Date of Hearing: April 23, 2024

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION
Rebecca Bauer-Kahan, Chair
AB 2829 (Papan) – As Amended April 1, 2024

SUBJECT: Digital Advertising Services Tax Law

SYNOPSIS

Roses are red
Violets are blue
When the product is free
The product is you.[1]

The "free" internet, despite its many boons, has come with enormous costs. The spectacular profitability of digital advertising has created powerful incentives for platforms to design their websites to mesmerize and addict users, entrapping them with features carefully designed to exploit human psychology while harvesting user data in order to feed them targeted ads. Children and youth are especially vulnerable to social media addiction. It is no coincidence that as much of adolescent social life has shifted online over the last decade, mental health challenges for this demographic have skyrocketed.

Arguing that "Tech has undoubtedly played an outsized role in the deterioration of our youth's mental health" and that "California is in dire need of a comprehensive solution and a consistent funding source to remediate the ill effects that have been thrust upon us," the author has brought this measure, which would, for those companies with global revenues of at least $100 million a year, impose a five percent tax on digital advertising revenue generated in California, the proceeds of which would fund youth mental health services. The bill is based in part on a similar tax adopted in Maryland that is the subject of pending litigation. John Burton Advocates for Youth supports the bill.

A large coalition of opponents, led by California Taxpayers' Association, argues the bill poses implementation challenges, will drive away businesses, and is unconstitutional on multiple grounds—echoing claims from the Maryland litigation.

If the bill passes this Committee, it will next be heard in the Revenue and Taxation Committee.

SUMMARY: Imposes on companies with global revenues of $100 million a year a five percent tax on digital advertising revenue generated in California in order to fund youth mental health services. Specifically, **this bill**:

[1] Matt Cagle (@Matt_Cagle), X (Feb. 14, 2019, 11:47 PM), https://twitter.com/Matt_Cagle/status/1096269666412986373, cited in Raimondi, "Biometric Data Regulation and the Right of Publicity: A Path to Regaining Autonomy Over Our Commodified Identity" (2021) 16 U. Mass. L. Rev. 198, 200.

1) Beginning January 1, 2025, establishes, for persons with at least $100 million in global revenue a five percent tax on the person's annual gross revenues that are derived from digital advertising services in the state.

2) Defines "digital advertising services" as advertisement services on a digital interface, including advertisements in the form of banner advertising, search engine advertising, interstitial advertising, and other comparable advertising services. Excludes from this definition advertisement services on digital interfaces owned or operated by or operated on behalf of a broadcast entity or news media entity. Defines other terms.

3) Prohibits a taxpayer who derives gross revenues from digital advertising services in the state from directly passing on the cost of the tax to a customer who purchases the digital advertising services by means of a separate fee, surcharge, or line item.

4) States the intent of the Legislature that net proceeds from the tax will fund youth mental health services.

5) Requires the California Department of Tax and Fee Administration to administer and collect the tax pursuant to the Fee Collection Procedures Law.

6) Takes effect immediately as a tax levy.

EXISTING LAW:

1) Under the Fee Collection Procedures Law, provides procedures for the collection of certain fees and surcharges and is administered by the California Department of Tax and Fee Administration. (Rev. & Tax Code § 55001 *et seq*.)

2) Provides for the taxation of sales, other than sales of tangible personal property, with a sufficient nexus to the state, as specified. (Rev. & Tax Code § 25136.)

3) Establishes the Marketplace Facilitator Act, which requires marketplace facilitators to pay tax on retail sales made through their marketplace for delivery to California customers. (Rev. & Tax Code § 6040 *et seq*.)

FISCAL EFFECT: As currently in print, this bill is keyed fiscal.

