VIA EMAIL

May 25, 2021

Hon. Robert Rodriguez
Hon. Paul Lundeen
Colorado General Assembly
200 E Colfax Avenue
Denver, CO 80203

Re: Constitutional Defects in the Colorado Privacy Act.

Dear Senators Rodriguez and Lundeen:

On behalf of the Software and Information Industry Association, I am writing to express our concerns over SB-21-190, the draft Colorado Privacy Act. SIIA is the only trade association representing more than 700 companies across the global information industry. Our members reflect the broad and diverse landscape of the digital information age. This includes B2B and B2C services, from small and specialized firms to large multinational industry leaders – across finance, education, health, technology and specialized content and publishing. Many of our members do business in Colorado and will be subject to the Colorado Privacy Act if it passes.

I am writing with respect to the Act's treatment of publicly available information. Our members create and provide a variety of publications and services incorporating public domain information, ranging from educational products to scientific, technical, and medical publishing to B2B publications (such as professional directories) to research tools. The value of these tools depends on their completeness and accuracy and consists in large part of obtaining information that is publicly available from both government and non-governmental sources. These tools are used for many valuable activities, including academic research, fraud detection, news and financial reporting, locating missing witnesses, corporate transactions, and other valuable uses.

SIIA supports the goals of the Colorado Privacy Act, and believes both that privacy is critical to democratic

decision making and an appropriate and important focus of legislative activity. With that said, however, interests in privacy must be balanced against other core values, such as freedom of speech. The Colorado Privacy Act takes important steps to recognize that balance, but nonetheless contains overbreadth that renders it constitutionally vulnerable.

The Act regulates "personal data," which it defines as any information that is linked or reasonably linkable" to an individual.[1] Rather than simply exclude First Amendment-protected speech from the Act entirely, the Act handles the treatment of publicly available information in three separate sections. First, it excludes "publicly available information" from the definition of personal data, defining it as (1) information lawfully made available from government records or (2) information that the controller has a "reasonable basis to believe" the consumer has lawfully made available to the general public.[2] Second, it excludes from the definition of "sale" information that the consumer directs the controller to disclose by using the controller to interact with a third party or (most relevant to these purposes) is "intentionally made available via a channel of mass media and did not restrict to a specific audience [sic]."[3] And third, the Act states that the consumers' rights to opt-out of sale in section 6-1-1306(a) and deletion in 6-1-1306(d) do not apply if the controller has a "reasonable basis to believe" that the information is lawfully made available to the general public by someone other than the consumer in the valid exercise of the person's first amendment rights.[4]

As a result, the Colorado Privacy Act burdens large amounts of expression in which the consumer has absolutely no privacy interest or legitimate expectation of privacy. The Act's treatment of publicly available information therefore creates two constitutional problems. First, it is content discriminatory, as it covers large swaths of protected expression while leaving others unaffected. Secondly, it

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1 Colorado Privacy Act, 6-1302(16).
2 Colorado Privacy Act, 6-1302 (22)(b)(V)(B),
3 Colorado Privacy Act, 6-1303, (24)(V)(A), (B).
4 *Id.* 6-1-1304.

imposes a general duty of care on publishers: they must have a "reasonable basis to believe" that the information is lawfully made available and/or constitutionally protected. The effect of this language is to impose a general duty of care on the handling of protected speech.

With that said, the Act's First Amendment problems are eminently fixable. Over the last year, an emerging legislative consensus has formed that privacy regulation must address the First Amendment with respect to the entire public domain. For example, the California Privacy Rights Act, that constitutionally addresses this problem by excluding information contained in widely distributed media from its definition of personal information in order to address First Amendment requirements.[5] The ballot initiative's backer has stated that the definition for publicly available information and its resulting exclusion was based on the need to meet First Amendment standards.

Thus, we believe that the most straightforward fix for the Colorado Privacy Act's constitutional flaws is to expand the definition of "publicly available information" to include information from non-governmental sources. As a drafting matter, the solution is easy: the legislature need only add the following exemption to the definition of "personal information."

> **"For purposes of this subsection, "publicly available information" means information that is lawfully made available from federal, state, or local government records or information that a business has a reasonable basis to believe is lawfully made available to the general public by the consumer or from widely distributed media."**

Like the other enacted statutes, the Act would only cover that information which collected in circumstances in which the consumer held a reasonable expectation of privacy, such as when online shopping at home. By adding the above language, the Colorado Privacy Act would be limited to those

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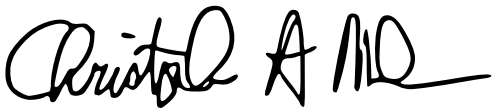
[5] *See* "Inside the closed-door campaigns to rewrite California privacy law, again" available at: https://www.protocol.com/inside-california-privacy-law-redo.

areas in which such an expectation exists. Without that language or something very similar, however, the statute will fail constitutional scrutiny.

We recognize that these comments raise significant concerns and welcome a dialogue as this process moves forward.

Sincerely,



Christopher A. Mohr
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General Counsel