



April 10, 2018

The Honorable Greg Waldren
Chairman, Committee on Energy and Commerce
2185 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Frank Pallone
Ranking Member, Committee on Energy and Commerce
237 Cannon House Office Building
Washington, D.C. 20515

RE: Facebook: Transparency and Use of Consumer Data

Dear Chairman Walden and Ranking Member Pallone,

We write to you regarding your April 11 hearing, "Facebook: Transparency and Use of Consumer Data." We, the president and public policy director of the Committee for Justice (CFJ), are concerned that the hearing will lead to the introduction of new legislation regulating online data collection and use. We are convinced such legislation is not only unnecessary but, if enacted, would also hurt consumers, threaten the online ecosystem that has transformed our daily lives, and negatively impact our country's economic growth.

Founded in 2002, CFJ is a nonprofit, nonpartisan legal and policy organization that educates the public and policymakers about and promotes the rule of law and constitutionally limited government. Consistent with this mission, CFJ engages in the national debate about a variety of tech policy issues, including advocating for digital privacy protections in Congress, the federal courts, and the news media.¹

We have concluded that a legislative solution to the data privacy issues being discussed at the hearing would be detrimental to our nation for the following reasons:

- **Government-imposed restrictions on data collection would undercut economic growth, the vibrancy of the online ecosystem, and consumer satisfaction.** In recent decades, consumers' personal and professional lives have been transformed for the better by a vast collection of data-driven online resources that are made available to consumers for no cost because they are subsidized by advertising. These resources have also been an engine of economic growth, even during difficult economic times. For example, more than 70 million small businesses now use Facebook to grow and create jobs.² In particular, data-driven marketing, at issue in this hearing, is estimated to have added more than \$200 billion to the U.S. economy in 2014, a 35% increase over just two years earlier.³ Government-imposed restrictions on such marketing would slow or reverse this economic growth, while hurting consumers by causing the demise of many of the data-driven online resources they rely on.

¹ See, e.g., amicus briefs filed in *Carpenter v. United States*. August 2017. <https://www.scribd.com/document/356288790/Amicus-Brief-Filed-in-Carpenter-v-United-States> and *United States v. Kolsuz*. March 2017. <https://www.scribd.com/document/355249553/United-States-v-Kolsuz-Amicus-Brief>; Letter to Congress in support of the CLOUD Act. March 2018. <https://www.committeeforjustice.org/single-post/support-clarifying-lawful-use-data>.

² *Facebook: Transparency and Use of Consumer Data: Hearing Before the H. Comm. on Energy & Commerce*, 115th Cong. (2018) (statement of Mark Zuckerberg).

³ Deighton, John and Johnson, Peter. "The Value of Data 2015: Consequences for Insight, Innovation and Efficiency in the U.S. Economy." Data & Marketing Association. Dec. 2015. <http://thedma.org/advocacy/data-driven-marketing-institute/value-of-data>.

- **Legislation designed to reign in big companies like Facebook will inevitably harm small companies and tech startups the most.** When regulations restrict companies' ability to collect and use data, advertisers and other online companies experience decreased revenue. Large companies can typically survive these decreases in revenue, while small companies are often driven out of business. The vast majority of Internet companies fall in the latter category and include the very companies that might otherwise grow to compete with and even supplant Facebook and the other tech giants of today. The European Union's Privacy and Electronic Communications Directive (2002/58/EC) provides an unfortunate example of the harm privacy regulations can inflict on small businesses.⁴ It is one reason why there are relatively few technology start-ups in Europe and most of them struggle to receive venture capital funding.⁵
- **The best way to provide consumers with data privacy solutions that meet their needs is competition in the Internet marketplace.** In contrast, increased government regulation of data privacy will stifle competition, in part because only larger companies can afford the increased compliance costs and reductions in revenue. This hearing will undoubtedly include questions about balancing the tradeoffs between privacy and the ability to share our lives, make our voices heard, and build online communities through social media. It makes little sense for Congress to impose a one-size-fits-all answer to these questions, given that individuals value the tradeoffs very differently. Addressing data privacy through competition, on the other hand, allows consumers to answer these questions for themselves according to their individual values.
- **Public opinion polls showing support for stronger data protections are misleading because they rarely confront consumers with the monetary and other costs of their choices.**⁶ A 2016 study found that, despite most participants' unease with an email provider using automated content analysis to provide more targeted advertisements, 65 percent of them were unwilling to pay providers *any* amount for a privacy-protecting alternative.⁷ However, in the real world, consumers will lose free email and social media if government-imposed privacy regulations cut into providers' advertising revenue. Moreover, such studies remind us that most consumers do not value data privacy enough to pay anything for it. That should not be too surprising considering that today's thriving but largely unregulated social media ecosystem is not something that was thrust upon consumers or arose from factors beyond their control. Instead, it arose through the collective choices and values tradeoffs of billions of consumers.
- **New, punitive data privacy legislation is unnecessary because legal safeguards already exist.** In addition to industry self-regulation, consumers of social media and other Internet services are protected by the Federal Trade Commission's vigorous enforcement of its data privacy and security standards, using the prohibition against "unfair or deceptive" business

