



March 6, 2023

Senator Malcom Augustine
214 James Senate Office Building
11 Bladen Street
Annapolis, MD 21401

Senator Melony Griffith
Chair of the Maryland Senate Finance Committee
3 East Miller Senate Office Building
11 Bladen Street
Annapolis, MD 21401

Senator Katherine Klausmeier
Vice Chair of the Maryland Senate Finance Committee
123 James Senate Office Building
11 Bladen Street
Annapolis, MD 21401

RE: Oppose: SB 698

Dear Senator Augustine, Chair Griffith, and Vice Chair Klausmeier:

On behalf of the advertising industry, we oppose Maryland SB 698.¹ We and the companies we represent, many of whom do substantial business in Maryland, strongly believe consumers deserve meaningful privacy protections supported by reasonable government policies. However, we are concerned that state efforts to pass privacy laws will only add to the increasingly complex privacy landscape for both consumers and businesses throughout the country. We and our members therefore support a national standard for data privacy at the federal level. As presently drafted, SB 698 contains provisions that are out-of-step with privacy laws in other states and would create the potential for private litigants to bring lawsuits for violations of its terms. We therefore encourage Maryland legislature to update the bill so it aligns with recently enacted legislation in the majority of other states, such as the Virginia Consumer Data Protection Act (“VCDPA”).²

As the nation’s leading advertising and marketing trade associations, we collectively represent thousands of companies across the country. These companies range from small businesses to household brands, advertising agencies, and technology providers. Our combined membership includes more than 2,500 companies that power the commercial Internet, which accounted for 12 percent of total U.S. gross domestic product (“GDP”) in 2020.³ Our group has more than a decade’s

¹ Maryland SB 698 (Gen. Sess. 2023) located [here](#).

² See, e.g., Virginia Consumer Data Protection Act, Va. Code Ann. § 59.1-575 et. seq.

³ John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, INTERACTIVE ADVERTISING BUREAU, 15 (Oct. 18, 2021), located at <https://www.iab.com/wp->

worth of hands-on experience it can bring to bear on matters related to consumer privacy and controls. We would welcome the opportunity to engage with you further on our suggested amendments to the bill outlined here.

I. Maryland Should Take Steps to Harmonize its Approach to Privacy with Other State Laws

Instead of adopting SB 698, we encourage the legislature to consider a framework for data privacy that better aligns with recently enacted privacy legislation in other states, such as the VCDPA. In the current absence of a national standard for data privacy at the federal level, it is critical for legislators to seriously consider the costs to both consumers and businesses that will accrue from a patchwork of differing privacy standards across the states. Harmonization with existing privacy laws is critical to minimizing costs of compliance and fostering similar consumer privacy rights for consumers, particularly in localities like the DC-Maryland-Virginia area where individuals regularly cross state lines.

One way that SB 698 presently diverges from existing state privacy laws is that it does not address the concept of pseudonymous data. Most state privacy laws, including the VCDPA, recognize the privacy benefits of “pseudonymous data,” which is typically defined to include personal data that cannot be attributed to a specific natural person without the use of additional information. These other laws exempt this data from consumer rights to access, delete, correct, and port personal data, provided that this data is kept separately from information necessary to identify a consumer and is subject to effective technical and organizational controls to prevent the controller from accessing such information. Without an explicit exemption for pseudonymous data from consumer rights, controllers could be forced to reidentify data or to maintain it in identifiable form to ensure they can, for example, return such information to a consumer in response to an access request. Requiring companies to link pseudonymous data with identifiable information is less privacy protective for consumers than permitting and encouraging companies to keep such data sets separate. We ask you to amend SB 698 and harmonize it with other privacy laws to exempt pseudonymous data from consumer rights of access, correction, deletion, and portability.

Absent amendments to SB 698 to unify its approach with existing state privacy laws, the costs to facilitate compliance with divergent state privacy requirements would be significant. To make the point: a regulatory impact assessment of the California Consumer Privacy Act of 2018 (“CCPA”) concluded that the initial compliance costs to California firms for the CCPA *alone* would be \$55 billion.⁴ Additionally, a recent study on a proposed privacy bill in a different state found that the proposal would have generated a direct initial compliance cost of between \$6.2 billion to \$21 billion, and an ongoing annual compliance cost of between \$4.6 billion to \$12.7 billion for companies.⁵ Other

[content/uploads/2021/10/IAB_Economic_Impact_of_the_Market-Making_Internet_Study_2021-10.pdf](#) (hereinafter, “Deighton & Kornfeld 2021”).

