March 12, 2025

Senator Wendy Harrison, Chair
Senate Committee on Institutions
115 State Street
Montpelier, VT 05633

Senator Robert Plunkett, Vice Chair
Senate Committee on Institutions
344 Elm Street
Bennington, VT 05201

Senator Alison Clarkson
18 Golf Avenue
Woodstock, VT 05091

RE: Letter in Opposition to Vermont SB 71

Dear Chairperson Harrison, Vice Chairperson Plunkett, and Senator Clarkson:

On behalf of the advertising industry, we write to oppose Vermont SB 71.[1] We provide this letter to offer our non-exhaustive list of concerns about this bill. Our organizations support meaningful privacy protections for Vermonters. As described in more detail below, the bill contains provisions that are out-of-step with privacy laws in other states and will only add to the increasingly complex privacy landscape for both businesses and consumers across the country. The Governor vetoed a consumer privacy bill last year that also diverged from other state privacy laws, highlighting a significant misalignment with established standards for how to support privacy protections for consumers and businesses.[2] In vetoing the bill, the Governor expressed concern that "the bill creates an unnecessary and avoidable level of risk" while referencing specific provisions that would make Vermont "a national outlier, and more hostile than any other state to many businesses and non-profits."[3] At the time, the Governor also stated that "if the underlying goals are consumer data privacy and child protection, there is a path forward" and encouraged the legislature to consider the consumer privacy law in Connecticut as a model.[4] We ask you to harmonize SB 71 with other state privacy laws like Connecticut and New Hampshire. Accordingly, we ask you to decline to advance the bill as drafted out of the Committee on Institutions ("Committee") and to consider updates to enhance the bill to bring it in line with the majority of states that have passed privacy legislation.

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

[1] Vermont SB 71 (2025 Session), located here (hereinafter, "SB 71").
[2] Governor Philip Scott's veto letter on H. 121, located here.
[3] *Id.*
[4] *Id.*

accounted for 12 percent of total U.S. gross domestic product ("GDP") in 2020.[5] By one estimate, over 15,000 jobs in Vermont are related to the ad-subsidized Internet.[6] We would welcome the opportunity to engage with the Committee further on the non-exhaustive list of issues with SB 71 outlined here.

I. SB 71 Should Be Harmonized with Existing State Privacy Laws

SB 71 is based on federal privacy legislation from 2024 that did not undergo a hearing post introduction or a markup. Instead of working from a privacy model that did not have success at a federal level, Vermont should focus its efforts on harmonizing SB 71 with the approach taken in a majority of other states. A patchwork of differing privacy standards across the states would create significant costs for businesses and consumers alike. Efforts to harmonize state privacy legislation with existing privacy laws are critical to minimizing costs of compliance and fostering similar privacy rights for consumers no matter where they live. Below we provide a non-exhaustive list of ways SB 71 deviates from the dominant approach to privacy across the states:

- SB 71's definition of "sensitive data" includes data no other state considers sensitive.
- SB 71 does not include consumer and business safeguards for opt-out preference signals that have been adopted by every other state that has passed a privacy law that requires adherence to such signals.

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 concluded that the initial compliance costs to California firms would be $55 billion.[7] Another recent study found that a consumer data privacy proposal in a different state considering privacy legislation would have generated a direct initial compliance cost of $6.2 billion to $21 billion and ongoing annual compliance costs of $4.6 billion to $12.7 billion for the state.[8] Other studies confirm the staggering costs associated with varying 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 with small businesses shouldering a significant portion of the compliance cost burden.[9] Harmonization with existing

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[5] 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.

[6] *Id.* at 135.

[7] *See* State of California Department of Justice Office of the Attorney General, *Standardized Regulatory Impact Assessment: California Consumer Privacy Act of 2018 Regulations*, 11 (Aug. 2019), located at https://dof.ca.gov/wp-content/uploads/sites/352/Forecasting/Economics/Documents/CCPA_Regulations-SRIA-DOF.pdf.

[8] *See* Florida Tax Watch, *Who Knows What? An Independent Analysis of the Potential Effects of Consumer Data Privacy Legislation in Florida*, 2 (Oct. 2021), located at https://floridataxwatch.org/DesktopModules/EasyDNNNews/DocumentDownload.ashx?portalid=210&moduleid=34407&articleid=19090&documentid=986.

[9] 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).

privacy laws is essential to create an environment where consumers in Vermont have privacy protections that are consistent with those in other states, while minimizing unnecessary compliance costs for businesses. Vermont should not add to this compliance bill for businesses and should instead opt for an approach to data privacy that is in harmony with already existing state privacy laws.

