



Written Testimony of Irene Ly

Policy Counsel, Common Sense Media

Before the Senate Finance Committee

"Online and Biometric Data Privacy Act"

Bill No: SB 698

Position: Favorable

March 8, 2023

My name is Irene Ly, and I am a Policy Counsel for Common Sense Media, where I work on privacy and platform accountability issues at the state and federal level. Common Sense Media is the leading organization dedicated to helping kids and families thrive in a rapidly changing digital world. We help parents, teachers, and policymakers by providing unbiased information, trusted advice, and innovative tools to help them utilize the power of media and technology as a positive force in all kids' lives.

Testimony Summary: Maryland must pass a strong privacy law that reduces harms against children online. Children are uniquely vulnerable because their brains are still developing, and their brain structures are fundamentally different from adults. These developmental vulnerabilities subject children to more harm from practices like targeted advertising and the algorithmic recommendation of content. Companies successfully engage in such practices by collecting billions of data points from users. Senator Augustine's SB 698 provides strong and needed protections for all consumers, and for children in particular, by imposing data minimization principles and requiring companies to obtain opt-in consent from teens before serving them targeted ads or selling their data. SB 698 should be further strengthened by amending the knowledge standard, and banning targeted advertising to children altogether. It is time for Maryland residents, and particularly Maryland children, to have their privacy truly protected online.

Thank you for the opportunity to offer comments on this important matter.

I. Absent Federal Legislation, Maryland Must Pass a Strong Comprehensive Privacy Law to Protect its Children

A. Existing Laws are Insufficient to Protect Consumers Online, and There is No Guarantee Federal Privacy Legislation Will Pass

The internet looks completely different from how it did just ten years ago. Platforms collect billions of data points of personal information about users that go far beyond their birthdate, home address, and phone number. As soon as users are on a platform, it is recording their online activity: which websites they visit and for how long, what information they looked for and the search terms they used, and which ads and other user posts elicited a response. With the use of emerging technologies like machine learning, platforms draw inferences about users based on these data points to hypertarget them with specific ads and content in an effort to maximize user engagement and profit. Strong privacy legislation is essential to protecting people online, particularly children, who have unique vulnerabilities, by cutting off the firehose of data that companies are unnecessarily but intentionally collecting on everyone.

Over the last two decades, there have been many attempts to pass a federal comprehensive online privacy law to no avail, leaving states to take the initiative. To date, five states have passed – to varying degrees of strength/or adequacy – an online privacy law: California, Colorado, Connecticut, Virginia, and Utah.

If an individual does not live in one of these five states, they do not have any privacy protections over their online personal information except when their data is subject to specific federal laws, such as the Children's Online Privacy Act (COPPA) and the Health Insurance Portability and Accountability Act (HIPAA). COPPA, which protects children's online data by requiring a company to obtain parental opt-in consent before collecting information from a child under 13 years old, was passed over two decades ago. For more than a decade, legislators and advocates have called for it to be updated to reflect what the internet, and the harms associated with it, look like today.

Last year, the Senate Commerce Committee passed the Children and Teens' Online Privacy Protection Act (COPPA 2.0) and the Kids Online Safety Act, and the House Energy and Commerce Committee passed the American Data Privacy and Protection Act. Although all three bills had strong bipartisan support, they did not get a floor vote. The Senate and House will likely reintroduce these three bills this session, but it takes more than strong bipartisan interest to pass legislation.

Consequently, it is left to states to protect children from the harm we know is associated with its unnecessary collection, storage and sharing. State legislatures should also, in tandem but not in place of privacy legislation, push for platform design and safety legislation, like Senators Kramer and West's SB 844, the Maryland Age-Appropriate Design Code Act. These are two distinct

types of legislation that are complementary, not synonymous with one another. Strong privacy legislation like Senator Augustine's SB 698 is needed to limit the amount of data companies can collect and use from consumers in the first place, and then platform design legislation like SB 844 is needed to address the harmful design practices companies engage in to keep young users engaged, such as utilizing algorithmic recommendation systems, endless scroll, and push alerts.

