

February 14, 2022

Representative Anna Eshoo
272 Cannon House Office Building
Washington, DC 20515

Representative Bobby Rush
2188 Rayburn House Office Building
Washington, DC 20515

Representative Jan Schakowsky
2367 Rayburn House Office Building
Washington, DC 20515

Senator Cory Booker
717 Hart Senate Office Building
Washington, DC 20510

Dear Representative Eshoo, Representative Schakowsky, Representative Rush, and Senator Booker:

On behalf of the ANA – Association of National Advertisers (“ANA”) – we write to express our opposition to H.R. 6416, the Banning Surveillance Advertising Act of 2022, and its Senate counterpart, S. 3520 (collectively, “the proposed bills”).¹ While we strongly believe a need exists for comprehensive and preemptive federal legislation on data privacy, the proposed bills would harm consumers and the diverse businesses that serve them.

The ANA’s mission is to drive growth for marketing professionals, brands and businesses, the industry, and humanity. We serve the marketing needs of 20,000 brands by leveraging the 12-point ANA Growth Agenda, which has been endorsed by the Global CMO Growth Council. The ANA’s membership consists of U.S. and international companies, including client-side marketers, nonprofits, fundraisers, and marketing solutions providers (data science and technology companies, ad agencies, publishers, media companies, suppliers, and vendors). The ANA creates Marketing Growth Champions by serving, educating, and advocating for more than 50,000 industry members that collectively invest more than \$400 billion in marketing and advertising annually. Our members include companies of all sizes, including small and mid-sized firms, virtually all of which rely on data-driven advertising practices that give consumers access to relevant information, messaging, and advertisements at the right time and in the right place.

The ANA advocates for the passage of a comprehensive, preemptive federal data privacy standard to provide rules of the road for businesses in all industries; by contrast, the proposed bills suggest that outlawing a specific advertising practice would offer the privacy protections Americans need. If passed, the proposed bills would virtually ensure that Americans lose access to the open Internet on which they depend to provide them with information, news, products, and services for free or at a very low cost; cripple the economy and stifle competition; and likely even violate bedrock First Amendment free speech protections. Congress should enact a data privacy law that provides a complete regime rather than banning a legitimate and constitutionally protected business practice. We therefore urge you to reconsider the proposed bills’ overly restrictive approach to advertising and instead adopt more well-balanced models for preemptive federal data privacy legislation, such as Privacy for America’s Principles for Privacy Legislation, which the ANA strongly supports.² We outline some of our significant concerns with the bills below.

- **Consumers Desire Relevant Advertising and Benefit from the Data-Driven Advertising Industry.**
Consumers can access practically limitless free and low-cost information and offerings through the Internet because of data-driven advertising. Without data-driven advertising, many online providers could be forced to shift to a subscription-based model where much of the online world would be accessible to a consumer only upon payment of a fee. An increase in subscription-based services (the predictable result of the proposed bills) would change the egalitarian nature of the Internet by which consumers of all economic

¹ Banning Surveillance Advertising Act of 2022, H.R. 6416, 117th Cong. (2022) (hereinafter, “Act”); see also S. 3520, 117th Cong. (2022).

² Privacy for America, Principles For Privacy Legislation, <https://www.privacyforamerica.com/overview/principles-for-privacy-legislation/> (hereinafter, “Framework”).

backgrounds can access content and offerings on a relatively equal basis. Understandably, consumers prefer today's Internet. A recent survey of consumer attitudes towards data-driven advertising found that consumers assign a value of over \$1,400 per year to virtually free content and information they access online due to data-driven advertising, and 88 percent of respondents stated they find advertising useful for finding new products.³ In addition, data-driven advertising generates jobs and supports Americans' livelihoods.⁴ For example, advertising supported \$2.1 trillion in Americans' salaries and wages in 2020, a figure that represents 18.2% of total labor income in the United States.⁵ As a result, a ban like the one proposed in H.R. 6416 and S. 3520 could threaten Americans' livelihoods and salaries at a time of significant economic stress.⁶

- **Data-Driven Advertising Allows Diverse Businesses to Reach Interested Audiences and Grow, Thereby Contributing to a Vibrant and Competitive Economy.** Data-driven advertising enables businesses of all sizes to reach current and potential customers with relevant messaging, services, and products efficiently and inexpensively. The practice helps today's small and start-up companies evolve into flourishing businesses that lend value to everyday Americans' lives. Additionally, nonprofits use advertising to solicit donations to further their charitable missions. Surveys show that 74% of small and mid-size entities believe that data-driven advertising is "important to the success of their business."⁷ These businesses rely on data-driven advertising to generate sales and revenue to a much greater degree than their larger business counterparts.⁸ A ban of the type contained in the proposed bills would cause many companies, including nonprofits and charities, that use data-driven advertising to reach audiences and compete to lose an essential method of making contact with existing and new customers. In turn, consumers' access to offerings would be severely limited and they would not benefit from receiving messaging and advertisements from a wide variety of firms. Small businesses would disproportionately shoulder these detrimental impacts. New businesses may never have the opportunity to get off the ground. Only the large, well-resourced companies that could afford to reach customers through means other than data-driven advertising would be able to function in the economy. A ban of the type that H.R. 6416 and S. 3520 propose could consequently lead to "more concentrated" control of the ad-supported Internet,⁹ where large companies could find a way to live with the ban, while smaller firms would likely die out or shut down due to a lack of customer acquisition and engagement.
- **A Private Right of Action Should Have No Place in Comprehensive Privacy Legislation.** The proposed bills would permit private litigants to bring lawsuits. We strongly believe private rights of action have no place in privacy legislation, and enforcement should be vested only in the Federal Trade Commission ("FTC") and/or state attorneys general. Including a private right of action in the proposed bills would not provide any real avenues for meaningful consumer redress but would be an unjustified windfall to the plaintiffs' bar. Additionally, a private right of action would discourage businesses from innovating for fear of potential expensive litigation costs. The possibility of a private lawsuit would force smaller companies to agree to settle claims to avoid "bet-the-company" litigation, even if such claims are entirely without merit.

