



October 25, 2021

Representative Johnny Garrett
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Suite 636 Cordell Hull Bldg.
Nashville, TN 37243

Senator Jon Lundberg
425 Rep. John Lewis Way N.
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RE: Comments from Advertising Industry to Ad Hoc Committee Review of Data Privacy

Dear Representative Garrett and Senator Lundberg:

On behalf of the nation's leading advertising and marketing trade associations, we are writing to express our shared support of your interests to advance meaningful state privacy standards, and to offer our recommendation that the Joint Ad Hoc Committee to Review Data Privacy ("Committee") adopts a legislative approach that aligns with recently enacted privacy legislation in other states, such as the Virginia Consumer Data Protection Act.¹

Our organizations collectively represent thousands of companies, from small businesses, to household brands, advertising agencies, and technology providers, including a significant number of Tennessee businesses. Our combined membership includes more than 2,500 companies and is responsible for more than 85 percent of U.S. advertising spend. Through robust self-regulatory bodies and strong industry-imposed standards, our members engage in responsible data collection and use that benefits consumers and the economy, and we believe consumers deserve consistent and enforceable privacy protections in the marketplace. It is our primary objective to promote enactment of national, preemptive data privacy legislation.

We share the Tennessee legislature's interest in advancing meaningful state law privacy standards so consumers have consistent privacy rights and businesses are able to take a more holistic approach to privacy law compliance. However, we understand that Tennessee is considering various approaches to data privacy, and, in particular, is considering advancing the Tennessee Information Protection Act as a set of amendments to SB 1554 and HB 1467 (Amendments"). We caution the Committee from adopting a legislative approach that would unreasonably restrict advertising and hinder small businesses. Data-driven advertising provides significant and undeniable benefits to consumers and the economy-at-large. Legislation hindering advertising would adversely impact individuals and the business community alike—particularly small and medium-sized firms.

Instead, we encourage the Committee to adopt approaches to data privacy that align with recently enacted privacy legislation in other states, such as the Virginia Consumer Data Protection Act.² Harmonization with existing privacy laws is critical to minimizing the costs of compliance. A regulatory impact assessment of California's Consumer Privacy Act of 2018 concluded that the

¹ See Virginia Consumer Data Protection Act, §§ Va. Code Ann. 59.1-571 et seq., located [here](#).

² *Id.*

initial compliance costs to California firms would be \$55 billion.³ A recent study found that a consumer data privacy proposal in Florida would have generated a direct initial compliance cost of \$6.2 billion to \$21 billion for Florida and an ongoing annual compliance costs of \$4.6 billion to \$12.7 billion for the state.⁴ Tennessee should not add to this compliance bill to businesses.

We also strongly urge the Committee to vest privacy law enforcement responsibility in the state Attorney General alone, as private rights of action do not adequately protect consumers or provide clear rules for businesses. Finally, we suggest that the Committee avoids broad opt-in consent requirements, which would limit Tennesseans from receiving the benefits of vital uses of data, and we ask that you include clear bill definitions in order to promote consistency and clarity for consumers and businesses alike.

I. A Private Right of Action Would Be an Ineffective Form of Enforcement for Consumer Rights

As presently drafted, the Amendments would vest enforcement of its rights-related provisions in the Tennessee Attorney General (“AG”). We encourage the Committee to retain this approach to privacy law enforcement, because such an enforcement structure would lead to strong outcomes for Tennesseans while better enabling businesses to allocate resources to developing processes, procedures, and plans to facilitate compliance with new data privacy requirements. AG enforcement of rights-related provisions, instead of a private right of action, is in the best interests of both Tennessean consumers and businesses. This AG enforcement structure, coupled with a reasonable cure period, would help to keep businesses who have tried in good faith to comply with new privacy requirements out of the courts, thereby preserving judicial resources and minimizing litigation costs.

A. A Private Right of Action Would Not Provide Meaningful Redress to Tennesseans

A private right of action would create a complex and flawed compliance system without tangible privacy benefits for Tennesseans. Allowing private actions would flood the state’s courts with frivolous lawsuits driven by opportunistic trial lawyers searching for technical violations of the law rather than focusing on actual consumer harm. A study of 3,121 private actions under the Telephone Consumer Protection Act (“TCPA”) occurring over a 17-month timespan after the Federal Communications Commission issued a ruling that opened the floodgates of TCPA litigation showed that approximately 60 percent of TCPA lawsuits were brought by just forty-four law firms.⁵ Private actions thus create an environment that enriches a select few attorneys while providing only nominal benefits for consumers with viable claims. Moreover, the same TCPA study found that

³ 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://www.dof.ca.gov/Forecasting/Economics/Major_Regulations/Major_Regulations_Table/documents/CCPA_Regulations-SRIA-DOF.pdf.