B. Without Privacy Legislation, Children Will Keep Being Harmed Online

1. The Structural Disparities Between Children and Adults' Brains Make Children More Vulnerable to Online Harms

Although people of all ages may face a range of harms online, children are particularly vulnerable. Individuals' brains gradually develop as they go through adolescence. It takes time for kids to learn key skills like critical thinking, and taking a step back before acting. As a result, children are impressionable and companies more easily manipulate them with tactics like targeted advertising, addictive platform design, and social pressure. For example, most kids cannot distinguish an ad from content, or recognize the persuasive intent of ads, until they are at least 8 years old.¹ Even tweens and teens 12 to 15 years old still have trouble identifying ads and their persuasive intent.² These vulnerabilities make kids and teens largely defenseless against advanced and personalized techniques like targeted advertising.³

Children's developmental vulnerabilities stem from the structural differences between the brains of adults and adolescents that cause kids and teens to respond to stimuli differently from adults.⁴ The limbic system and the prefrontal cortex of our brains grow synchronously, but at different speeds.⁵ The limbic system is associated with survival and contains the part of our brain that controls certain emotional responses such as our "fight or flight" response.⁶ Meanwhile, the prefrontal cortex is associated with higher-level functions such as planning, problem solving, reasoning, and impulse control, and will not mature until closer to adulthood.⁷ Before the prefrontal cortex is fully matured and able to counterbalance the limbic system, kids and teens

¹ American Psychological Association, Report of the APA Task Force on Advertising and Children 5 (Feb. 2004).

² Ofcom. (Nov. 2016). Children and parents: Media use and attitudes report, 86 (stating only 38 percent of 12 to 15-year-olds correctly identified sponsored links on Google as advertising despite their being distinguished by an orange box with the word "ad" on it. See also Samantha Graff, Dale Kunkel, and Seth E. Mermin, Government Can Regulate Food Advertising to Children Because Cognitive Research Shows That It Is Inherently Misleading, 31 Health Affairs 2, 392–98 (2012); Owen B.J. Carter et al., Children's Understanding of the Selling Versus Persuasive Intent of Junk Food Advertising: Implications for Regulation, 72 Social Sci. & Med. 6, 962–68 (2011).

³ Common Sense Media, AdTech and Kids: Behavioral Ads Need a Time-Out (May 13, 2021).

⁴ See Brief for Common Sense Media and Frances Haugen as Amici Curiae Supporting Respondents 6–9, *Gonzales v. Google*, ___ U.S. ___ (2022) (No. 21-1333) (discussing the structural disparities between the adult and adolescent brain and how they lead adults and adolescents to respond to stimuli differently).

⁵ B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 63 (2008).

⁶ See Velayudhan Rajmohan and Eladath Mohandas, *The Limbic System*, 49 INDIAN J. OF PSYCHIATRY 132–39 (2007) (providing an overview of the components and functions of the limbic system).

⁷ Edward E. Smith and John Jonides, *Storage and Executive Processes in the Frontal Lobes*, 283 SCIENCE 1657, 1659–60 (1999).

are less equipped than adults to make rational decisions, consider long term consequences, and control impulses.⁸

These structural disparities help explain why kids more often fail to stop and think before giving into impulses or temptation. Kids are not simply being difficult: their brains are biologically less capable than adults of mulling over the long-term consequences of their decisions.

2. *Children Face a Wide Range of Online Harms From Targeted Advertising and Algorithmic Recommendations Powered by Online Data*

Data is what makes online platforms so powerful. By the time a child turns 13 years old, adtech firms have compiled more than 72 million data points on that child.⁹ The more data companies have, the more information they have to utilize for practices like (1) targeted advertising and (2) algorithmically recommending content on their online platforms. Both these practices impose great harm on children, and demonstrate the imminent need for privacy legislation that would cut off companies' access to this incessant amount of data.