COMMENTS:

1) **Author's statement.** According to the author:

> The Internet's prevalence and power have so fundamentally changed the dynamics of our economy and culture that we must update our approach. While it has come with both positive and negative impacts, Tech has undoubtedly played an outsized role in the deterioration of our youth's mental health. Today, with a mental health crisis greater than the State has ever seen, California is in dire need of a comprehensive solution and a consistent funding source to remediate the ill effects that have been thrust upon us. Assembly Bill (AB) 2829 will provide a consistent funding source to remediate the mental health crisis facing young Californians.

2) **The nexus between tech and youth mental health.** From 2010 to 2019, "rates of [youth] depression and anxiety—fairly stable during the 2000s—rose by more than 50 percent in many studies" and "[t]he suicide rate rose 48 percent for adolescents ages 10 to 19." This trend tracks "the years when adolescents in rich countries traded their flip phones for smartphones and moved much more of their social lives online—particularly onto social-media platforms designed for virality and addiction."[2]

According to the recent U.S. Surgeon General's advisory on the impact of social media on children's mental health, social media use by youth is nearly universal. Up to 95% of youth ages 13-17 report using a social media platform, with more than a third saying they use social media "almost constantly." Although age 13 is commonly the required minimum age used by social media platforms in the U.S., nearly 40% of children ages 8–12 use social media. As of 2021, the Surgeon General notes that 8th and 10th graders spent an average of 3.5 hours per day on social media.[3]

Whereas the European Union requires platforms to take down certain illegal content, Section 230 of the Communications Decency Act of 1996 provides civil immunity for online platforms based on third-party content and for the removal of content in certain circumstances.[4] As the United States Department of Justice has stated, "[t]he combination of significant technological changes since 1996 and the expansive interpretation that courts have given Section 230. . . has left online platforms both immune for a wide array of illicit activity on their services and free to moderate content with little transparency or accountability."[5] Social media platforms thus have virtually no duty to remove deplorable, tortious, or even criminal content such as hate speech, harassment, misinformation, criminal incitement, sexually predatory content, and drug trafficking.[6] Inadequate content moderation exposes users, particularly children, to enormous risks.

Beyond the directly harmful content created by third parties that is all too common on many social media sites, the conduct of social media sites themselves has also been associated with harm to users. In particular, social media sites often build engagement and, in turn, addict users, through features that exploit human psychology. The encouragement to publicly "like" or favorite another user's content or message provides a sense of validation while also nudging the receiver of a "like" to "like" content as well, generating a mutually-reinforcing network of engagement. Snapchat's "snap streaks" feature capitalizes on the desire for social reciprocity by encouraging users to exchange content daily. The feature employs a system of emoji badges that indicate how many days the streak has lasted and when the streak is about to expire.[7] Many

[2] Haidt, "End the Phone-Based Childhood Now" (March 13, 2024) The Atlantic, https://www.theatlantic.com/technology/archive/2024/03/teen-childhood-smartphone-use-mental-health-effects/677722/.

[3] "Social Media and Youth Mental Health: The U.S. Surgeon General's Advisory" (May 23, 2023) p. 7, https://www.hhs.gov/sites/default/files/sg-youth-mental-health-social-media-advisory.pdf.

[4] 47 U.S.C. § 230.

[5] "Section 230—Nurturing Innovation or Fostering Unaccountability" (June, 2020), https://www.justice.gov/ag/file/1072971/dl?inline=.

[6] See Rustad and Koenig, "The Case for a CDA Section 230 Notice-and-Takedown Duty" (Spring, 2023) 23 Nev.L.J. 533; Hoffman, "Fentanyl Tainted Pills Bought on Social Media Cause Youth Drug Deaths to Soar" (May 19, 2022) N.Y. Times, https://www.nytimes.com/2022/05/19/health/pills-fentanyl-social-media.html.