³ 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](#).

⁴ See generally IHS Markit, *The economic impact of advertising on the US economy 2018 – 2026* (Nov. 2021).

⁵ *Id.* at 11-12.

⁶ Annie Nova, "'6% inflation is devastating' to everyday Americans, rising prices need to be curbed, expert says," CNBC (Dec. 8, 2021), located at <https://www.cnbc.com/2021/12/08/6percent-inflation-is-devastating-to-americans-financial-expert-says-.html>.

⁷ Deloitte, *Dynamic Markets: Unlocking small business innovation and growth through the rise of the personalized economy* at 2 (May 2021).

⁸ Digital Advertising Alliance, *Summit Snapshot: Data Drives Small- and Mid-sized Business Online, It's Imperative that Regulation not Short-Circuit Consumer Connections* (Aug. 17, 2021), located [here](#).

⁹ See e.g., John Deighton, *The Socioeconomic Impact of Internet Tracking*, IAB at 4 (Feb. 2020), <https://www.iab.com/wp-content/uploads/2020/02/The-Socio-Economic-Impact-of-Internet-Tracking.pdf>.

- **The Proposed Ban Runs Afoul of the First Amendment.** The United States Constitution protects a business’s right to disseminate data and messages under First Amendment commercial free speech doctrine.¹⁰ For a law restricting commercial speech to pass constitutional muster, the state must assert a substantial interest in restricting the speech, the law must directly and materially advance that interest, and the law must be narrowly tailored to serve that interest.¹¹ The proposed bills assert no clear government interest through this draconian ban; they are also far from narrowly tailored but instead take the most severe approach possible by proposing to completely outlaw an otherwise legitimate and beneficial advertising activity. For these reasons, the proposed bills would almost certainly be vulnerable to legal challenges alleging violations of First Amendment commercial free speech protections. We therefore urge you reconsider the proposed bills’ approach and instead adopt more balanced models for a preemptive, national standard for consumer privacy.
- **The Privacy for America Framework Model for Federal Privacy Legislation Offers a Preferable Preemptive and Comprehensive Approach.** H.R. 6416 and S. 3520 offer a blunt tool to regulate the highly nuanced subject of consumer privacy by affording no consideration to the benefits data-driven advertising provides to consumers, businesses of all sizes, and the economy at large. Because a flat ban on data-driven advertising would severely and detrimentally impact consumers and businesses alike, more balanced approaches should be considered to protect consumer privacy and preserve the benefits of advertising. The Privacy for America Framework (“Framework”) is an example of an approach to regulating consumer privacy that prioritizes consumer protection while also allowing beneficial uses of data to power the economy and facilitate access to a vibrant online ecosystem. The Framework takes the approach of defining reasonable and per se unreasonable uses of personal information.¹² For other uses of personal information, the Framework calls on the FTC to exercise authority to issue regulations as needed to clarify permissible and impermissible activities based on specific criteria.¹³ The Framework also recognizes that some consumers may choose not to participate in certain data driven practices, and so individuals could opt out of some data-driven activity.¹⁴

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Thank you for your consideration of this letter. We welcome opportunities to work with you and your colleagues to develop comprehensive preemptive privacy legislation. Please contact me with any questions or requests for assistance.

Sincerely,



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¹⁰ *Individual Reference Services Group, Inc. v. F.T.C.*, 145 F. Supp. 2d 6, 41 (D.D.C. 2001); see also *Central Hudson Gas and Electric Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 566 (1980).

¹¹ See *Individual Reference Services Group, Inc. v. F.T.C.*, 145 F. Supp. 2d 6, 41 (D.D.C. 2001); *Boetler v. Advance Magazine Publishers Inc.*, 210 F. Supp. 3d 579, 597 (S.D.N.Y. 2016); *Sorrell et. al. v. IMS Health Inc.*, 564 U.S. 552, 571-72 (2011).

¹² Framework at Part 1, Sec. 3.

¹³ Framework at Part 2, Sec. 2.

¹⁴ Framework at Part 1, Sec. 6.