With targeted advertising, firms track children's activities online, collecting tens of millions of data points to make inferences about them. They use these inferences to create a behavioral profile for each child. Then, based on these profiles, marketers create any number of ads, with each customized to appeal to a group of kids with similar profiles. Most children are not aware that ads may be tailored to them, and researchers have concluded that they are even less equipped to identify targeted ads compared to traditional ads.¹⁰ This inability to identify ads and their intent makes kids much more susceptible to these ads' influence.

Targeted advertising can push kids towards unhealthy products or behaviors such as vaping. For example, one in four teens in a 2019 survey responded that they first learned about vaping predominantly through targeted ads and sponsored content while on social media.¹¹ In a 2016 report, middle school students were shown to be three times more likely and high schoolers two times more likely to use e-cigarettes than their peers when they routinely saw ads for the product

⁸ See Angela Griffin, *Adolescent Neurological Development and Implications for Health and Well-Being*, 5 HEALTHCARE 62, 63 (2017) (describing how the prefrontal cortex is late-evolving and enables individuals to learn how to manage long term planning, monitor what is going on, and adjusting smoothly to surroundings while keeping emotions and behaviors context-appropriate).

⁹ Tim Cross, *Ad Tech collects 72 million data points on the average American child by age 13*, VideoWeek (Dec. 14, 2017), <https://videoweek.com/2017/12/14/ad-tech-collects-72-million-data-points-on-the-average-american-child-by-age-13/>. This number is from 2017, so it is likely a substantial underestimate today.

¹⁰ Kaiwen Sun, Carlo Sugatan, Tanisha Afnan, Hayley Simon, Susan A. Gelman, Jenny Radesky, and Florian Schaub. 2021. "They See You're a Girl if You Pick a Pink Robot with a Skirt": A Qualitative Study of How Children Conceptualize Data Processing and Digital Privacy Risks. In Proceedings of the 2021 CHI Conference on Human Factors in Computing Systems (CHI '21). Association for Computing Machinery, New York, NY, USA, Article 687, 1–34. DOI:<https://doi.org/10.1145/3411764.3445333>.

¹¹ Common Sense Media, *Vaping and Teens: Key Findings and Toplines*, 2019. More than half of teens on TikTok saw vaping-related posts.

online.¹² This push towards unhealthy products and behaviors can be covert as well. In 2019, Facebook was revealed to have categorized 740,000 kids under 18 years old as being interested in gambling, and 940,000 kids as being interested in alcoholic beverages.¹³ While advertisers cannot target minors with ads for products illegal for them, they can still use this knowledge in a way that harms children, such as by advertising games that contain gambling elements.¹⁴

Further, when kids know they are being monitored by surveillance technology, they are less likely to engage in critical thinking, political activity, or questioning of authority.¹⁵ Knowing ads are being targeted to them can chill kids' expression, because they are afraid these ads could expose parts of their lives they want to keep private or share on their own terms.¹⁶ For example, a kid may be afraid that ads for LGBTQ+ resources will show up on a shared device, outing a child to their family instead of giving them the autonomy to come out on their own accord.¹⁷

Social media platforms like Instagram and TikTok also use algorithmic recommendation systems to curate an endless feed of content for users based on data and analytics from online activity like who the user follows and the content they have consumed and engaged with, such as by liking or commenting. However, these algorithms can take users down dark rabbit holes – and these companies not only know about it, but often continue to push that content to users anyway. Online platforms recommend content promoting self-harm and suicide, eating disorders, and dangerous physical challenges that pose grave physical and mental health harm to kids and teens.