⁴ 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://floridatxwatch.org/DesktopModules/EasyDNNNews/DocumentDownload.ashx?portalid=210&moduleid=34407&articleid=19090&documentid=986>.

⁵ U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl* 2, 4, 11-15 (Aug. 2017), located at https://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf; see also *In re Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C.Rcd. 7961 (2015).

private rights of action tend to attract repeat plaintiffs. Plaintiffs looking to take advantage of private action regimes strain judicial resources and exact penalties from businesses for technical violations of law that may not equate to any quantifiable harms on consumers.

Even entirely meritorious private claims against companies for legal violations that impact multiple consumers rarely result in material compensation to individuals as redress. Class action settlement amounts, for example, are usually underwhelming from the individual consumer’s perspective. To make the point: under a truth-in-advertising labeling legal regime that allowed a private right of action in a lawsuit targeting a well-known food manufacturing company, lawyers pocketed millions—an amount equal to \$2,100 per hour they spent on the case.⁶ Their clients, on the other hand, took home a mere \$15 per consumer *at most*—a miniscule fraction of the amount their attorneys received.⁷ The result is similar in TCPA litigation, as individuals often walk away with a minimal portion of a settlement fund that pays out to class members pro rata, while 25 to 30 percent of that fund goes directly to class counsel.⁸ Amounts paid out to consumers have proven to be insignificant, even though only 4 to 8 percent of eligible claim members make themselves available for compensation from settlement funds.⁹ Private rights of action therefore unjustly enrich attorneys without offering proportionate, tangible benefits or meaningful recompense to consumers.

B. A Private Right of Action Would Have a Chilling Effect on Tennessee Businesses

Additionally, a private right of action for consumer rights would have a chilling effect on Tennessee’s economy by creating the threat of steep penalties for companies that are good actors but inadvertently fail to conform to technical provisions of the law. Private rights of action can drive companies to settle cases to avoid excessive litigation costs despite plausible arguments they may have to support their defense. A recent study estimates that a Florida privacy law including a private right of action would generate more than 80 class-action lawsuits initially, incurring more than \$4.2 billion in litigation costs.¹⁰ The study anticipates those litigation costs would increase over time. Small, startup, and mid-size firms are particularly vulnerable to the threat of litigation and premature settlements. One notable example is a suit brought against a consumer’s local dry cleaner for \$54 million, claiming that the store did not abide by its “Satisfaction Guaranteed” promise when it failed to return a man’s pants. After a hard-fought, three-year legal battle, the dry cleaner went out of business due to expenses associated with defending the suit. Outcomes such as these provide little benefit to consumers on the whole, threaten the viability of honest, well-meaning businesses, and do not support the development of consistent, enforceable standards.

Beyond the staggering cost to Tennessee businesses a private right of action would create, 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. As a result, including a private right of action in privacy legislation would make

⁶ American Tort Reform Foundation, *State Consumer Protection Laws Unhinged: It’s Time to Restore Sanity to the Litigation 4* (2003), located at http://www.atra.org/wp-content/uploads/2016/12/WP_2013_Final_Ver0115.pdf. (hereinafter, “ATR Report”).

⁷ *Id.*

⁸ U.S. Chamber Institute for Legal Reform, *Ill-Suited: Private Rights of Action and Privacy Claims 7-8* (Jul. 2019), located at https://www.instituteforlegalreform.com/uploads/sites/1/III-Suited_-_Private_Rights_of_Action_and_Privacy_Claims_Report.pdf.

⁹ *Id.*

¹⁰ See Florida Tax Watch at 19.

Tennessee unfriendly to consumers and businesses alike. We therefore encourage legislators to maintain the AG enforcement structure in the Amendments and resist efforts to include a private right of action.

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

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 target specific messaging to varying groups of individuals. Targeted 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 the Amendments, can have unintended consequences and, ultimately, serve as a detriment to consumers' health and welfare.

