March 6, 2023

Senator Floyd Prozanski
Chair of the Oregon Senate Committee on Judiciary
900 Court St. NE, S-413
Salem, OR 97440

Senator Kim Thatcher
Vice Chair of the Oregon Senate Committee on Judiciary
900 Court St. NE, S-307
Salem, OR 97440

RE: SB 619 – Oppose

Dear Chair Prozanski and Vice Chair Thatcher:

On behalf of the advertising industry, we write to make to recommendations to improve Oregon SB 619.[1] We and the companies we represent, many of whom do substantial business in Oregon, strongly believe consumers deserve meaningful privacy protections supported by reasonable laws and responsible industry 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 619 contains provisions that are out-of-step with privacy laws in other states. Below we identify areas where harmonizing the bill with other existing state privacy laws would benefit consumers and businesses. Specifically, we encourage you to harmonize SB 619 to:

- Recognize the privacy benefits of pseudonymous data.
- Adopt an "actual knowledge" standard for processing restrictions related to minors.
- Avoid prescribing onerous disclosure and consent requirements.
- Vest enforcement responsibility in the Attorney General alone.

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, long-standing and emerging publishers, 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.[2] By one estimate, nearly 80,000 jobs in Oregon are related to the ad-subsidized Internet.[3] Our group has more than a decade's 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 SB 619 outlined here.

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[1] Oregon SB 619, 82nd Leg. Assembly Reg. Sess. (2023), located here.
[2] 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-content/uploads/2021/10/IAB_Economic_Impact_of_the_Market-Making_Internet_Study_2021-10.pdf (hereinafter, "Deighton & Kornfeld 2021").
[3] *Id*. at 132.

I. Oregon Should Take Steps to Harmonize Its Approach to Privacy with Other State Laws

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 essential for creating an environment where consumers in Oregon and other states have a consistent set of expectations, while minimizing compliance costs for businesses. Compliance costs associated with divergent privacy laws are 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 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] Oregon 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 Is Inconsistent with Existing Privacy Laws Because It Does Not Address the Concept of Pseudonymous Data

One way SB 619 diverges from existing state privacy laws is that it does not address the concept of pseudonymous data. The vast majority of state privacy laws 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 in order 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 619 and harmonize it with other privacy laws to exempt pseudonymous data from consumer rights of access, correction, deletion, and portability.

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[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 https://floridataxwatch.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).

III. Requirements Related to Minors Should Adopt an "Actual Knowledge" Standard to Align with Federal Privacy Law and Other State Laws

SB 619 significantly diverges from federal and state privacy requirements by imposing a constructive knowledge standard on its requirements related to minors. As presently drafted, the bill would require opt-in consent for a controller to process certain data about a consumer if the data concerns a consumer "that the controller knows or constructively knows is a child."[7] This constructive knowledge requirement is not present in any other state privacy law that has been enacted to date. Moreover, the requirement is entirely misaligned with the Children's Online Privacy Protection Act (COPPA), which places requirements on operators of websites or online services when such operators maintain child-directed digital properties or have *actual knowledge* their users are children. SB 619's requirements would consequently contradict the approach taken in every other state privacy law as well as intrude upon and contradict an area that is already settled in federal law.

Similarly, SB 619 would prohibit a controller from selling personal data pertaining to a consumer or processing it for targeted advertising absent consumer consent if the controller "has actual or constructive knowledge that the consumer is at least 13 years of age and not older than 15 years of age."[8] Applying a constructive knowledge standard to this requirement would likely force every controller doing business in Oregon to implement an age gate before *any consumer* could access the business's offerings online. Such an age gate would significantly hinder Oregon minors' ability to access free and informational content online and would substantially hinder Oregon adults' ability to traverse the Internet freely and easily. We encourage you to amend SB 619 so it applies an actual knowledge standard to data processing restrictions related to minors.

IV. The Bill Diverges From Existing Privacy Laws Because It Requires Controllers to Disclose the Names of Specific Third-Party Partners

Another way SB 619 diverges from existing state privacy laws is that it would require controllers to disclose "a list of specific third parties to which the controller has disclosed… personal data" upon a consumer's request.[9] Other states that have enacted privacy laws do not include this impractical requirement. Instead, all other state privacy laws require companies to disclose the *categories* of third parties to whom they transfer personal data rather than the specific names of such third parties themselves.[10] Requiring documentation or disclosure of the names of entities would be operationally burdensome, as controllers change business partners frequently, and companies regularly merge with others and change names. For instance, a controller may engage in a data exchange with a new business-customer on the same day it responds to a consumer disclosure request. This requirement would either force the controller to refrain from engaging in commerce with the new business-customer until its consumer disclosures are updated, or risk violating the law. This is an unreasonable restraint. From an operational standpoint, constantly updating a list of all third-party partners a controller works with would take significant resources and time away from companies' efforts to comply with other new privacy directives in SB 619.

International privacy standards like the European Union's General Data Protection Regulation ("GDPR") also do not require burdensome disclosures of specific third parties in response to data subject access requests, according to the text of the law. Mandating that companies disclose the names

[7] *Id*. at Sec. 5(2)(b).
[8] *Id*. at Sec. 5(2)(c).
[9] *Id.* at Sec. 3(1)(a)(B).
[10] *See, e.g.,* Cal. Civ. Code § 1798.110; Va. Code Ann. § 59.1-578(C); Colo. Rev. Stat. § 6-1-1301(1)(a) (effective Jul. 1, 2023); Connecticut Act Concerning Personal Data Privacy and Online Monitoring, Sec. 6(c) (effective Jul. 1, 2023); Utah Rev. Stat § 16-61-302(1)(a) (effective Dec. 31, 2023)..

of their third-party partners could obligate companies to abridge confidentiality clauses they maintain in their contracts with partners and expose proprietary business information to their competitors. Finally, the consumer benefit that would accrue from their receipt of a list of third-party partners to whom a controller discloses data would be minimal at best. For these reasons, we encourage you to reconsider this onerous requirement, which severely diverges from the approach to required disclosures taken in existing state privacy laws. To align SB 619 with other state privacy laws, the bill should require disclosures of the categories of third parties rather than the names of such third parties themselves.

