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Proponents of Regulating "Surveillance Advertising" Cannot Ignore the First Amendment

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Efforts to regulate targeted online advertising are heating up. Earlier this month, several members of Congress proposed the Banning Surveillance Advertising Act of 2022 ("BSAA"), legislation that would authorize the Federal Trade Commission to treat as an "unfair or deceptive act or practice" certain online advertisements that "target" individuals based upon their "personal information" or information that identifies them as a member of a "protected class." Meanwhile, the Commission has announced that it is considering rulemaking efforts to curb what it describes as "abuses stemming from surveillance-based business models," and last week closed a period for public comment on a petition for rulemaking asking the Commission to "prohibit surveillance advertising."

In their enthusiasm for government action, proponents of legislative and regulatory measures have tended to downplay or overlook the potential First Amendment implications of these proposals—even though, on their face, the proposals appear to regulate speech. Indeed, for nearly half a century, the Supreme Court has recognized that regulations of advertising are regulations of speech.[1] In more recent years, the Court has subjected such regulations to increasingly rigorous review. And some lower courts have extended First Amendment review to regulations of advertisers' use of customer data even where those regulations do not affect the form or content of the advertisement itself.[2]

The sponsors of the BSAA may have inadvertently acknowledged the bill's regulation of speech, arguing in a background brief that federal regulation is needed because "companies collect unseemly amounts of data" and then use that data "to target ads with major societal harms, including voter suppression, racist housing discrimination, sexist employment exclusions, political manipulation, and threats to national security." Despite relying on these apparently content-based objections to certain types of speech as a justification for regulation, the congressional background brief does not mention the potential First Amendment implications of the BSAA. Similarly, proponents of Commission action, when they have addressed First Amendment concerns at all, have tended to oversimplify Supreme Court precedent by arguing that governments have a free hand to regulate "advertising."

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[1] *See Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).
[2] *See, e.g.*, *Verizon Northwest, Inc. v. Showalter*, 282 F. Supp. 2d 1187, 1190–91 (W.D. Wash. 2003).

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The First Amendment implications of proposals to regulate targeted advertising deserve a closer look. As a general matter, the Supreme Court distinguishes between content-based and content-neutral regulations of speech. Content-based regulations are "presumptively unconstitutional" and reviewed under "strict scrutiny," meaning such regulations will be upheld "only if the government proves that they are narrowly tailored to serve compelling state interests."[3] The Court considers a regulation of speech content based if it "applies to particular speech because of the topic discussed or the idea or message expressed."[4] That includes regulations which expressly draw content-based distinctions, and regulations "that cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message the speech conveys.'"[5]

The justifications offered by proponents of the BSAA and of Commission action give rise to concerns that a key objective of their proposals may be to regulate advertising based upon disagreement with its content. As noted above, the sponsors of congressional action have highlighted the dangers of speech they consider racist or sexist. Similarly, the petition seeking Commission action argues that targeted advertisements are a threat in part because they "amplify toxic misinformation" about Covid-19 and "boost outrageous content" from "the QAnon movement" and alleged "insurrectionists." Although it may be possible for supporters of federal regulation to justify their proposals apart from the content-based reasoning they have so far advanced—for example, it may be possible to craft statutory or regulatory language such that the content of the ads need not be considered to determine whether the rule would apply—the continued presence of such reasoning suggests that any final legislation or agency rule may be subject to the strictest First Amendment scrutiny. And even if advocates stop openly advancing such contentbased reasoning, a court would still need to consider whether such content-based distinctions are baked into the language or structure of the statute or rule.

Perhaps recognizing these potential problems, some supporters of federal action have argued that any final regulations of targeted advertising could be reviewed under the more deferential intermediate scrutiny standard that the Supreme Court has applied to "speech which does no more than propose a commercial transaction."[6] Under that standard, a regulation of non-misleading commercial speech that proposes a lawful transaction will be upheld if the government proves that the regulation is narrowly drawn to directly advance an important state interest.[7]

This theory presents an interesting question about the sweep of the BSAA and similar regulatory proposals. Presumably, much of the targeted advertising within the reach of these proposals could be fairly characterized as "commercial" because that advertising proposes a commercial transaction through the promotion of various goods and services. But that is not the only type of advertisements some of the proposals would reach.

In the BSAA, for example, there does not appear to be any language that would limit application of the statute to "commercial" advertising. Furthermore, as explained above, the sponsors and proponents of federal action have identified objectives that, at least in some cases, appear unrelated to anything that resembles a commercial transaction. For example, advertisements that promote "voter suppression"—while plainly harmful—could not in most cases be easily characterized as "commercial."

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[3] *See, e.g.*, *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018).
[4] *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).
[5] *Id*. at 164 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 7911 (1989)) (brackets omitted).
[6] *See Virginia State Bd. of Pharm.*, 425 U.S. at 762.
[7] *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Commn. of New York*, 447 U.S. 557, 566 (1980).

The same is likely true for many advertisements designed to target a "protected class"—a term the BSAA defines to mean "the actual or perceived race, color, ethnicity, national origin, religion, sex (including sexual orientation and gender identity or gender expression), familial status, or disability of an individual or group of individuals." For example, an organization that advocates on behalf of those with a particular disability might wish to target ads promoting awareness of its efforts to persons who share that disability. Similarly, a religious institution might wish to target adherents of a particular faith that it believes are likely to be responsive to its message. Such efforts would seem to be encompassed by the BSAA's prohibition on targeting advertisements based upon membership in a protected class yet, at the same time, do not appear obviously "commercial."

For now, none of these proposals have become law and so any potential First Amendment harms are theoretical. In the meantime, the proponents of increased regulation for targeted advertising would do well to give more serious consideration to the potential First Amendment implications of their proposals.