



May 16, 2023

Senator Affie Ellis
P.O. Box 454
Cheyenne, WY 82003

Senator Dan Furphy
2605 Dover Drive
Laramie, WY 82072

Senator Tara Nethercott
P.O. Box 20173
Cheyenne, WY 82003

Senator Chris Rothfuss
P.O. Box 1791
Laramie, WY 82073

Representative Ocean Andrew
P.O. Box 2148
Laramie, WY 82073

Representative Daniel Singh
P.O. Box 22106
Cheyenne, WY 82003

Representative Cyrus Western
P.O. Box 175
Big Horn, WY 82833

Representative Mike Yin
P.O. Box 13469
Jackson, WY 83002

RE: Letter in Opposition to Private Right of Action in Wyoming Privacy Legislation

Dear Senator Ellis, Senator Furphy, Senator Nethercott, Senator Rothfuss, Representative Andrew, Representative Singh, Representative Western, and Representative Yin:

We write to oppose the inclusion of a “private civil action” enforcement mechanism in the “Wyoming data privacy act,” as suggested by the Data Privacy Bill Draft Outline related to this potential legislation.¹ Private enforcement would not help to protect the privacy of Wyoming citizens, but instead would disproportionately benefit plaintiff’s attorneys at the expense of consumers. Private rights of action hinder innovation by subjecting businesses to excessive legal costs to defend suits and potential penalties for mere technical violations of laws. Moreover, states that have previously enacted data privacy statutes have declined to include a broad private right of action for violations. We therefore encourage Wyoming to adopt the approach taken by others in this area by placing enforcement responsibilities in the purview of the Wyoming Office of the Attorney General.

As the nation’s leading advertising and marketing trade associations, we collectively represent thousands of companies across the country. These companies range from small businesses to household brands, advertising agencies, and technology providers. Our combined membership includes more than 2,500 companies that power the commercial Internet, which accounted for 12 percent of total U.S. gross domestic product (“GDP”) in 2020.² Our group has

¹ See 2023 Select Committee on Blockchain, Financial Technology and Digital Innovation Technology, *Data Privacy Bill Draft Outline*, located [here](#).

² John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, INTERACTIVE ADVERTISING BUREAU, 15 (Oct. 18, 2021), located [here](#) (hereinafter, “Deighton & Kornfeld 2021”).

more than a decade’s worth of hands-on experience it can bring to bear on matters related to consumer privacy and controls.

I. Private Enforcement Would Benefit Wyoming’s Plaintiff’s Bar Without Providing Sufficient Benefits to Consumers

Private rights of action serve as a windfall to the plaintiff’s bar without providing commensurate relief for consumers. A small number of lawyers benefit immensely from these enforcement mechanisms instead of the consumers who are the basis for the claims. For instance, 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 declaratory ruling that opened the floodgates of TCPA litigation showed that approximately 60 percent of TCPA lawsuits were brought by just forty-four law firms.³ Moreover, the same TCPA study found that private rights of action tend to attract repeat plaintiffs.⁴ Plaintiffs looking to take advantage of private action regimes strain judicial resources and exact penalties from businesses for technical violations of the law that may not impose 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.⁵ Their clients, on the other hand, took home a mere \$15 per consumer *at most*—an amount that is dwarfed by the sum their attorneys received.⁶ 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.⁷ 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 the settlement funds.⁸ Private enforcement thus creates an environment that enriches a select few attorneys while providing only nominal benefits for consumers with viable claims.

II. Private Enforcement Stifles Innovation that Benefits Consumers

Private rights of action can cause financial strain for businesses even when they do not violate the law. Enforcement regimes adopting a private right of action oftentimes subject entities to bet-the-company lawsuits that threaten their very existence due to the potential for exorbitant costs resulting from ongoing litigation. The harm caused from companies shutting down ultimately

³ U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl 2*, 4, 11-15 (Aug. 2017), located [here](#); see also *In re Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C.Rcd. 7961 (2015).

⁴ *Id.*

⁵ American Tort Reform Foundation, *State Consumer Protection Laws Unhinged: It’s Time to Restore Sanity to the Litigation 4* (2003), located [here](#) (hereinafter, “ATR Report”).

⁶ *Id.*

⁷ U.S. Chamber Institute for Legal Reform, *Ill-Suited: Private Rights of Action and Privacy Claims 7-8* (Jul. 2019), located [here](#).

⁸ *Id.*

falls to consumers. With every business closure due to overpowering legal costs, consumers are less enriched by a vibrant, innovative marketplace of companies with which they can engage and choose to do business.

