

January 25, 2022

The Honorable Rep. Zack Fields
Co-Chair of the House Labor and
Commerce Committee
State Capitol Room 24
Juneau, AK 99801

The Honorable Rep. Ivy Spohnholz
Co-Chair of the House Labor and
Commerce Committee
State Capitol Room 406
Juneau, AK 99801

RE: Letter in Opposition to Alaska HB 159 – Version I

Dear Representative Fields and Representative Spohnholz:

On behalf of the advertising industry, we oppose Alaska HB 159 – Version I (“HB 159”).¹ We and the companies we represent, many of whom do substantial business in Alaska, strongly believe consumers deserve meaningful privacy protections supported by reasonable government policies. However, HB 159 contains provisions that could hinder Alaskans’ access to valuable ad-supported online resources, impede their ability to exercise choice in the marketplace, and harm businesses of all sizes that support the economy.

To help ensure Alaskan businesses can continue to thrive and Alaskan consumers can continue to reap the benefits of a robust ad-supported online ecosystem and exercise choice in the marketplace, we recommend that the legislature undertake a study of available approaches to regulating data privacy before moving forward with enacting the onerous, and in some cases, outdated provisions set forth in HB 159. As presently written, the bill falls short of creating a regulatory system that will work well for Alaskan consumers or businesses. Below we address a non-exhaustive list of areas of concern with the bill at this time.

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, is responsible for more than 85 percent of the U.S. advertising spend and drives more than 80 percent of our nation’s digital advertising expenditures. 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 on further study of the proposal with an aim toward better aligning the wants of consumers with the needs of the Internet economy.

I. Alaska Should Not Model Its Approach to Data Privacy Off of Outdated and Confusing Privacy Standards

Though HB 159 appears to draw many of its provisions from the California Consumer Privacy Act of 2018 (“CCPA”), the bill does not take into account many clarifications to the CCPA that followed its initial passage. The CCPA was amended more than five times after its enactment in June 2018, and the California Attorney General revised the regulations implementing the law four times after initially publishing draft regulations in October 2019. Many facets of the confusing and operationally complex law are still not fully tested or fleshed out. Moreover, the CCPA is not even the

¹ HB 159 – Version I (Alaska 2022) (hereinafter “HB 159”), located [here](#).

most up-to-date privacy law in the state, as the California Privacy Rights Act of 2020 (“CPRA”) was enacted, yet again materially amending California privacy law substantially. Further, the CPRA is a complex law that it not only relies on a yet-to-be-determined set of implementing regulations, but also a dedicated agency in California to continually interpret and update those initial regulations. Alaska should not adopt a legal regime that is outdated, confusing, or burdensome to Alaskan businesses and others operating in the state. Instead, we encourage the legislature to examine more current consumer protection standards that are available for regulating data privacy, including the Virginia Consumer Data Protection Act (“VCDPA”), before moving forward with HB 159.

As currently drafted, HB 159 also would create some of the most onerous requirements in the nation, potentially depriving Alaskans of valuable online content and services. For instance, the bill would require businesses to include a “Do Not Collect or Sell My Personal Information” link on their homepages that would appear to prohibit a covered business following an opt out from “buying, renting, gathering, obtaining, receiving, or accessing any personal information pertaining to a consumer by any means, actively or passively receiving information from the consumer, or by observing the consumer’s behavior.”² Such a “do not collect” requirement, however, would prevent basic and vital Internet operations, including rendering a website to a visitor. This could result in many providers of online content and services to elect not to serve Alaskans, particularly given the threat of a private right of action which is included in the bill. Indeed, when the Federal Trade Commission recently opined on a related matter, it stated: “Privacy standards that give short shrift to the benefits of data-driven practices may negatively affect innovation and competition. Moreover, regulation can unreasonably impede market entry or expansion by existing companies; the benefits of privacy regulation should be weighed against these potential costs to competition.”³

