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NetChoice
Defending Free Speech and Free Enterprise Online

Maryland SB 571

OPPOSITION TESTIMONY

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Maryland State Senate
Economic Matters Committee

NetChoice respectfully asks that you **oppose** SB 571, legislation that would chill lawful speech online and negatively impact Maryland's vibrant small business community. Indeed, similar Data Privacy Impact Assessment (DPIA) requirements that are similar to the one contemplated in this bill have already been challenged and are currently enjoined.[1]

While well-intentioned, SB 571 has significant flaws:

> 1. SB 571's DPIA will chill speech and are therefore unconstitutional under the First Amendment—and already being actively litigated in other states;
> 2. The chilling effect of SB 571 would negatively impact Maryland's small business community; and
> 3. Would result in Maryland's minors seeing more ads for products and activities that are illegal for them to buy or do.

NetChoice is a trade association of leading internet businesses that promotes the value, convenience, and choice that internet business models provide to American consumers. Our mission is to make the internet safe for free enterprise and free expression.

We share the sponsor's goal to better protect minors from harmful content online. NetChoice members have taken issues of teen safety seriously and in recent years have rolled out numerous new features, settings, parental tools, and protections to better empower parents and assist in monitoring their children's use of social media. We ask that you oppose SB 571 and instead use this bill as a way to jumpstart a larger conversation about how best to protect minors online and consider alternatives that do not raise constitutional issues.

[1] *NetChoice v. Bonta*, 2023 WL 6135551 (N.D. Cal.).

1. SB 571's DPIA Requirements will chill constitutionally protected speech.

SB 571 contains several constitutional defects. Chief among them is the requirement that "covered entities" (i.e., websites) produce a Data Privacy Impact Assessment (DPIA) and outline the potential negative impacts of their services and features–which must be made available to the government upon request. These requirements will necessarily chill websites' lawful speech by discouraging them from innovating new ways to disseminate and communicate information.

DPIAs Violate the First Amendment and Chill Speech

As a general matter, the government may not compel speech or force someone to espouse a view on a subject.[2] Indeed, the Court has only permitted the government to compel speech in exceedingly narrow circumstances. Such cases must involve: 1) commercial advertisements that are, 2) inherently false or misleading. In such cases, the court may compel speech about *purely factual and non-controversial* information to eliminate the deception.[3]

Yet, SB 571's DPIA requirements do not concern commercial advertisements nor do they compel "purely factual and non-controversial information." Rather, the DPIA's require websites to speculate about the potential harms of their websites, features, products, and designs. But the features, designs, and services of websites are *speech*. In other words, the DPIA provision demands that websites speculate about the potential harms of their own speech and the dissemination thereof.[4]

In 2021, California passed its own Age-Appropriate Design Code. And, like this proposal, California's AADC required websites to create DPIAs. When challenged, the district court struck down the AADC, including the DPIA requirement, and found that by requiring websites to speculate about the harms of their *designs* (i.e., content) the law impermissibly compelled speech.[5] Indeed, the district court found that the DPIA did not advance the state's interest in securing minor privacy because the DPIA concerned the potential harms of being exposed to certain *content* rather than from actual data management practices.[6]

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[2] *Wooley v. Maynard*, 430 U.S. 705 (1977) (striking down a requirement to display the state's preferred message); *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) (striking down requirements to profess the State's desired message).
[3] *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).
[4] *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (the dissemination of information is speech for purposes of the First Amendment); *see also 303 Creative v. Elenis*, 600 U.S. 570 (2023)
[5] *See NetChoice v. Bonta*, 2023 WL 6135551*, *20-21 (N.D. Cal.). (compelling speech about website designs violates the First Amendment).
[6] *Id*.

Further, by requiring websites to turn over the DPIAs about their new and existing services and how they measure up to the "best interests of children standard" to the government on demand, websites will be disincentivized from innovating. Indeed, the looming specter of government review and inspection of a website's features will discourage the offering of new features (which would then be subject to review) and thereby chills the dissemination of speech.[7]

SB 571 Chills Commercial Advertising

One clear example of SB 571's chilling effect pertains to the requirements that websites assess the "foreseeable harm" of personalized advertising. The First Amendment protects commercial speech–including advertising–and the State cannot impose its desires in an attempt to advance its view of what is "correct."[8]

Yet, SB 571 requires that websites disclose the potential harms of personalized advertising. Such harm includes "financial harm." By including a requirement to speculate about the potential "financial harms" of personalized advertising, services will be less inclined to offer such services. By attempting to steer websites away from making certain decisions about their own offerings and how they display content, the DPIA requirement would also interfere with websites' editorial discretion—the ability to make editorial choices free from coercion or pressure from the government.[9]

2. SB 571 undermines the benefits of personalized ads to Maryland's minors and small business community.

If passed, the chilling effect on personalized advertising will be felt most deeply by Marlynad's minors and small business community.

Harm to Maryland's Teens

Personalized advertisements help make sure that when we see content it is personalized for us. **That is a good thing.**

Personalized ads make sure that women don't see ads for men's products and vice-versa. But when it comes to Maryland's minors, personalized ads become even more important. Personalized ads help

[7] *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018) (burdensome disclosure requirements impermissibly chill speech).
[8] *44 Liquormart v. R.I.*, 517 U.S. 484 (1996) (striking down a ban on advertising alcohol prices).
[9] *See Atty. Gen. Fla. v. NetChoice*, 34 F.4th 1196 (11th Cir. 2022).

make sure that our teens don't see ads for things that are illegal for them to do or buy. Consider advertisements for alcohol, gambling, and physical enhancement medicines. Personalized ads helps make sure that these ads are only seen by those who can purchase and use them, not by our teens.

But under SB 571, the benefits and protections of personalized ads are annihilated for minors resulting *in a less safe environment for Maryland minors.*

Harm to Maryland's Small Businesses

Small businesses, especially new market entrants, rely on cost-effective measures to increase their reach and get in front of relevant audiences. Personalized advertising is a key factor in this strategy.

By discouraging the use of personalized advertising online, SB 571 would make it more difficult for new businesses to reach customers in cost-effective ways. Cost-effective marketing can mean the difference between success or failure, profit or bankruptcy. In the aggregate, by precluding Maryland businesses from communicating effectively and efficiently with willing customers, it will negatively impact the economy of the state and the quality of life for small business owners and all Marylanders.

Maryland should avoid the mistakes made by California. Protecting minors online is important, but an unconstitutional law protects no one. In fact, the unintended consequences of SB 571 stand to actually *harm* Marylanders and their quality of life. Instead of repeating California's mistakes, Maryland should enact legislation with a real chance of making a difference for its citizens–adults and minors alike. Online safety and data protection are important, to achieve these goals, we recommend adopting educational models like those passed in Florida and Virginia. We believe educating students and adults about how to use the internet in a safe and responsible manner, and avoiding heavy handed government mandates is the best path forward.

Again, we respectfully **ask you to oppose SB 571.** As always we offer ourselves as a resource to discuss any of these issues with you in further detail, and we appreciate the opportunity to provide the committee with our thoughts on this important matter.[10]

Sincerely,
Carl Szabo
Vice President & General Counsel, NetChoice
NetChoice is a trade association that works to protect free expression and promote free enterprise online.

[10] The views of NetChoice expressed here do not necessarily represent the views of NetChoice members.