In many circumstances, low pleading standards allow private litigants to proceed in court with minimal showings of injury, leading to excessive costs for entities to defend lawsuits when claims may be questionable or even unsupported.⁹ For example, trivial protections the state of California maintained for stopping gratuitous private actions under its Unfair Competition Law (“UCL”) “launched an unending attack on businesses all over the state.”¹⁰ Consumers brought suits against homebuilders for abbreviating “APR” instead of spelling out “Annual Percentage Rate” in advertisements.¹¹ These lawsuits disproportionately impacted small businesses, ultimately resulting in citizens voting to pass Proposition 64 in 2004 to stem the tide of abuse from the state’s broad private right of action under the UCL.¹²

Private rights of action can drive companies to settle cases despite plausible arguments they may have to support their defense to avoid excessive litigations costs.¹³ Small, startup, and mid-size firms are particularly vulnerable to the threat of litigation and premature settlements. For instance, in 2005 a consumer brought suit against his local dry cleaner for \$54 million, claiming that the store did not abide by its “Satisfaction Guaranteed” promise when it failed to return the man’s pants.¹⁴ 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, threaten the viability of honest, well-meaning businesses, and do not support the development of consistent, enforceable standards. As a result, including a private right of action in Wyoming’s privacy legislation would make Wyoming unfriendly to consumers and businesses alike.

III. A Broad Private Right of Action in Wyoming Privacy Legislation Would Contradict Other State Approaches to Data Privacy

Including a private right of action in the Wyoming data privacy act would run counter to other states’ approaches to enforcement for privacy harms. In Iowa, Indiana, and Tennessee, for instance, the Attorney General is responsible for enforcing violations of the state’s privacy law enabling consumers to opt out of personal information sales.¹⁵ Additionally, the California Consumer Privacy Act (“CCPA”), which allows for *limited* private enforcement for violations of its data breach terms related to a subset of personal information, does not bestow a broad private right of action on residents to bring suits for any violation of the law.¹⁶ Enforcement for the vast

⁹ See Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 COLUM. BUS. L. REV. 1, 14-15 (2010) (hereinafter, “Butler & Johnston”).

¹⁰ ATR Report at 8.

¹¹ *Id.*

¹² *Id.*

¹³ Butler & Johnston at 25; see also Stephen B. Burbank, Sean Farhang, & Herbert Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 669 (2013) (hereinafter, “Burbank, Farhang, & Kritzer”).

¹⁴ *Id.* See also *Pearson v. Chung*, 961 A.2d 1067 (D.C. Ct. App. 2005).

¹⁵ See Iowa SF 262 (Gen. Sess. 2023), located [here](#); Indiana SB 5 (Gen. Sess., 2023), located [here](#); and Tennessee HB 1181 (Gen. Sess., 2023), located [here](#).

¹⁶ Cal. Civ. Code §§ 1798.150, 155, 199.90.

majority of CCPA violations is left to the California Office of the Attorney General and the California Privacy Protection Agency, which serves to better protect consumers and foster the development of consistent and clear rules for businesses. Wyoming should similarly decline to include a broad private right of action in the Wyoming data privacy act and instead vest enforcement in the capable hands of the Wyoming Office of the Attorney General.

Private enforcement creates incongruity in legal rules, as each lawsuit is assessed on a case-by-case basis and can yield fragmented, inconsistent, and sometimes even contradictory results.¹⁷ As an alternative to private enforcement, we ask the Wyoming legislature to take steps to ensure consumer data privacy enforcement responsibilities rest with the Wyoming Office of the Attorney General. This enforcement framework would lead to stronger and more consistent outcomes for consumers while better enabling businesses to allocate funds to developing processes, procedures, and plans to facilitate compliance with new data privacy requirements.

* * *

Thank you for your consideration of this letter. We look forward to continuing to work with you as you develop workable and meaningful privacy legislation in Wyoming. We ask you to decline to include a private right of action in the Wyoming data privacy act.

Sincerely,

Christopher Oswald
EVP for Law, Ethics & Govt. Relations
Association of National Advertisers
202-296-1883

Alison Pepper
Executive Vice President, Government Relations
American Association of Advertising Agencies, 4A's
202-355-4564

Lartease Tiffith
Executive Vice President for Public Policy
Interactive Advertising Bureau
212-380-4700

Clark Rector
Executive VP-Government Affairs
American Advertising Federation
202-898-0089

Lou Mastria, CIPP, CISSP
Executive Director
Digital Advertising Alliance
347-770-0322

CC: Mike Signorelli, Venable LLP
Allie Monticollo, Venable LLP

¹⁷ Burbank, Farhang, & Kritzer at 667-68.