II. SB 71's Approach to Targeted Advertising Would Affect Vermonters' Access to Internet Resources and Businesses' Ability to Reach Customers

If enacted, SB 71's proposed approach to "targeted advertising" would be out of step with all other state laws regulating this activity. SB 71 would define "targeted advertising" in a way that would categorize *any advertisement* delivered based on *any inference* as targeted advertising, unless exempt as "first-party advertising" or "contextual advertising."[10] If SB 71 is enacted, Vermont businesses would be significantly hindered in their efforts to reach potential consumers, and Vermonters would become subject to entirely different Internet experiences than residents of other states, such as Connecticut and New Hampshire. In addition, while SB 71 would exempt "first-party advertising" from the broader definition of targeted advertising, it would define the term in an extremely limited way such that certain first-party advertising activity would become "targeted advertising" subject to strict restrictions.[11] The limited definition of the term could result in preventing even the most basic of data enhancements, such as limiting businesses from correcting postal addresses that the businesses have directly collected from consumers for mailers, thus impacting direct marketing efforts. Data enhancement services are often essential for ensuring accuracy, reducing errors, and improving the effectiveness advertising campaigns. Without the ability to enhance first-party data, businesses, particularly small businesses, may face increased costs and inefficiencies, leading to less effective marketing efforts and increased costs on consumers. The definition of the term "targeted advertising" in SB 71 should be updated so it aligns with other state definitions.

III. Online Activity Data Should Be Allowed for Use in Targeted Advertising and First-Party Advertising

SB 71 proposes a novel definition of "sensitive data" that includes online activity data, or information about an individual's online activities over time.[12] The bill would strictly prohibit using sensitive data, including online activity data, unless "strictly necessary" for providing or maintaining a consumer-requested product or service.[13] This approach, however, fails to recognize that online activity data is necessary for targeted advertising. Thus, while the bill would permit targeted advertising, it would ban the use of the very data that drives targeted advertising. By banning the use of online activity data for targeted advertising while simultaneously permitting targeted advertising subject to a consumer opt-out right, the bill proposes a confusing approach to targeted advertising that would have a chilling effect on commerce. No other state that has enacted an omnibus privacy law has taken this approach.

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[10] SB 71 at § 2415(57).
[11] *Id.* at § 2415(11), (22), (57).
[12] *Id.* at § 2415(56)(N).
[13] *Id.* at § 2419(c)(1).

Online activity data should not be considered sensitive when used for an advertising purpose. Use of online activity data to deliver targeted advertising and first-party advertising is permitted on an opt out basis in virtually every other state's privacy law. Furthermore, the use of data to deliver truthful, relevant advertising is protected by the First Amendment. The First Amendment protects both businesses in their right to free expression and individuals in their right to receive accurate information through advertising.[14] Vermont should not advance an approach to privacy that may run afoul of bedrock constitutional protections when other workable approaches to governing sensitive data processing are used across several states.

IV. Overly Restrictive Limitations on Data Collection and Processing Would Stifle the Economy

SB 71 includes data minimization terms that would permit collection and processing of personal data only if reasonably necessary and proportionate "to provide or maintain… a specific product or service requested by the consumer to whom the data pertains."[15] This overly restrictive limitation on personal data processing would impede business' ability to process data for the benefit of consumers and to enrich the availability of goods and services in the economy. The proposed data minimization term could impose significant limitations on the availability of personal data for developing new technologies, providing pertinent messaging and advertising to consumers, creating cost-effective and efficient services, and combatting fraud.

For example, the term would functionally prohibit the collection of personal data to develop new and innovative offerings unrelated to requested products, or to improve existing offerings, because controllers would be prohibited from collecting data outside of the context of providing a specific product or service requested by the consumer. The term would also hinder businesses from cross-selling products and services to their own customer base because collection of data for such a purpose would not necessarily be tied to a product or service the customer already knew about or requested specifically. The term could also impede the general availability of personal data for prospecting, *i.e.*, taking steps to find new customers who may be interested in a business's products or services. In addition, the proposed term would severely inhibit third-party data sources from collecting personal data to further vital consumer fraud prevention efforts. As a result of this data minimization term, third-party fraud prevention services may be forced to refrain from collecting and making data available that Vermont businesses rely on to prevent fraud, thereby making Vermonters more susceptible to identity theft and other negative outcomes.

The vast majority of states that have passed a data privacy law permit businesses to collect and process personal data as reasonably necessary and proportionate to achieve the purposes for which the personal data was collected, as disclosed to the consumer.[16] SB 71 would contradict this reasonable, majority approach, thereby subjecting Vermont consumers to fewer benefits of data processing than their counterparts in nearby states and other parts of the country. Vermont should take steps to align SB 71's data minimization terms with other states instead of

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[14] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-67 (1976); *Sorrell et. Al. v. IMS Health Inc.*, 564 U.S. 552, 570-71 (2011).
[15] SB 71 at § 2419(a).
[16] *See, e.g.,* Cal. Civ. Code § 1798.100(c); Va. Code Ann. § 59.1-578(1).

adopting an onerous and untested approach to data collection and processing that could disadvantage Vermont consumers and businesses.

