy laws.²¹⁷

A **YES** vote for Proposition 24 would make it harder for special interests to weaken California's consumer privacy laws, establish better privacy protections for Californians and their children, and allocate approximately \$10 million annually from the General Fund to regulate consumer privacy. A **NO** vote would not enact these changes, and the DOJ would remain in control of regulating consumer privacy and enforcing the CCPA.

²¹⁴ *Id.*; Homepage, NO ON PROP 24, <https://noon24ca.org> (last visited Sept. 7, 2020).

²¹⁵ *Compare, e.g.*, CAL. CIV. CODE § 1798.120 (West 2020) (requiring that a consumer direct their privacy preferences to each business that they would like to opt out of collection and sale from), *with* Snow Interview, *supra* note 189 (notes on file with the *California Initiative Review*) (arguing Proposition 24 places the burden on consumers to opt out).

²¹⁶ Mactaggart Interview, *supra* note 9 (notes on file with the *California Initiative Review*).

²¹⁷ *Id.*