[7] Bhargava and Velazquez, "Ethics of the Attention Economy: The Problem of Social Media Addiction," (July 2021) https://www.cambridge.org/core/journals/business-ethics-quarterly/article/ethics-of-the-attention-economy-the-problem-of-social-media-addiction/1CC67609A12E9A912BB8A291FDFFE799/share/08cfe97de12fef45b5175836cfd00d3941a74b78

social media platforms use algorithms that are carefully calibrated to continually mesmerize users. For example, TikTok uses "a machine-learning system that analyzes each video and tracks user behavior to serve up a continually refined, never-ending stream of TikToks optimized to hold [users'] attention."[8] Moreover, social media products tend to addict users by omitting natural stopping cues from products. Nearly all social media products contain a near-infinite feed of content with no logical end. Finally, the content in such feeds is often only partly displayed on the screen, which is designed to encourage users to continue to scroll to see the content.[9]

Adolescents, in a critical formative period of brain development, are especially vulnerable to the mental health impacts of social media. Among these impacts are increased neuroticism and anxiety, higher rates of depression, lower self-esteem, decreased attention spans, impulsivity, and brain patterns that resemble attention-deficit hyperactivity disorder.[10] The studies reviewed by the Surgeon General's Office point to a higher risk of harm in adolescent girls and those already experiencing poor mental health. The Surgeon General concludes:

> [T]he current body of evidence indicates that while social media may have benefits for some children and adolescents, there are ample indicators that social media can also have a profound risk of harm to the mental health and well-being of children and adolescents. At this time, we do not yet have enough evidence to determine if social media is sufficiently safe for children and adolescents.[11]

Social media companies have known for some time that social media use can be harmful to young users, and despite that knowledge, have continued to use algorithms and other design features to capture and hold their attention. Whistleblower Frances Haugen, for instance, revealed in 2021 that Facebook was well aware of the apparent causal connection between the teen mental health crisis and social media—including the severe harm to body image visited disproportionately on young teen women as a result of social comparison on these platforms—but nonetheless sought to recruit more children and expose them to addictive features that would lead to harmful content.[12] Such revelations underscore the culpability of some social media companies in propagating features detrimental to the wellbeing of youth through intentional design choices that maximize engagement with profit-motivated online services.

3) **Youth mental health in California.** "Between 2016–2020, California youth had the second largest percent increase in depression and anxiety among children ages 3–17 in the nation. The majority (57%) of non-fatal self-harm related emergency department visits among California residents occurred among children and youth aged 10–24."[13] "Mental health among youth worsened during the COVID-19 pandemic, with one survey showing 63% of middle and high

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[8] Tolentino, "How TikTok holds our attention" (Sep. 23, 2019), New Yorker https://www.newyorker.com/magazine/2019/09/30/how-tiktok-holds-our-attention.
[9] "Ethics of the Attention Economy: The Problem of Social Media Addiction," *supra.*
[10] Center for Humane Technology, "Extractive Technology is Damaging our Attention and Mental Health," https://www.humanetech.com/attention-mental-health.
[11] "Social Media and Youth Mental Health," *supra*, p. 4.
[12] "Facebook Whistleblower Frances Haugen Testifies on Children & Social Media Use: Full Senate Hearing Transcript" (Oct. 5, 2021), https://www.rev.com/blog/transcripts/facebook-whistleblower-frances-haugen-testifies-on-children-social-media-use-full-senate-hearing-transcript.
[13] California Department of Public Health, Summary Report 2024, California State of Public Health Summary Report 2024.

school students reported having had an emotional meltdown, 43% reported panic or anxiety attacks, and 19% described suicidal thoughts between April 2020 and March 2021."[14]

In 2022, Governor Newsom issued a Master Plan for Kids' Mental Health, intended to overhaul the state's mental health system by increasing access to mental health services for all Californians ages 0-25 through a one-time $4.7 billion investment and an effort to add 40,000 new mental health workers.[15] In 2023, the Department of Health Care Services announced the allocation of $150 million in grants—including $100 million for trauma-informed behavioral health services and counties, and $50 million for youth-driven community center programs—to 262 organizations, to promote the mental health and wellness of children and youth across the state.[16] Additionally, the Mental Health Services Act, which voters recently approved to be overhauled via Proposition 1, provides, in fluctuating amounts, several hundred million dollars annually of ongoing funding for youth behavioral health and early intervention services.[17]