Young users can find an alarming amount of content promoting self-harm and suicidal ideation online. In 2017, 14-year-old Molly Russell killed herself after falling into a vortex of despair on social media the last year of her life.¹⁸ An inquest into her life concluded that she died from "an act of self-harm while suffering from depression and the negative effects of online content."¹⁹ Of 16,300 pieces of content Molly saved, liked, or shared on Instagram in the six months before she died, 2,100 were related to suicide, self-harm, and depression.²⁰ The more of this content she consumed, the more the algorithm bombarded her with similar content. The content was so

¹² Lisa Rapaport, Reuters Health Report, Teens Most Drawn to E Cigarettes by Online Ads, Reuters (Apr. 2016), <http://www.reuters.com/article/us-health-ecigarettes-internet-advertisi-idUSKCN0XM08T>.

¹³ Alex Hern and Frederik Hugo Ledegaard, Children 'interested in' gambling and alcohol, according to Facebook, The Guardian (Oct. 9, 2019), <https://www.theguardian.com/technology/2019/oct/09/children-interested-in-gambling-and-alcohol-facebook>.

¹⁴ *Ibid.*

¹⁵ D.H. Brown & N. Pecora, Online Data Privacy as a Children's Media Right: Toward Global Policy Principles, *Journal of Children and Media*, 8(2), 201–207 (2014).

¹⁶ *Supra* note 3, at 5 (adtech explainer).

¹⁷ *Id.*

¹⁸ John Naughton, *Molly Russell was Trapped by the Cruel Algorithms of Pinterest and Instagram*, The Guardian (Oct. 1, 2022), <https://www.theguardian.com/commentisfree/2022/oct/01/molly-russell-was-trapped-by-the-cruel-algorithms-of-pinterest-and-instagram>.

¹⁹ *Id.*

²⁰ *Id.*

disturbing that at a hearing in a London coroner court, a consultant child psychiatrist said he could not sleep well for weeks after viewing the content Molly had seen right before she died.²¹ The coroner even considered editing footage for the court because of how distressing the content is, but decided against it because Molly herself had no such choice.²²

Eating disorder content is also rampant on social media. A report by the children's advocacy watchdog group Fairplay showed that Meta, formerly Facebook, knowingly profited from pushing pro-eating disorder content to children on Instagram since at least 2019.²³ This pro-eating disorder bubble on Instagram includes 90,000 unique accounts that reach 20 million unique followers, with at least one-third of the followers in this bubble being underage.²⁴ This targeting happens quickly, too. Within a day of U.S. Senator Richard Blumenthal (D-CT)'s office creating a fake Instagram account for a 13-year-old girl and following accounts with content related to disordered eating and dieting, the platform began serving content promoting eating disorders and self-harm.²⁵

*Additionally, many dangerous physical challenges like the "blackout challenge," where people choke themselves until they pass out on camera, have become viral online.*²⁶ The blackout challenge, which went viral on TikTok, has now killed seven kids.²⁷ Although platforms do not allow content that encourages dangerous or illegal activities, new dangerous challenges pop up and become amplified.

With strong privacy legislation in place, online platforms would not be able to serve up targeted ads or algorithmic recommendations with as extreme precision, helping to prevent kids from falling into dark rabbit holes that harm their physical and mental health.

II. SB 698 Provides Strong and Needed Protections for All Consumers and Children, And It Could Be Even Stronger with a Few Reasonable Modifications

Maryland residents deserve true privacy protections. Senator Augustine's SB 698 moves beyond the "notice and consent" model that existing privacy legislation has long adhered to to begin providing more meaningful online protections.

²¹ *Id.*

²² Molly Russell Inquest: Instagram Clips Seen by Teen "Most Distressing," BBC News (Sept. 23, 2022), <https://www.bbc.com/news/uk-england-london-62998484>.amp.

²³ Fairplay, Designing for Disorder: Instagram's Pro-eating Disorder Bubble (Apr. 2022), https://fairplayforkids.org/wp-content/uploads/2022/04/designing_for_disorder.pdf.