⁴ See State of California Department of Justice Office of the Attorney General, *Standardized Regulatory Impact Assessment: California Consumer Privacy Act of 2018 Regulations* at 11 (Aug. 2019), located at <https://www.oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-isor-appendices.pdf>.

⁵ See Florida Tax Watch, *Who Knows What? An Independent Analysis of the Potential Effects of Consumer Data Privacy Legislation in Florida* at 2 (Oct. 2021), located at

studies confirm the staggering costs associated with different state privacy standards. One report found that state privacy laws could impose out-of-state costs of between \$98 billion and \$112 billion annually, with costs exceeding \$1 trillion dollars over a 10-year period and small businesses shouldering a significant portion of the compliance cost burden.⁶ Maryland should not add to this compliance burden for businesses and should instead opt for an approach to data privacy that is in harmony with already existing state privacy laws.

II. The Bill Should Vest Enforcement Exclusively in the Maryland Attorney General

SB 698 also diverges from existing privacy laws in its approach to enforcement. As presently drafted, the bill would permit private litigants to bring lawsuits for violations of its terms. We strongly believe a private right of action is not an effective enforcement mechanism for privacy legislation. Instead, enforcement should be vested solely with the Maryland Attorney General (“AG”) alone. This enforcement structure would lead to effective compliance by businesses and strong outcomes for state residents, while better enabling businesses to allocate funds to develop processes and procedures to facilitate compliance with new data privacy requirements. AG enforcement, instead of a private right of action, is in the best interests of consumers and businesses alike.

A private right of action would create a complex and flawed compliance system without tangible privacy benefits for consumers. Allowing private actions would flood Maryland’s courts with frivolous lawsuits driven by opportunistic trial lawyers searching for technical violations, rather than focusing on actual consumer harm.⁷ Private right of action provisions are completely divorced from any connection to actual consumer harm and provide consumers little by way of protection from detrimental data practices.

Additionally, establishing a private right of action would have a chilling effect on the state’s economy by creating the threat of steep penalties for companies that are good actors but inadvertently fail to conform to technical provisions of law. Private litigant enforcement provisions and related potential penalties for violations represent an overly punitive scheme that would not effectively address consumer privacy concerns or deter undesired business conduct. A private right of action would expose businesses to extraordinary and potentially enterprise-threatening costs for technical violations of law rather than drive systemic and helpful changes to business practices. It would also encumber businesses’ attempts to innovate by threatening companies with expensive litigation costs, especially if those companies are visionaries striving to develop transformative new technologies. The

<https://floridatagwatch.org/DesktopModules/EasyDNNNews/DocumentDownload.ashx?portalid=210&moduleid=34407&articleid=19090&documentid=986>.

⁶ Daniel Castro, Luke Dascoli, and Gillian Diebold, *The Looming Cost of a Patchwork of State Privacy Laws* (Jan. 24, 2022), located at <https://itif.org/publications/2022/01/24/looming-cost-patchwork-state-privacy-laws> (finding that small businesses would bear approximately \$20-23 billion of the out-of-state cost burden associated with state privacy law compliance annually).

⁷ A select few attorneys benefit disproportionately from private right of action enforcement mechanisms in a way that dwarfs the benefits that accrue to the consumers who are the basis for the claims. For example, a study of 3,121 private actions under the Telephone Consumer Protection Act (“TCPA”) showed that approximately 60 percent of TCPA lawsuits were brought by just forty-four law firms. Amounts paid out to consumers under such lawsuits proved to be insignificant, as only 4 to 8 percent of eligible claim members made themselves available for compensation from the settlement funds. U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl* at 2, 4, 11-15 (Aug. 2017), located [here](#).

threat of an expensive lawsuit may force smaller companies to agree to settle claims against them, even if they are convinced the claims are without merit.⁸

Beyond the staggering cost to Maryland businesses, the resulting snarl of litigation could create a chaotic and inconsistent enforcement framework with conflicting requirements based on differing court outcomes. Overall, a private right of action would serve as a windfall to the plaintiff's bar without focusing on the business practices that actually harm consumers. We therefore encourage legislators to remove the private right of action from SB 698 and make enforcement responsibility the purview of the AG alone.