According to the author:

> The demand for mental health services has rapidly outpaced supply, leaving families without adequate resources to overcome the negative effects of technology. A UC San Francisco study has predicted that by 2028, demand for psychologists and other therapists will be 40% more than those available. Mental health weighs heavily on societies and economies. Yet, two thirds of people seeking mental health support reported difficulties getting it. This bill will create an ongoing funding source to address and mitigate the mental health challenges facing California.

4) **How does digital advertising work?** A recent article in the Notre Dame Law Review describes how digital platforms offering "free" services profit by having users watch ads and tender their data:

> To illustrate the new tax problems in the platform economy, consider the hypothetical example of Mary. Mary, a single millennial lawyer living in Maryland, wants to purchase new business attire online. Mary is particularly interested in basic business casual, not too luxurious, and she begins "googling" key words like "business casual for women." For no explicit charge, Google shows search results, such as suits by J. Crew, Banana Republic, and H&M. Mary clicks only on J. Crew and skips other brands. For Google, the data it collects from Mary about "business casual for women" is information that it can, and does, monetize in order to provide its "free" service. So, it is not surprising that when Mary visits her favorite YouTube channel to watch a new video clip, YouTube shows an advertisement for J. Crew, which Mary is now more likely to click on or at least not to skip.

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[14] Hwang, "Newsom is proposing a boost in mental health funding. Why children's advocates are worried" (Jun. 20, 2023), *CalMatters*, Mental health funding: California proposing increase - CalMatters
[15] "Governor Newsom Unveiles New Plan to Transfor Kids' Mental Health" (Aug. 18, 2022) Governor Newsom Unveils New Plan to Transform Kids' Mental Health | California Governor
[16] Grzunov, " 'Children Across California Struggle' Gov. Newsom Awards $150 Million to Support Mental Health Programs for Youth and Young Adults," MSN.com, "Children Across California Struggle" Gov. Newsome Awards $150 Million to Support Mental Health Programs for Youth and Young Adults (msn.com).
[17] Mental Health Services Act Expenditure Report—May Revision—Fiscal Year 2023-24 (May 2023), p. 8, 2023-24-Mental-Health-Services-Act-May-Revision-Final (ca.gov).

> In sum, digital platforms (Google) sell user-advertisers (J. Crew) precisely targeted, individualized, and verifiable access to user-consumers (Mary). Their business practice relies on two-sided, mutually reenforcing transactions. On one side, user-advertisers pay digital advertising platforms to place their ads in front of user-consumers. On the other, the platforms engage in a barter with user-consumers: exchanging services (e.g., social networking, search, maps, etc.) for the right to place targeted advertising in front of them and to collect enormous amounts of user data (e.g., where those users browse the web, how they use the platforms' services, or whether they click on an ad) including by installing small bits of tracking code on user-consumers' computers. These transactions are often conducted simultaneously, and the success of the first side of the transaction depends at every step on the barter exchange (e.g., platforms simultaneously show a user-consumer a targeted ad, collect data about that users' activities, adapt ads in real time to increase chance of affecting user behavior, and get paid by the advertiser based on the user's activities).[18]

5) **Rationales for a digital ad tax.** There are several possible rationales for imposing a digital ad tax. One such rationale is maintaining uniformity of taxes on consumption. As the economy has digitized, states have sought to maintain the consumption tax base by extending sales taxes to products that are purchased online. The United States Supreme Court's decision helped pave the way for such taxes in *South Dakota v. Wayfair* (2018) 138 S.Ct. 2080, 2103, which held that businesses need only have an economic, rather than physical, presence in a state in order to be subjected to its sales tax.