⁴ OJ L 201, 31.7.2002, p. 37–47, ELI: <http://data.europa.eu/eli/dir/2002/58/oj>.

⁵ Scott, Mark. "For Tech Start-Ups in Europe, an Oceanic Divide in Funding." *The New York Times*. January 19, 2018. <https://www.nytimes.com/2015/02/14/technology/for-tech-start-ups-in-europe-an-oceanic-divide-in-funding.html>.

⁶ McQuinn, Alan. "The Economics of 'Opt-Out' Versus 'Opt-In' Privacy Rules." Information Technology and Innovation Foundation. Oct.6, 2017. <https://itif.org/publications/2017/10/06/economics-opt-out-versus-opt-in-privacy-rules>.

⁷ Strahilevitz, Lior Jacob, and Matthew B. Kugler. "Is Privacy Policy Language Irrelevant to Consumers?" *The Journal of Legal Studies* 45, no. S2. Sept. 9, 2016. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2838449.

practices in Section 5 of the Federal Trade Commission Act 15 U.S.C. §45(a).⁸ In addition, state attorneys general enforce similar laws at the state level.⁹

- **The Cambridge Analytica incident that sparked this hearing must be put in perspective.** It is important to remember that the personal data disclosed by Facebook to an academic app builder named Aleksandr Kogan was not the sort of highly private data—credit card numbers, health records, and the like—that is sometimes stolen by hackers to the great detriment of consumers.¹⁰ The data disclosed by Facebook came from the profiles of its users and consisted mostly of names, hometowns, and page likes—in other words, the type of data most people on Facebook are public about.¹¹ However, even that data is no longer available to app developers today. Kogan got the idea before Facebook tightened its data privacy policies in 2014.¹² Finally, the concern that has focused so much attention on the Kogan incident—claims that the data was used by Cambridge Analytica to put Donald Trump over the top in 2016—have little basis in fact. Cambridge used the Facebook data to run voter-targeted ads for political campaigns, but it appears that those ads were neither effective nor used in the Trump campaign.¹³
- **Because there is no crisis requiring urgent action and because no one yet fully understands the extent and nature of the privacy risks posed by Facebook's now discontinued policies, calls for government-imposed regulation are premature.** Replacing the light-touch regulation of data privacy currently provided by the FTC and state law with more heavy-handed federal legislation should be a last resort, not the reflexive response to news headlines. Consider also that the Cambridge Analytica incident would not be dominating the news but for the report, apparently incorrect, that the data in question was used to elect Donald Trump president.¹⁴ Nor would the news coverage be so negative. Contrast that with the widely documented use of Facebook data in Barack Obama's 2012 presidential campaign, which was portrayed in a vastly different light by the news media and did not set off calls for Congressional

⁸ See, e.g., Federal Trade Commission. *FTC Staff Report: Self-regulatory Principles for Online Behavioral Advertising*. 2009. <https://www.ftc.gov/reports/federal-trade-commission-staff-report-self-regulatory-principles-online-behavioral>; Federal Trade Commission. *Privacy Online: Fair Information Practices in the Electronic Marketplace*. 2000. <http://www.ftc.gov/reports/privacy2000/privacy2000.pdf>.

⁹ Widman, Amy, and Prentiss Cox. "State Attorneys General Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws." *SSRN Electronic Journal*, 2011. doi:10.2139/ssrn.1850744.

¹⁰ Iraklis Symeonidis, Pagona Tsormpatzoudi, and Bart Preneel. *Collateral Damage of Online Social Network Applications*. 2016. <https://eprint.iacr.org/2015/456.pdf>; Ruffini, Patrick. "The Media's Double Standard on Privacy and Cambridge Analytica." Medium. March 20, 2018. <https://medium.com/@PatrickRuffini/the-medias-double-standard-on-privacy-and-cambridge-analytica-1e37ef0649da>.