Efforts to emulate the CCPA in Alaska will significantly and disproportionately impact the ability of small and mid-size businesses and start-up companies to operate successfully in the state. A standardized regulatory impact assessment of the CCPA estimated *initial* compliance costs at 55 billion dollars.⁴ This amount did not account for ongoing compliance expenses and needed resource allotments outside of the costs to businesses to bring themselves into initial compliance. Additionally, that same report estimated that businesses with less than 20 employees would need to spend \$50,000 each to begin their CCPA compliance journey, and businesses with less than 50 employees would need to spend approximately \$100,000 each.⁵ Other studies confirm the staggering costs associated with varying state privacy standards. One report has 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 Alaska should reconsider implementing outdated provisions of the CCPA, that now have been supplanted, as foundational aspects of its own privacy bill.

² HB 159, Sec. 45.49.940(7); Sec. 45.48.800(c)(1).

³ Federal Trade Commission, *In re Developing the Administration’s Approach to Consumer Privacy*, 11 (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.

⁴ California Attorney General, *Standardized Regulatory Impact Assessment: California Consumer Privacy Act Regulations* at 11 (August 2019), located at https://www.tellusventure.com/downloads/privacy/calif_doj_regulatory_impact_assessment_ccpa_14aug2019.pdf.

⁵ *Id.*

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).

II. Proposed Global Privacy Control Provisions Lack Reasonable Safeguards to Protect Consumer Choice

HB 159 would require businesses to “treat the use of [a] global privacy control as a valid request submitted by the consumer” to opt out of sales, sharing, and disclosures of personal information and/or categories of personal information.⁷ These provisions should be subject to further study by the Alaska legislature to ensure that any global privacy control requirement includes protections to guarantee that such controls are user-enabled, rather than turned on by default by technology intermediaries. HB 159’s current provisions surrounding such controls are not accompanied by sufficient safeguards to ensure a preference indicated by a setting is a true expression of a consumer’s choice.

Such controls must be designed and implemented in a manner that ensures a preference expressed through the setting is enabled by a consumer, and does not unfairly disadvantage or advantage one business or model over another.⁸ Otherwise, these settings run the risk of intermediary interference, as the companies that stand between businesses and consumers, such as browsers and others, can set such controls by default without requiring an affirmative consumer action to initiate the control. Unconfigurable, global opt out setting mechanisms have already been introduced in the market, making decisions for consumers by default without requiring them to affirmatively turn on the mechanisms.⁹ These tools are not user-enabled, as they do not provide any assurance that consumers themselves are the ones making privacy choices. Consumers should be assured the ability to take an action to enable these settings, and such settings should be subject to specific parameters that ensure they do not unfairly advantage certain businesses at the expense of others. For these reasons, the global privacy control provisions should be removed from HB 159.

III. HB 159 Should Not Include a Private Right of Action

As presently drafted, HB 159 allows for private litigants to bring lawsuits by deeming violations of the bill to be unfair or deceptive acts or practices under the Alaska Consumer Protection Act.¹⁰ We strongly believe private rights of action should have no place in privacy legislation. Instead, enforcement should be vested with the Alaska Attorney General (“AG”), because such an enforcement structure would lead to strong outcomes for Alaskans while better enabling businesses to allocate funds to developing processes, procedures, and plans 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 in HB 159 would create a complex and flawed compliance system without tangible privacy benefits for consumers. Allowing private actions would flood Alaska’s courts with frivolous lawsuits driven by opportunistic trial lawyers searching for technical violations, rather than focusing on actual consumer harm. 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.

⁷ HB 159, Sec. 45.48.835(b).

⁸ See, CPRA, § 1798.185(a)(19)(A); Colorado Privacy Act, § 6-1-1313(2).

⁹ See Brave, *Global Privacy Control, a new Privacy Standard Proposal, now Available in Brave’s Desktop and Android Testing Versions*, located [here](#) (“Importantly, Brave does not require users to change anything to start using the GPC to assert your privacy rights. For versions of Brave that have GPC implemented, the feature is on by default and unconfigurable.”)