Promoting regulatory goals is another rationale. In a 2019 opinion piece in the *New York Times*, Nobel Laureate Paul Romer argued for a tax on digital advertising. The dominant digital platform companies, he argued, "have created a haven for dangerous misinformation and hate speech that has undermined trust in democratic institutions. And it is troubling when so much information is controlled by so few companies." A digital tax could serve as a means of prompting the largest tech companies to shift to a different revenue-generating model that doesn't incentivize deploying addictive features to harvest user information in order to sell target digital ads. Romer argued such a tax would be more effective than antitrust law, which "addresses mainly the harm from price gouging, not the other kinds of harm caused by these platforms, such as stifling innovation and undermining the institutions of democracy." Romer also asserted that structuring the tax to be progressive would "make sure that dominant social media platforms bear the brunt of the tax" without unduly burdening new market entrants.[19]

The author's focus is on helping offset the externalities from the digital economy—that is, the widespread deterioration of youth mental health as adolescents have moved much of their social lives online. The author notes that "we are now realizing the negative externalities of technology on physical and mental health. Tech executives were forced to recognize the harm inflicted upon young users. Meta CEO, Mark Zuckerberg, publicly apologized to families at a U.S. Senate hearing about the impact technology has on our youth."

6) **How much would the tax yield?** Digital advertising has become a major source of growth for many of the largest tech companies. In the fourth quarter of 2023 alone, Alphabet's Google ad

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[18] Kim and Shanske, "State digital services taxes: a good and permissible idea (despite what you might have heard)" (Dec. 2022) 98 Notre Dame L. Rev. 741, 744-745.
[19] Romer, "A Tax That Could Fix Big Tech" (May 6, 2019) New York Times, Opinion | A Tax That Could Fix Big Tech - The New York Times (nytimes.com)

business yielded $65.5 billion in revenues, Meta's online ad sales brought in $38.7 billion, and Amazon's brought in $14.7 billion. In 2024, global digital ad spending is expected to rise by 10%. Meanwhile, several other countries, including the United Kingdom and France, have enacted taxes on digital services.[20] A major component of this growth is from China-based advertisers; last year, 10% of Meta's sales were from China.[21]

These companies do not publicly report their revenues by state. Based off California's share of the population, approximately $32 billion in total advertising revenues was derived from viewers in 2023. A five percent tax on those revenues, then, would come out to roughly $1.6 billion. By comparison, roughly $3.4 billion was available from the Mental Health Services Act, which imposes a one percent tax on person income in excess of $1 million.[22]

Currently two US states—New Mexico and Maryland—and 12 countries, including Austria, Turkey, and India, tax ad revenues. New Mexico imposes a 4.9 percent tax as part of its broader business gross receipts tax.[23] Maryland, by contrast, imposes a specific tax on digital advertising. The tax rate is progressive, beginning at 2.5% for entities with global annual revenues between $100 million and $1 billion, and topping out at 10% for businesses with global annual revenues exceeding $15 billion.[24] The tax rate is calculated based on an entity's global annual revenues but is then applied only to the entity's annual gross revenues derived from digital advertising services in Maryland.[25] It is estimated that the tax will generate roughly $250 million a year, to be used for education. [26]

7) **Implementation questions.** Opponents assert that the bill fails to resolve important questions surrounding the bill's implementation, such as the means of verifying the actual amount of gross tax revenue derived from digital advertising in the state. The author is currently working on amendments related to the administration of the tax.

As to the use of proceeds, the bill is thin on details, merely stating the Legislature's intent that net proceeds from the tax will fund youth mental health services. Children Now, in a support-if-amended position, states that they "recommend the author consider how to ensure dollars are used directly for the services and supports of youth mental health. Specifically, we recommend non-supplantation language be added to the language, the state agency to administer the funds be named and the types of mental health services and supports be listed within the bill." The author is encouraged to continue fleshing out such details as the bill moves forward.