III. The Data-Driven and Ad-Supported Online Ecosystem Benefits Maryland Residents and Fuels Economic Growth

Over the past several decades, data-driven advertising has created a platform for innovation and tremendous growth opportunities. A recent study found that the Internet economy's contribution to the United States' GDP grew 22 percent per year since 2016, in a national economy that grows between two to three percent per year.⁹ In 2020 alone, it contributed \$2.45 trillion to the U.S.'s \$21.18 trillion GDP, which marks an eightfold growth from the Internet's contribution to GDP in 2008 of \$300 billion.¹⁰ Additionally, more than 17 million jobs in the U.S. were generated by the commercial Internet in 2020, 7 million more than four years prior.¹¹ More Internet jobs, 38 percent, were created by small firms and self-employed individuals than by the largest Internet companies, which generated 34 percent.¹² The same study found that the ad-supported Internet supported 168,600 full-time jobs across Maryland, almost triple the number of Internet-driven jobs from 2016.¹³

A. Advertising Fuels Economic Growth

Data-driven advertising supports a competitive online marketplace and contributes to tremendous economic growth. Overly restrictive legislation that significantly hinders certain advertising practices, such as third-party tracking, could yield tens of billions of dollars in losses for the U.S. economy—and, importantly, not just in the advertising sector.¹⁴ One recent study found that “[t]he U.S. open web’s independent publishers and companies reliant on open web tech would lose between \$32 and \$39 billion in annual revenue by 2025” if third-party tracking were to end “without

⁸ For instance, in the early 2000s, private actions under California’s Unfair Competition Law (“UCL”) “launched an unending attack on businesses all over the state.” American Tort Reform Foundation, *State Consumer Protection Laws Unhinged: It’s Time to Restore Sanity to the Litigation* at 8 (2003), located [here](#). Consumers brought suits against homebuilders for abbreviating “APR” instead of spelling out “Annual Percentage Rate” in advertisements and sued travel agents for not posting their phone numbers on websites, in addition to initiating myriad other frivolous lawsuits. These lawsuits disproportionately impacted small businesses, ultimately resulting in citizens voting to pass Proposition 64 in 2004 to stem the abuse of the state’s broad private right of action under the UCL. *Id.*

⁹ Deighton & Kornfeld 2021 at 5.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 6.

¹³ *Compare id.* at 127 (Oct. 18, 2021), located [here](#) with John Deighton, Leora Kornfeld, and Marlon Gerra, *Economic Value of the Advertising-Supported Internet Ecosystem*, INTERACTIVE ADVERTISING BUREAU, 106 (2017), located [here](#) (finding that Internet employment contributed 61,898 full-time jobs to the Maryland workforce in 2016 and 168,600 jobs in 2020).

¹⁴ See John Deighton, *The Socioeconomic Impact of Internet Tracking* 4 (Feb. 2020), located at <https://www.iab.com/wp-content/uploads/2020/02/The-Socio-Economic-Impact-of-Internet-Tracking.pdf>.

mitigation.”¹⁵ That same study found that the lost revenue would become absorbed by “walled gardens,” or entrenched market players, thereby consolidating power and revenue in a small group of powerful entities.¹⁶ Smaller news and information publishers, multi-genre content publishers, and specialized research and user-generated content would lose more than an estimated \$15.5 billion in revenue.¹⁷ According to one study, “[b]y the numbers, small advertisers dominate digital advertising, precisely because online advertising offers the opportunity for low cost outreach to potential customers.”¹⁸ Absent cost-effective avenues for these smaller advertisers to reach the public, businesses focused on digital or online-only strategies would suffer immensely in a world where digital advertising is unnecessarily encumbered by overly-broad regulations.¹⁹ Data-driven advertising has thus helped to stratify economic market power and foster competition, ensuring that smaller online publishers can remain competitive with large global technology companies.

B. Advertising Supports Maryland Residents’ Access to Online Services and Content

In addition to providing economic benefits, data-driven advertising subsidizes the vast and varied free and low-cost content publishers offer consumers through the Internet, including public health announcements, news, and cutting-edge information. Advertising revenue is an important source of funds for digital publishers,²⁰ and decreased advertising spends directly translate into lost profits for those outlets. Revenues from online advertising based on the responsible use of data support the cost of content that publishers provide and consumers value and expect.²¹ And, consumers tell us that. In fact, consumers valued the benefit they receive from digital advertising-subsidized online content at \$1,404 per year in 2020—a 17% increase from 2016.²² Another study found that the free and low-cost goods and services consumers receive via the ad-supported Internet amount to approximately \$30,000 of value per year, measured in 2017 dollars.²³ Legislative frameworks that inhibit or restrict digital advertising can cripple news sites, blogs, online encyclopedias, and other vital information repositories, and these unintended consequences also translate into a new tax on consumers. The effects of such legislative frameworks ultimately harm consumers by reducing the availability of free or low-cost educational content that is available online.