For example, broad opt-in requirements for demographic data could undermine public health efforts to ensure information about the COVID-19 pandemic and vaccines are accessible to all Tennesseans. Businesses' ability to process key demographic data enables them to identify at-risk groups and reach out to these communities with crucial information about the coronavirus as well as information regarding who can receive vaccines at particular locations and particular times. Targeted messaging sent to various communities based on demographic characteristics have worked to encourage members of hard to reach communities to receive COVID-19 vaccinations.¹¹

Examples of the use of targeted messaging encouraging vaccines by both public and private entities are everywhere. The Department of Health and Human Services ("DHHS") uses targeted advertising to reach individual communities with information about the vaccine in a way that is relevant and meaningful to them; DHHS is using demographic information to tailor messaging to individuals in the Native American community by showing images and symbols of Native American culture in the digital advertisements directed to those populations.¹² This kind of specific, targeted messaging to combat coronavirus is just one example of how demographic data is used to benefit consumers and the public at-large. In fact, the same ad-technology systems and processes that enable such COVID-19-related public health messaging also enable retailers to reach consumers, allow timely wildfire warnings to reach local communities, and facilitate the dissemination of missing children alerts, among myriad other beneficial uses.¹³

In accordance with responsible data use, uses of data for targeted 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

¹¹ See Jeremy B. Merrill and Drew Harwell, *Telling conservatives it's a shot to 'restore our freedoms': How online ads are promoting coronavirus vaccination*, WASHINGTON POST (Aug. 24, 2021), located [here](#).

¹² *Id.*

¹³ See, e.g., 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 [here](#); 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](#); Digital Advertising Alliance, *Zogby Poll: Americans Say Free, Ad-Supported Online Services Worth \$1200/Year, 85 Percent Prefer Ad-Supported Internet to Paid* (May 11, 2016), located [here](#); Digital Advertising Alliance, *Study: Online Ad Value Spikes When Data Is Used to Boost Relevance* (Feb. 10, 2014), located [here](#).

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 beneficial uses of information that help consumers, businesses, and non-profits by making messaging and information more relevant to them. 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 Tennesseans can persist, and to help maintain a competitive business marketplace, we suggest that the Committee considers limiting any opt-in requirement to apply to demographic data only in cases where processing results in decisions that produce legal effects concerning a consumer or similarly significant effects concerning a consumer.

III. Data-Driven Advertising Provides Significant Benefits to Tennesseans, to the Economy, and to All Consumers

Over the past twenty years, 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 grow between two to three percent per year.¹⁴ 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.¹⁵ Additionally, more than 17 million jobs in the U.S. were generated by the commercial internet, 7 million more than four years ago.¹⁶ More internet jobs, 38 percent, were created by small firms and self-employed individuals than by the largest internet companies, which generated 34 percent.¹⁷ The same study found that the ad-supported Internet supported 101,184 full-time jobs across the state of Tennessee, almost double the growth in Internet-driven employment from 2016.¹⁸

A. Advertising Fuels Economic Growth

Data-driven advertising supports a competitive online marketplace and contributes to tremendous economic growth. Overly restrictive legislation significantly hindering certain advertising practices, such as third-party tracking, could yield tens of billions of dollars in losses for the U.S. economy.¹⁹ 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.”²⁰ That same study found that the lost revenue would become absorbed by “walled gardens,” entrenched market players, thereby consolidating power and revenue in a small group of powerful entities.²¹ 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.²² Data-driven advertising has

¹⁴ 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.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 113.

¹⁹ 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>.

²⁰ *Id.* at 34.

²¹ *Id.* at 15-16.

²² *Id.* at 28.

thus helped to stratify economic market power, ensuring that smaller online publishers can remain competitive with large corporations.

B. Advertising Supports Tennesseans 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,²³ 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.²⁴ Publishers have been impacted 14 percent more by such reductions than others in the industry.²⁵ Revenues from online advertising based on the responsible use of data support the cost of content that publishers provide and consumers value and expect.²⁶ 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.²⁷ 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.²⁸ Indeed, as the Federal Trade Commission noted in its recent comments to the National Telecommunications and Information Administration, if a subscription-based model replaced the ad-based model, many consumers likely

²³ See Howard Beales, *The Value of Behavioral Targeting* 3 (2010), located at https://www.networkadvertising.org/pdfs/Beales_NAI_Study.pdf.

²⁴ 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

²⁵ *Id.*

²⁶ See John Deighton & Peter A. Johnson, *The Value of Data: Consequences for Insight, Innovation & Efficiency in the US Economy* (2015), located at <http://thedma.org/wp-content/uploads/Value-of-Data-Summary.pdf>

²⁷ 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.

²⁸ 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.

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.²⁹

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.

* * *

Thank you for your consideration of these comments. We look forward to working with Tennessee to develop data privacy approaches that best serve consumers and businesses.

Sincerely,

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²⁹ 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.