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[20] Morris and Brown, "Digital Services Taxes: Are they here to stay?" PricewaterhouseCoopers: https://www.pwc.com/us/en/services/tax/library/digital-service-taxes.html.
[21] Vanian, Digital ad market shows signs of sharp rebound as Meta, Amazon point to growth (Feb. 5, 2024) CNBC, https://www.cnbc.com/2024/02/05/digital-ads-show-signs-of-rebound-as-meta-amazon-point-to-growth.html.
[22] Mental Health Services Act Expenditure Report – Governor's Budget, Fiscal Year 2023-24 (Jan. 2023), p. 5, 2023-24 Mental Health Services Act - Governor's Budget - Final.pdf (ca.gov).
[23] "New Mexico tax department adopts rules clarifying when receipts from digital advertising services are taxable" (Dec. 22, 2023) Tax News Update, New Mexico tax department adopts rules clarifying when receipts from digital advertising services are taxable (ey.com)
[24] Md. Code Ann., Tax-Gen § 7.5-103.
[25] Id. §§ 7.5-102; 7.5-101(c).
[26] Kim and Shanske, "State digital services taxes: a good and permissible idea (despite what you might have heard)" (Dec. 2022) 98 Notre Dame L.Rev. 741, 760.

8) **Tax fatigue?** Opponents assert the bill "would create a disincentive for businesses to locate and grow in California, and would exacerbate California's reputation as a challenging state in which to do business." However, the tax would not be specific to businesses that are located in California but rather to those that extract revenue from California via digital advertisements.

Opponents also assert that "[a] January 18 poll by the Berkeley Institute of Governmental Studies [IGS] found that only 13 percent of California's registered voters support tax increases as a method of bridging the state's deficit. Opposition to tax increases was strong across all partisan, age, and ethnic groups polled, with Black and Latino voters voicing the strongest opposition." But the survey simply asked respondents to select their preferred categories of closing the state's budget deficit from the following options: spending cuts, tapping "rainy day" fund reserves, borrowing from special funds, and "raising taxes."[27] The survey did not specify whether the tax would be on residents or on businesses that may or may not be in California.

Analyzing the results, the Berkeley IGS Co-Director stated, "The survey suggests little appetite for tax increases to address the deficit, but a challenge for Governor Newsom and the legislature is that while spending cuts, in principle, are relatively popular, that support would likely dissipate when it comes time to making cuts to specific programs and services."[28]

9) **Legal challenges.** The legality of a tax is beyond the jurisdiction of this Committee. However, given the numerous concerns raised by opposition and the similarity of the Maryland tax that is the subject of pending litigation, some exploration of this issue is warranted.

Maryland litigation. Challenges to Maryland's tax are proceeding in both state and federal courts. In both cases, the plaintiffs assert, among other things, that the tax is unconstitutional under the First Amendment, Commerce Clause, and Due Process Clause, as well as the Supremacy Clause because the tax is preempted by the Internet Tax Freedom Act (ITFA).

On May 9, 2023 the Maryland Supreme Court vacated, on procedural grounds, a lower court's invalidation of the tax. The state's high court held that the lower court lacked jurisdiction because the companies challenging the tax were required to first go through a statutory administrative process to pursue their challenge.[29] That process is underway.

Meanwhile, the U.S. Court of Appeals for the Fourth Circuit, on January 10, 2024, affirmed a federal District Court ruling that the Tax Injunction Act, which prevents federal courts from enjoining collection of state taxes where state law provides an adequate remedy, barred challenge to the tax other than the First Amendment challenge. That claim asserts that Maryland's prohibition on passing costs of the tax to customers is an unconstitutional content-based regulation of speech. The Court of Appeals remanded to the District Court to decide the issue on its merits.[30]

This bill. The opposition coalition asserts that the tax is "discriminatory" and "will be met with numerous legal challenges and would create a chilling effect on California's tech industry."

