PREPARED TESTIMONY AND STATEMENT FOR THE
RECORD
OF

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“SAFEGUARDING DATA AND INNOVATION:
BUILDING THE FOUNDATION FOR THE USE OF ARTIFICIAL INTELLIGENCE.”

BEFORE THE

U.S. HOUSE COMMITTEE ON ENERGY, COMMERCE
SUBCOMMITTEE ON INNOVATION, DATA, AND COMMERCE
Chair Rodgers, Ranking Member Pallone, and Members of the Committee, thank you for inviting me to appear before you and provide testimony on this important issue. My name is Amba Kak and I am the Executive Director of the AI Now Institute and Senior Affiliate Fellow at the Khoury College of Computer Sciences, Northeastern University. AI Now is a policy research organization, founded in 2017, committed to actionable research on artificial intelligence (“AI”). I have over a decade of experience working on technology policy and research in the United States and across multiple other jurisdictions, with a special focus on AI and data privacy law. This testimony is offered on behalf of myself and my colleague Dr. Sarah Myers West and our remarks are based on research we have conducted at AI Now.¹

I applaud the Committee for taking the initiative to advance this conversation and in particular for recognizing that privacy and innovation are mutually reinforcing goals that can, and must, be advanced in concert. As excitement and trepidation about large scale AI systems continues to fill headlines and hearings, it’s important to remember that there is nothing about the current trajectory of these privately developed technologies that is inevitable. It goes without saying that in a democracy, the trajectory of powerful technologies should be shaped in the public interest through public deliberation, not solely by a handful of corporate actors driven, ultimately, by commercial incentives: regulation can play a crucial role in ensuring such democratic shaping of technological systems.

Which brings me to the one overarching point I want to make in today’s testimony: We already have many of the regulatory tools we need to govern and regulate AI effectively, including privacy, consumer protection, and competition frameworks. Now is the time to extend what we have in pursuit of ensuring that our legal regime meets the moment. Specifically, I encourage this Committee to prioritize data privacy—and in particular, the passage of strong, legally enforceable data minimization mandates, already included in legislative proposals such as the ADPPA which has already received this Committee's resounding support. Data protection is a core mechanism that can help mitigate the serious privacy and competition implications of large scale AI.²

In fact, the notion that we need to wipe away years of regulation and policy and create new frameworks from scratch serves large industry players more than it does the rest of us: it serves to delay, and to provide current actors with significant influence on the scope and direction of such policymaking. AI systems are not wholly novel. Far from it. And rather than view them that way, to responsibly govern these technologies we must instead disaggregate these systems, or the “AI stack”, into their composite inputs, recognizing the details of how they work and what they require to operate. These include close examination of data, computational infrastructure, or labor. Precise and technically-aware regulatory strategies can then be deployed at different layers of this stack, for example preventing cloud companies from using their

dominant market position to restrict competition in the AI market, or copyright strategies against use of artistic works by image generation tools, or, as is the subject of this testimony, how data regulation can prevent AI firms from the irresponsible collection and retention of personal information.\(^3\) Once this is done, we can explore whether new approaches to address previously unanticipated harms or to tackle specific sectoral use cases are needed. But before that, we must leverage and continue to strengthen the regulatory toolbox we have already honed over the last decade.

**To illuminate this argument, we divide it into three specific points:**

*First*, that data privacy regulation *is* AI regulation and provides many essential tools that we need to govern AI and protect the public from harm. As AI systems proliferate in our social and economic lives, a strong federal privacy law, such as the ADPPA, is an ever more urgent priority.

*Second*, that, as it stands today, there is no large-scale AI without Big Tech given their stronghold on access to both data and computational infrastructure. This gives their combined access to both data and computational infrastructure. If we want a vibrant, innovative and competitive AI ecosystem, then privacy and competition goals must be advanced in concert.

*Finally*, legally binding data minimization rules that tackle unfettered first-party data surveillance as well as limit secondary uses of data for training AI are a key way forward. Without these, we risk a race to the bottom with consumer privacy and competition as the collateral damage in the AI race.

1. **Data privacy regulation is AI regulation and provides many essential tools that we need to govern AI and protect the public from harm.** As AI systems proliferate in our social and economic lives, a strong federal privacy law, such as the ADPPA, is an ever more urgent priority.

Soon after the public release of chatGPT, questions from the public about what data these AI models had been trained on began to circulate,\(^4\) followed by panic when people began to realize that chatGPT was sometimes leaking personal data “accidentally” in response to prompts.\(^5\) This example was not a one-off: there are ongoing privacy and security challenges introduced by

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large-scale AI systems. Regardless of the training procedure, guardrails, and use of anonymization in data inputs, certain AI systems can unpredictably produce highly sensitive outputs, including personally identifiable information, that pose foundational privacy problems.