²⁴ *Id.*

²⁵ See also Adam Westbrook, Lucy King, and Jonah M. Kessel, *What's One of the Most Dangerous Toys for Kids? The Internet*, New York Times (Nov. 24, 2021), <https://www.nytimes.com/2021/11/24/opinion/kids-internet-safety-social-apps.html>.

²⁶ Fairplay, Dared by the Algorithm: Dangerous Challenges Are Just a Click Away (Sept. 29, 2022), <https://fairplayforkids.org/wp-content/uploads/2022/09/Dangerous-Challenges.pdf>.

²⁷ Mitchell Clark, *The TikTok 'Blackout Challenge' Has Now Allegedly Killed Seven Kids*, The Verge (Jul. 7, 2022), <https://www.theverge.com/2022/7/7/23199058/tiktok-lawsuits-blackout-challenge-children-death>.

A. Through a Combination of Data Minimization and Consumer Rights, SB 698 Would Protect All Consumers' Data

The most effective way to limit privacy harms is to limit the amount and type of data that companies collect from consumers in the first place. Under SB 698, a controller shall limit the collection of personal data to what is (i) adequate, relevant, and reasonably necessary to collect for the purposes for which the data is processed; and (ii) disclosed to the consumer. This creates a data minimization regime, instead of the notice and consent-based regime where companies overwhelm consumers with long, convoluted terms of service and privacy policies, which leads to more data collection.

This bill also recognizes the extreme sensitivity of biometric data, such as our fingerprints, voiceprints, or eye retinas or irises, by imposing restrictions on this data. For example, companies are prohibited from selling, leasing, or trading a consumer's biometric data, and prohibited from collecting, using, disclosing, or redisclosing it except in specific circumstances.

The consumer rights SB 698 provides, such as the right to opt out of profiling, are also more meaningful because of the global opt out language. Every online service is different, and some websites, both intentionally and unintentionally, make it burdensome to navigate the opt-out process, and every consumer uses a countless number of websites and apps. Allowing consumers to utilize global opt out signals such as browser extensions or global device settings greatly simplifies the opt-out process so that consumers can easily exercise their data rights.

B. SB 698 Extends Needed Privacy Protections to Teens

SB 698 would provide protections teens do not currently have under federal COPPA by requiring companies to obtain opt-in consent from teens over the age of 13 and under the age of 16 years old before serving them targeted advertising or selling their data. In combination with the bill's data minimization principle, SB 698 would help decrease the amount of data companies collect on kids and teens.

Requiring a teen's opt-in consent creates an affirmative action that teens have to take that would help them to better understand the fact that companies are collecting and using their personal information. Common Sense Media recognizes the paradox in requiring companies to obtain consent from teens whose sense of judgment is not yet fully formed. However, adolescence is a time when teens are expected and should be allowed to become increasingly independent. For teens' consent to be informed and effective though, companies must provide terms of service and privacy policies in a format they can understand.²⁸ Section 14-4508(A)(1) addresses this by

²⁸ In a 2018 UK Children Commissioner's report, a privacy lawyer rewrote Instagram's terms of service in child-friendly language by taking its original 17-page, roughly 5,000 word form and boiling it down to a single 800 word page. One 13-year-old girl who read the revised policy stated that if such notices were easier to read, "then people would actually read it and think twice about the app." The report also found that only people with postgraduate levels of education – which is only about 13.1 percent of U.S. adults – could probably understand the

requiring a company to provide a consumer with a "reasonably accessible, clear, and meaningful privacy notice..." and lays out the information a notice should include. This section should better ensure privacy notices are easy for consumers to understand by adding language further specifying what makes a notice "accessible, clear, and meaningful." For example, the section could state notices should be no longer than a certain number of pages (and if they must be longer, offer a shorter-form version), and written at no higher than a middle school reading level, so teens can provide informed opt-in consent.