¹¹ Albright, Jonathan. "The Graph API: Key Points in the Facebook and Cambridge Analytica Debacle." Medium. March 20, 2018. <https://medium.com/tow-center/the-graph-api-key-points-in-the-facebook-and-cambridge-analytica-debacle-b69fe692d747>.

¹² Facebook, "The New Facebook Login and Graph API 2.0." Facebook for Developers. April 30, 2014. <https://developers.facebook.com/blog/post/2014/04/30/the-new-facebook-login>.

¹³ Kavanagh, Chris. "Why (almost) Everything Reported about the Cambridge Analytica Facebook 'Hacking' Controversy Is Wrong." Medium. March 26, 2018. https://medium.com/@CKava/why-almost-everything-reported-about-the-cambridge-analytica-facebook-hacking-controversy-is-db7f8af2d042?mc_cid=849ab4c39f&mc_eid=5a60ec2d43.

¹⁴ See, e.g., Wood, Paul. "The British Data-crunchers Who Say They Helped Donald Trump to Win." *The Spectator*. December 01, 2016. <http://www.spectator.co.uk/2016/12/the-british-data-crunchers-who-say-they-helped-donald-trump-to-win/>; Taggart, Kendall. "The Truth About The Trump Data Team That People Are Freaking Out About." BuzzFeed. February 16, 2017. https://www.buzzfeed.com/kendalltaggart/the-truth-about-the-trump-data-team-that-people-are-freaking?utm_term=.it3kDeoJYn#.myDn1Kd9rJ; Kroll, Andy. "Cloak and Data: The Real Story behind Cambridge Analytica's Rise and Fall." *Mother Jones*. March 26, 2018. <https://www.motherjones.com/politics/2018/03/cloak-and-data-cambridge-analytica-robert-mercer>.

hearings or new privacy legislation.¹⁵ The important point is that allowing unhappiness with the 2016 election results to drive a push for increased government regulation and control of the Internet is a very bad way to make policy.

- **A rush to enact date privacy legislation is particularly dangerous in light of the glacial pace with which Congress will respond to the need for modernizing the legislation as technology rapidly evolves.** Consider the example of the Electronic Communications Privacy Act of 1986 (ECPA), which governs law enforcement's access to stored electronic data, such as emails. As storage of such data moved to the cloud, the ECPA became hopelessly obsolete, leading to increasingly concerned calls for its modernization from industry, law enforcement, and the White House. Despite those calls, it took many years for Congress to act by passing the Clarifying Lawful Overseas Use of Data or CLOUD Act in March of this year. And even then, Congress acted primarily because a Supreme Court case, *U.S. v. Microsoft*, forced them to.¹⁶ There is good reason to believe that any legislation that comes out of this hearing will similarly remain in effect, unchanged, long after today's technological and privacy landscape has morphed into something we cannot fathom in 2018. In contrast, the self-regulation continuously being improved by Facebook and similar companies not only allows adaptation to technological change with far greater speed but also allows those companies to tailor data privacy solutions to the specific features of their platforms, rather than trying to conform with a one-size-fits-all federal mandate.

In sum, rushing to enact new legislation regulating online data collection and use would hinder innovation in the rapidly evolving world of social media and data-driven marketing, lessen consumer choice, and negatively impact our nation's economic growth.

We ask that this letter be entered in the hearing record. We thank you for your oversight of this important issue.

Sincerely,

Curt Levey
President
The Committee for Justice

Ashley Baker
Director of Public Policy
The Committee for Justice

¹⁵ See Pilkington, Ed, and Amanda Michel. "Obama, Facebook and the Power of Friendship: The 2012 Data Election." *The Guardian*. February 17, 2012. <https://www.theguardian.com/world/2012/feb/17/obama-digital-data-machine-facebook-election>; Michael Scherer. "Friended: How the Obama Campaign Connected with Young Voters." *TIME*. November 20, 2012. <http://swampland.time.com/2012/11/20/friended-how-the-obama-campaign-connected-with-young-voters>.

¹⁶ Levey, Curt. "Your email privacy will get a boost thanks to the omnibus spending bill (and that's a good thing)." *Fox News*. March 22, 2018. <http://www.foxnews.com/opinion/2018/03/22/your-email-privacy-will-get-boost-thanks-to-omnibus-spending-bill-and-thats-good-thing.html>.