¹⁰ HB 159, Sec. 45.48.890; Alaska Stat. §§ 45.50.471 – 45.50.561.

Additionally, including a private right of action in HB 159 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 threat of an expensive lawsuit may force smaller companies to agree to settle claims against them, even if they are convinced they are without merit.

Beyond the staggering cost to Alaska 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 the bill and replace it with a framework that makes enforcement responsibility the purview of the AG alone.

IV. The Data-Driven and Ad-Supported Online Ecosystem Benefits Alaskans and Fuels Economic Growth

Over the past several decades, data-driven advertising has created a platform for innovation and tremendous growth opportunities. A new study found that the Internet economy's contribution to the United States' gross domestic product ("GDP") grew 22 percent per year since 2016, in a national economy that grows between two to three percent per year.¹¹ 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.¹² Additionally, more than 17 million jobs in the U.S. were generated by the commercial Internet in 2020, 7 million more than four years ago.¹³ More Internet jobs, 38 percent, were created by small firms and self-employed individuals than by the largest internet companies, which generated 34 percent.¹⁴ The same study found that the ad-supported Internet supported 11,855 full-time jobs across Alaska, almost double the growth in Internet-driven employment from 2016.¹⁵

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.¹⁶ One recent study found that "[t]he U.S. open web's independent publishers and

¹¹ See John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, INTERACTIVE ADVERTISING BUREAU, 5 (Oct. 18, 2021), located https://www.iab.com/wp-content/uploads/2021/10/IAB_Economic_Impact_of_the_Market-Making_Internet_Study_2021-10.pdf.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 6.

¹⁵ Compare *id.* at 121 (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 6,402 full-time jobs to the Alaska workforce in 2016 and 11,855 jobs in 2020).

¹⁶ 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>.

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.”¹⁷ 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.¹⁸ 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.¹⁹ Data-driven advertising has thus helped to stratify economic market power, ensuring that smaller online publishers can remain competitive with large global technology companies.

B. Advertising Supports Alaskans’ 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 about COVID-19. Advertising revenue is an important source of funds for digital publishers,²⁰ and decreased advertising spends directly translate into lost profits for those outlets. Since the coronavirus pandemic began, 62 percent of advertising sellers have seen advertising rates decline.²¹ Publishers have been impacted 14 percent more by such reductions than others in the industry.²² Revenues from online advertising based on the responsible use of data support the cost of content that publishers provide and consumers value and expect.²³ Legislative models that inhibit or restrict digital advertising can cripple news sites, blogs, online encyclopedias, and other vital information repositories, thereby compounding the detrimental impacts to the economy presented by COVID-19. The effects of such legislative models 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.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 recent comments to

¹⁷ *Id.* at 34.

¹⁸ *Id.* at 15-16.

¹⁹ *Id.* at 28.

²⁰ See Howard Beales, *The Value of Behavioral Targeting* 3 (2010), located at https://www.networkadvertising.org/pdfs/Beales_NAI_Study.pdf.

²¹ IAB, *Covid’s Impact on Ad Pricing* (May 28, 2020), located at https://www.iab.com/wp-content/uploads/2020/05/IAB_Sell-Side_Ad_Revenue_2_CPMs_5.28.2020.pdf

²² *Id.*

²³ 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>.

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.

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

During challenging societal and economic times such as those we are currently experiencing, 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 any future legislation'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 HB 159 would impose new and particularly onerous requirements on entities doing business in the state and would unnecessarily impede Alaska residents from receiving helpful services and accessing useful information online. We therefore respectfully ask you to reconsider the bill and instead convert it to a study so Alaskans can benefit from the legislature's careful consideration of approaches to data regulation that benefit consumers and businesses alike.

Thank you in advance for consideration of this letter.

Sincerely,

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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.