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[27] Berkeley IGS Poll (Jan. 18, 2024) p. 6, https://escholarship.org/uc/item/46g7q3hk.
[28] *Id.* at p. 1.
[29] *Comptroller of Md. v. Comcast of Cal.* (2023) 484 Md. 222, 250.
[30] Chamber of Commerce of United States v. Lierman (4th Cir. 2024) 90 F.4th 679, 683.

Echoing the Maryland litigation, they assert the tax is unconstitutional under the First Amendment, the Commerce Clause, and the Internet Tax Freedom Act (IFTA).

The latter claim appears to be the strongest. Among other things, the IFTA prohibits a "discriminatory" tax on electronic commerce that "is not generally imposed and legally collectible by such State . . . on transactions involving similar property, goods, services, or information accomplished through other means." [31] Opponents assert that the bill is discriminatory because there is no analogous tax on traditional forms of advertisements.

However, Professors Young Ran Kim and Darien Shanske argue that Maryland's tax will survive an ITFA challenge because it provides meaningful taxation on a novel kind of consumption. They assert that digital advertisements, unlike traditional advertisements, are typically part of a broader extractive scheme to collect data on users in order to actively predict their interests and show users targeted advertisements. Such transactions arguably may be characterized as a hidden form of consumption—the exchange of entertainment for data—that is unique to the digital realm. Accordingly, a court could conclude that the unique character of digital advertisement services finds no analog in traditional commerce and so is not discriminatory.[32]

10) **Related legislation.** AB 886 (Wicks, 2023) Creates the California Journalism Preservation Act, which will require a covered platform to remit a journalism usage fee to an eligible digital journalism provider, as defined, in an amount determined by a prescribed arbitration process; requires the provider to spend at least 70% of the fee received on news journalists and support staff; and prohibits retaliation against a provider who exercises their right to demand the fee. The bill is pending in the Senate Judiciary Committee.

ARGUMENTS IN SUPPORT:

John Burton Advocates for Youth writes:

> Since the 1990's technology has become ubiquitous in our society, especially among children and adolescents. As with many new innovations, we are only just beginning to fully understand the magnitude of the negative consequences. The day-to-day interactions of people, and consequently commerce, have changed significantly in the last 30 years. We are now realizing the negative externalities of technology on physical and mental health.
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> Young people in California are facing a mental health crisis, with skyrocketing rates of anxiety, depression, and loneliness - mental health challenges that lead to everything from disordered eating to self-harm and even suicide. Yet, our youth are left without adequate resources to overcome the negative effects of technology. The demand for services is quickly outpacing supply. In fact, a UC San Francisco study has predicted that by 2028, demand for psychologists and other therapists will be 40% more than those available. This in turn has downstream injurious effects on local communities.

ARGUMENTS IN OPPOSITION:

[31] 47 U.S.C. § 1105(2)(A)(i).
[32] 779

A coalition of opponents, led by the California Taxpayers Association, states it opposes the bill for the following reasons:

Unconstitutional Under ITFA. AB 2829 is substantially similar to Maryland's first-in-the-nation digital advertising tax, enacted in 2020, which has been the subject of litigation since its passage. Maryland's elected comptroller, the defendant in several of the suits concerning the digital advertising tax, has publicly stated he believes the state should no longer expend resources "to defend a law that was constitutionally questionable at the time of enactment." AB 2829 would be met with legal challenges similar to those being litigated in Maryland.

The Internet Tax Freedom Act, implemented by the Clinton administration in 1998 and made permanent by the Obama administration in 2016, prohibits discriminatory taxes on electronic commerce, defined as "any transaction conducted over the Internet or through Internet access, comprising the sale, lease, license, offer or delivery of property, goods, services, or information, whether or not for consideration." The federal law expressly prohibits states or political subdivisions from imposing "discriminatory taxes on electronic commerce."1 AB 2829 would impose a tax on only digital advertising, in clear violation of the Internet Tax Freedom Act.