¹⁵ *Id.* at 34.

¹⁶ *Id.* at 15-16.

¹⁷ *Id.* at 28.

¹⁸ J. Howard Beales & Andrew Stivers, *An Information Economy Without Data*, 9 (2022), located [here](#).

¹⁹ *See id.* at 8.

²⁰ *See* Howard Beales, *The Value of Behavioral Targeting* 3 (2010), located at https://www.researchgate.net/profile/Howard-Beales/publication/265266107_The_Value_of_Behavioral_Targeting/links/599eceeaa6fdcc500355d5af/The-Value-of-Behavioral-Targeting.pdf.

²¹ *See* John Deighton & Peter A. Johnson, *The Value of Data: Consequences for Insight, Innovation & Efficiency in the US Economy* (2015), located at <https://www.ipc.be/~media/documents/public/markets/the-value-of-data-consequences-for-insight-innovation-and-efficiency-in-the-us-economy.pdf>.

²² Digital Advertising Alliance, *Americans Value Free Ad-Supported Online Services at \$1,400/Year; Annual Value Jumps More Than \$200 Since 2016* (Sept. 28, 2020), located [here](#).

²³ J. Howard Beales & Andrew Stivers, *An Information Economy Without Data*, 2 (2022), located [here](#).

C. Consumers Prefer Personalized Ads & Ad-Supported Digital Content and Media

Consumers, across income levels and geography, embrace the ad-supported Internet and use it to create value in all areas of life. Importantly, research demonstrates that consumers are generally not reluctant to participate online due to data-driven advertising and marketing practices. One study found more than half of consumers (53 percent) desire relevant ads, and a significant majority (86 percent) desire tailored discounts for online products and services.²⁴ Additionally, in a recent Zogby survey conducted by the Digital Advertising Alliance, 90 percent of consumers stated that free content was important to the overall value of the Internet and 85 percent surveyed stated they prefer the existing ad-supported model, where most content is free, rather than a non-ad supported Internet where consumers must pay for most content.²⁵ Indeed, as the Federal Trade Commission noted in its comments to the National Telecommunications and Information Administration, if a subscription-based model replaced the ad-based model, many consumers likely would not be able to afford access to, or would be reluctant to utilize, all of the information, products, and services they rely on today and that will become available in the future.²⁶

Laws that restrict access to information and economic growth can have lasting and damaging effects. The ability of consumers to provide, and companies to responsibly collect and use, consumer data has been an integral part of the dissemination of information and the fabric of our economy for decades. The collection and use of data are vital to our daily lives, as much of the content we consume over the Internet is powered by open flows of information that are supported by advertising. We therefore respectfully ask you to carefully consider SB 698's potential impact on advertising, the consumers who reap the benefits of such advertising, and the overall economy before advancing it through the legislative process.

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We and our members support protecting consumer privacy. We believe, however, that SB 698 takes the wrong approach to privacy enforcement and would impose requirements that would be misaligned with other state privacy laws. We therefore respectfully ask you to decline to advance the bill in its current form. We are eager and willing to work with you on alternative, comprehensive privacy legislation that balances consumer privacy and choice with preserving the benefits that come from the responsible use of data.

²⁴ Mark Sableman, Heather Shoenberger & Esther Thorson, *Consumer Attitudes Toward Relevant Online Behavioral Advertising: Crucial Evidence in the Data Privacy Debates* (2013), located at https://www.thompsoncoburn.com/docs/default-source/Blog-documents/consumer-attitudes-toward-relevant-online-behavioral-advertising-crucial-evidence-in-the-data-privacy-debates.pdf?sfvrsn=86d44cea_0.

²⁵ Digital Advertising Alliance, *Zogby Analytics Public Opinion Survey on Value of the Ad-Supported Internet Summary Report* (May 2016), located at https://digitaladvertisingalliance.org/sites/aboutads/files/DAA_files/ZogbyAnalyticsConsumerValueStudy2016.pdf.

²⁶ Federal Trade Commission, *In re Developing the Administration's Approach to Consumer Privacy*, 15 (Nov. 13, 2018), located at https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-ntia-developing-administrations-approach-consumer-privacy/p195400_ftc_comment_to_ntia_112018.pdf.



Thank you in advance for your consideration of this letter.

Sincerely,

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