V. Broad Opt-in Consent Requirements Impede Consumers from Receiving Critical, Relevant Information and Messages

As discussed in more detail in Section VI below, the data-driven and ad-supported online ecosystem benefits consumers and fuels economic growth and competition. Companies, nonprofits, and government agencies alike use data to send varying groups of individuals specific, relevant messages. Tailored messaging provides immense public benefit by reaching individual consumers with information that is relevant to them in the right time and place. Legal requirements that limit entities' ability to use demographic data responsibly to reach consumers with important and pertinent messaging, such as those set forth in SB 619's sensitive data opt-in consent requirements, can have unintended consequences and, ultimately, serve as a detriment to consumers' health and welfare.

Ad-technology systems and processes enable everything from public health messaging to retailer messaging. They allow timely wildfire warnings to reach local communities and facilitate the dissemination of missing children alerts, among a myriad of other beneficial uses with the very same technology and techniques used for tailored advertising.[11] In accordance with responsible data use, uses of data for tailored advertising should be subject to notice requirements and effective user controls. Legal requirements should focus on prohibiting discriminatory uses of such data and other uses that could endanger the health or welfare of consumers instead of placing blanket opt-in consent requirements on uses of data.

One-size-fits-all opt-in requirements for data uses run the risk of regulating out of existence messaging and information which is more relevant to individuals and helpful to businesses, governments, and non-profits. Opt-in consent requirements also tend to work to the advantage of large, entrenched market players at the expense of smaller businesses and start-up companies. To ensure uses of demographic data to benefit Oregon residents can persist, and to help maintain a competitive business marketplace, we encourage you to remove the broad opt-in consent requirement for "sensitive data" processing. We suggest that you replace it with a requirement for opt-in consent only when such data will be used in furtherance of decisions that produce legal or similarly significant effects concerning a consumer. Such an approach would not only help to maintain competitive balance, but also reduce the risk of notice fatigue which some other laws have created as an unintended consequence.[12]

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[11] *See* Digital Advertising Alliance, *Summit Snapshot: Data 4 Good – The Ad Council, Federation for Internet Alerts Deploy Data for Vital Public Safety Initiatives* (Sept. 1, 2021), located at https://digitaladvertisingalliance.org/blog/summit-snapshot-data-4-good-%E2%80%93-ad-council-federation-internet-alerts-deploy-data-vital-public.

[12] Kate Fazzini, *Europe's sweeping privacy rule was supposed to change the internet, but so far it's mostly created frustration for users, companies, and regulators,* CNBC (May 5, 2019), located at https://www.cnbc.com/2019/05/04/gdpr-has-frustrated-users-and-regulators.html.

VI. The Bill Should Vest Enforcement Exclusively in the Oregon Attorney General

SB 619 presently includes a private right of action. The bill would also extend personal liability to directors, members, officers, employees, or agents of controllers who violate the bill's terms through their acts or omissions. 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 Oregon Attorney General ("AG"), and without subjecting individuals to civil penalties. This enforcement structure would lead to effective compliance by controllers and strong outcomes for state residents, while better enabling controllers 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 Oregon's courts with frivolous lawsuits driven by opportunistic trial lawyers searching for technical violations, rather than focusing on actual consumer harm.[13] 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 controllers 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 controllers' attempts to innovate by threatening companies with expensive litigation costs, especially if those companies are visionaries striving to develop transformative new technologies. The 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.[14]

Beyond the staggering cost to Oregon 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 619 and make enforcement responsibility the purview of the AG alone.

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[13] 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.

[14] 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.*

VII. The Data-Driven and Ad-Supported Online Ecosystem Benefits Oregon 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.[15] 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.[16] 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.[17] More Internet jobs, 38 percent, were created by small firms and self-employed individuals than by the largest Internet companies, which generated 34 percent.[18] The same study found that the ad-supported Internet supported 82,491 full-time jobs across Oregon, more than double the number of Internet-driven jobs from 2016.[19]

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.[20] 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 mitigation."[21] 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.[22] 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.[23] 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."[24] 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.[25] 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.

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[15] Deighton & Kornfeld 2021 at 5.
[16] *Id*.
[17] *Id*.
[18] *Id*. at 6.
[19] *Compare id.* at 132 (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 36,339 full-time jobs to the Oregon workforce in 2016 and 82,491 jobs in 2020).
[20] *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.
[21] *Id*. at 34.
[22] *Id*. at 15-16.
[23] *Id*. at 28.
[24] J. Howard Beales & Andrew Stivers, *An Information Economy Without Data*, 9 (2022), located here.
[25] *See id.* at 8.

B. Advertising Supports Oregon 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,[26] 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.[27] 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.[28] 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.[29] 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.

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.[30] 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.[31] 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.[32]

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[26] *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/599eceeea6fdcc500355d5af/The-Value-of-Behavioral-Targeting.pdf. .

[27] *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.

[28] 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.

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

[30] 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.

[31] 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.

[32] 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.

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 619'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 619 impose particularly onerous requirements on entities doing business in the state and would unnecessarily impede Oregon residents from receiving helpful services and accessing useful information online. We therefore respectfully ask you to reconsider SB 619 or amend it to reflect the recommendations set forth in this letter. Again, we would welcome the opportunity to discuss these comments with you in greater detail.

Thank you in advance for consideration of this letter.

Sincerely,

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