V. SB 71's Requirement to Disclose Names of Specific Third-Party Partners Would Interfere with Legitimate Business and Create Competition Concerns

SB 71 diverges from nearly all state privacy laws by requiring controllers to disclose "a list of third parties to which the controller has disclosed the consumer's personal data or, if the controller does not maintain this information, in a format specific to the consumer, a list of third parties to which the controller has disclosed personal data" upon a consumer's request.[17] The vast majority of other states that have enacted privacy laws do not include this impractical and duplicative requirement. Instead, most 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.[18]

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 efforts to comply with other new privacy directives in SB 71. And the bill's language giving controllers an option to provide a list of names of third-party partners that receive data about a requesting consumer or a list of third-party recipients of any personal data does little to ease this operational burden.[19] Even with this option, controllers may be forced to jeopardize new business opportunities and relationships just to compile, maintain, update, and distribute these ephemeral lists.

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 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. The benefit would be especially insignificant given SB 71 already requires controllers to disclose *categories* of third-

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[17] SB 71 at § 2418(a)(3).
[18] *See, e.g.,* Cal. Civ. Code § 1798.110; Va. Code Ann. § 59.1-578(C); Colo. Rev. Stat. § 6-1-1308(1)(a); Conn. Gen. Stat. § 42-520(c)(5); Utah Rev. Stat § 16-61-302(1)(a).
[19] SB 71 at § 2418(a)(3).

party partners in privacy notices for consumers.[20] For these reasons, we encourage the Senate to strike the onerous language requiring disclosure of a list of specific third parties, which severely diverges from the approach to disclosures taken in almost all existing state privacy laws. To align SB 71 with other state privacy laws, the bill should require disclosure of the categories of third parties rather than the names of such third parties themselves.

VI. SB 71 Contains Ambiguous Anti-Discrimination Terms

SB 71's ambiguous requirement to ensure personal data is not processed in a manner that would make unavailable the "equal enjoyment" of goods or services could result in flatly outlawing advertisements and messaging to specific communities.[21] For example, the provision could outlaw advertisements based on gender to connect individuals with clothing that matches their interests. The provision could also impede legitimate anti-discrimination efforts in Vermont by banning entities from purposefully reaching out to particular constituencies and communities with relevant and helpful messaging. Similar to other enacted state laws, anti-discrimination provisions should prohibit the processing of personal data in ways that violate state or federal laws against unlawful discrimination.[22]

VII. A Private Right of Action Is an Inappropriate Form of Enforcement for Privacy Legislation

As presently drafted, SB 71 permits private litigants to bring lawsuits.[23] We strongly believe private rights of action should have no place in privacy legislation. Instead, enforcement should be vested with the Attorney General ("AG") alone, because such an enforcement structure would lead to stronger outcomes for Vermont residents while better enabling businesses to allocate resources 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.

The private right of action in SB 71 would create a complex and flawed compliance system without tangible privacy benefits for consumers. Allowing private actions will flood Vermont'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.

Additionally, 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 do not effectively address consumer privacy concerns or deter undesired business conduct. They expose businesses to extraordinary and potentially enterprise-threatening costs for technical violations of law rather than drive systemic and helpful changes to business practices. A private right of

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[20] *Id.* at § 2419(f)(1)(A).
[21] *Id.* at § 2419(c)(5).
[22] *See, e.g.,* Va. Code Ann. § 59.1-578(A)(4); Colo. Rev. Stat. § 6-1-1308(6); Conn. Gen. Stat. § 42-520(a)(5).
[23] SB 71 at § 2424(d).

action 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.[24]

Beyond the staggering cost to Vermont businesses, the resulting snarl of litigation could create a chaotic and inconsistent enforcement framework with conflicting requirements based on differing court outcomes. Overall, the inclusion of 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 the Committee to update SB 71 to remove the private right vest sole enforcement authority to the AG.

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[24] 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.*

We and our members strongly support meaningful privacy protections for consumers. We believe, however, that SB 71 would impose particularly onerous requirements that would unreasonably restrict the free flow of information that powers the economy and Vermont residents' access to resources. We therefore respectfully ask the Committee to decline to advance SB 71 as proposed and would welcome the opportunity to engage further and work with you to craft a workable privacy framework that benefits Vermont businesses and consumers alike.

Thank you in advance for your consideration of this letter.

Sincerely,

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