C. Specific Amendments Would Make SB 698 Even Stronger

Crafting strong privacy legislation that effectively protects all consumers is a challenging endeavor. SB 698 is already a strong bill, but there is opportunity to strengthen it further, and we look forward to working with Senator Augustine and the committee to do so. In particular, we have two recommendations for the teens' protection section:

1. Amend the knowledge standard

The effectiveness of any children's privacy protections rests largely on the knowledge standard that determines when a company must comply with the law. To ensure that the teen opt-in protections are as effective as possible, the knowledge standard should be amended.

One major weakness of federal COPPA is that the current knowledge standard creates a loophole for companies to turn a blind eye to young users on their platform and avoid compliance. Companies are only required to comply with COPPA if their online service is directed to children, or when they have "actual knowledge" that a user is a child. This enables bad actors to bury their heads in the sand and claim their services are directed to a general audience, often while touting to advertisers that they can target kids. One of the most prominent companies that has exploited this loophole is YouTube, which settled with the Federal Trade Commission in 2019 for collecting data from children in violation of COPPA.²⁹ While the Commission ultimately fined YouTube, the Commission had to waste time and money to gather evidence confirming the obvious: YouTube knew kids were on its platform, and proceeded to collect information from them in violation of COPPA anyway. The knowledge standard must be updated to reflect today's reality: companies already collect large amounts of data, and some of this data can be used to infer the age of users.

original 17-page version. Children's Commissioner, Growing Up Digital: A Report of the Growing Up Digital Taskforce (Jan. 2017), https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/06/Growing-Up-Digital-Taskforce-Report-January-2017_0.pdf.

²⁹ Press Release, Federal Trade Commission, Google and YouTube Will Pay Record \$170 Million for Alleged Violations of Children's Privacy Law (Sept. 4, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations-childrens-privacy-law>.

SB 698 aims to strengthen the knowledge standard by eliminating the reference to "actual knowledge," and more simply stating that a controller shall not "process the personal data of a consumer that the processor *knows* is at least 13 years old and under the age of 16 years old without the consumer's consent." However, courts have interpreted "knows" by its plain meaning, which here would likely be actual knowledge.

We strongly recommend amending the provision to state, a controller shall not "**process the personal data of a consumer that the processor *knew or should have known* is at least 13 years old and under the age of 16 years old without the consumer's consent.**" This amendment would ensure that companies have to look at the data they already have, such as data collected directly from users or from parental complaints, and cannot turn a blind eye when they know children are on their site.

2. *Ban targeted advertising to minors*

In addition to teen opt-in protections, another baseline protection teens should have is a ban on targeted advertising to minors altogether. Because kids and teens' brains are still developing, they are incapable of defending themselves against targeted advertising. As a result, targeted advertising imposes a wide range of harm on kids and teens, as discussed in section I.B.

There is widespread bipartisan support behind the proposal. At the federal level, both the bipartisan American Data Privacy and Protection Act and COPPA 2.0 bills prohibit targeted advertising to minors under 17 years old. In addition, for two years in a row, President Biden has called for the ban of targeted advertising to minors in his State of the Union address.³⁰ Although requiring teens' opt-in consent for targeted advertising and sale of data is a step in the right direction, banning targeted advertising would be an even more significant step towards reducing harms to youth online.

III. Conclusion

Kids and teens are increasingly losing control of their privacy online and are facing harm to their mental health and overall well-being at the hands of companies' data and advertising practices. With each year we fail to pass privacy and platform accountability legislation, more youth are harmed. All Maryland residents, and particularly Maryland children, deserve to finally have their privacy protected online. Thank you Chair Griffith and Vice Chair Klausmeier for the opportunity to comment on this matter, and we look forward to working with you, Senator Augustine, and members of the Committee to get SB 698 across the finish line.

³⁰ Alfred Ng, *Biden Calls for Ban of Online Ads Targeting Children*, Politico (Feb. 7, 2023), <https://www.politico.com/news/2023/02/07/biden-calls-for-ban-of-online-ads-targeting-children-00081731>.