Specifically, the bill singles out online platforms with $100 million or more in global annual gross revenue. Only those platforms would be subject to the tax, while traditional forms of advertising – namely, billboards or advertisements placed in newspapers – would not be taxed.

Violates First Amendment Rights. AB 2829 is also ripe for a challenge on the basis that it violates taxpayers' First Amendment rights. The bill would unconstitutionally limit taxpayers' speech by prohibiting taxpayers from listing any costs associated with the tax on an invoice, fee, or line item provided to a consumer of digital advertising services. Additionally, the provision to statutorily prevent taxpayers from communicating to their customers about the tax would unnecessarily hinder tax transparency.

Runs Afoul of the Federal Commerce Clause. AB 2829 almost certainly would be challenged as a violation of the U.S. Constitution's Commerce Clause. The Commerce Clause prohibits state laws that discriminate against interstate commerce, and is generally interpreted to ban laws favoring in-state interests at the expense of out-of-state interests. AB 2829 sets a threshold of $100 million in global annual gross revenue. The bill would tax many out-of-state businesses, with potentially minimal advertising activities in California, while preventing businesses from passing on any costs associated with the tax. The effect would result in shifting the tax burden from businesses' California customers to their out-of-state customers, effectively discriminating against out-of-state customers in violation of the Commerce Clause.

Harms California's Business Climate. AB 2829 would create a disincentive for businesses to locate and grow in California, and would exacerbate California's reputation as a challenging state in which to do business.

Leaves Important Administration Questions for Regulations. AB 2829 omits any language regarding the sourcing or apportionment of receipts for the tax. Rather, the California Department of Tax and Fee Administration would be responsible for adopting regulations "governing collections, reporting, refunds, and appeals." Leaving important sourcing rules to the regulatory process ignores the important policy implications of a broad-based digital advertising tax. For instance, AB 2829 would apply only to the gross revenue derived from digital advertising in the state. How will California determine who is in the state? Will California use a network-based tracking system? Will the state utilize Wi-Fi positioning of mobile devices? How will the state handle the growing utilization of encryption to obscure users' locations? Is it even realistically possible to reliably obtain the information necessary for sourcing?

Voters Do Not Want Tax Increases. A January 18 poll by the Berkeley Institute of Governmental Studies found that only 13 percent of California's registered voters support tax increases as a method of bridging the state's deficit. Opposition to tax increases was strong across all partisan, age, and ethnic groups polled, with Black and Latino voters voicing the strongest opposition.

REGISTERED SUPPORT / OPPOSITION:

Support

John Burton Advocates for Youth

Support If Amended

Children Now

Opposition

American Advertising Federation (AAF)
Americans for Digital Opportunity (ADO)
Association of National Advertisers
California Attractions and Parks Association
California Business Roundtable
California Chamber of Commerce
California Retailers Association
California Taxpayers Association
Carlsbad Chamber of Commerce
Computer and Communications Industry Association
Council on State Taxation
CTIA
Cupertino Chamber of Commerce
Dana Point Chamber of Commerce
Exhibitions & Conferences Alliance
Family Business Association of California
Greater High Desert Chamber of Commerce
Greater Irvine Chamber of Commerce
Greater San Fernando Valley Chamber of Commerce
Imperial Valley Regional Chamber of Commerce
Interactive Advertising Bureau, INC.
Internet Coalition
LA Canada Flintridge Chamber of Commerce

Laguna Niguel Chamber of Commerce
Motion Picture Association
Ncta- the Internet and Television Association
Netchoice
Oceanside Chamber of Commerce
Orange County Taxpayers Association
Santa Maria Valley Chamber of Commerce
Silicon Valley Leadership Group
Simi Valley Chamber of Commerce
Solano County Taxpayers Association
Technet
West Ventura County Business Alliance

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