Regulators in countries with data privacy laws were able to act quickly in response: Italy issued a temporary ban on chatGPT to its citizens based on concerns that the mass data collection and storage of data to create the systems had been done in violation of privacy laws. This ban was lifted after OpenAI verified compliance with requests for greater transparency and privacy protective measures be implemented in its systems, including granting users certain opt-out rights, such as being able to toggle off the option for conversations to be used for training ChatGPT algorithms. The Japanese, Swiss and Spanish data protection authorities also issued notices following similar enquiries. Others raised concerns that AI systems like ChatGPT were not in compliance with the established “right to be forgotten” guaranteed in the GDPR and other international privacy laws, which guards against inaccurate or misleading information, and provides remedies of erasure. In stark contrast, the absence of a similar legal framework in the US has limited its ability to swiftly and nimbly respond to this moment, though enforcement agencies are doing all they can using existing authorities and limited resources. We must make these tools more robust.

But like AI systems themselves, the use of data privacy law to regulate AI far predates this current hype moment. Regulating the collection of certain kinds of sensitive data, like biometrics for example, effectively limits the unchecked proliferation of AI systems that require this data as a necessary input for training and deployment. The Illinois Biometric Information Privacy Act (BIPA) and several other similar state laws, for example, place a strict consent requirement for the collection of face and other biometric data. BIPA has already been used to challenge several

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concerning AI systems, including Clearview AI: a company notorious for claiming to have captured more than 10 billion faceprints from peoples’ online photos is now permanently banned from making its face database available to most businesses and other private actors because of the settlement in ACLU v. Clearview AI. Purpose limitation, i.e. that data use should also be limited or related to the purpose for which it was collected, is another key part of the data minimization standard. The FTC enforced this standard in its recent Amazon Alexa case, where Amazon was fined for violating children’s privacy by indefinitely retaining their data and then leveraging such data for improving its Alexa algorithm. In another context, automated hiring and firing of workers, an increasing concern globally with the proliferation of platform-based gig work, has also recently been successfully challenged in the Amsterdam Court of Appeals using the right to demand access to their personal data processed by any organization and to receive meaningful information about the processing of such data, as guaranteed by the GDPR.

**So what specific levers do data protection frameworks offer to regulate AI?** Taking the American Data Privacy and Protection Act (ADPPA) as an example of a strong baseline standard, this is an illustrative list of what beneficial interventions could be possible if we had a strong federal data privacy law:

a. **Data minimization:** Such a law could enable a proactive obligation on entities to put reasonable limits on the collection, use, and retention of personal data in the interest of the individual and group data holders. These ‘data minimization’ rules, which are described in the ADPPA as central to the ‘duty of loyalty’ to individuals, are a core part of global data protection laws globally. These rules cut against prevailing incentives that promote indiscriminate surveillance and data mining and privilege commercial benefits even when they run counter to individual interests.

Another reason we urgently need a data minimization rule is data security, and this concern is heightened in the age of large scale AI which, barring regulation, will further incentivize reckless collection and retention of sensitive information. We already have examples of the real human costs of careless retention of data, from biometric

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information of Afghan citizens in American-managed databases that fell into the hands of the Taliban,\(^{21}\) to the intricate web of third-party data brokers that buy and sell sensitive information about people that can be used to target them unfairly or to hinder their access to credit, housing, and education.\(^{22}\) Information that's never collected in the first place cannot be breached, and that which is deleted after it's no longer needed, is no longer at risk. Otherwise we risk creating more and more “honey pots” or “goldmines for cyber criminals”\(^{23}\) that are an attractive target for interception by unauthorized third parties,\(^{24}\) including malicious state and non-state actors.

Crucially, data minimization rules don’t hinge on user consent: they apply regardless, overcoming the now well known deficiencies of a privacy regime that hinges exclusively on individuals being able to meaningfully exercise choices online given the structural power asymmetries between individuals and massive tech firms that abound.\(^{25}\) This is particularly important in contexts such as workplace surveillance, where the entities deploying increasingly invasive ‘productivity monitoring’ and other AI-enabled measures have significant power over those on whom such systems are deployed, rendering ‘consent’ meaningless.\(^{26}\)

Beyond the broad principle, data privacy laws can include prohibitions on specific kinds of data use that have well known harms, such as prohibiting targeted advertising to children\(^{27}\) or the use of data about people’s interior mental states in so-called “emotion recognition” systems that have been repeatedly demonstrated as being based on faulty


\(^{27}\) See: American Data Privacy and Protection Act, H.R. 8152, [https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-1178152rh.pdf](https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-1178152rh.pdf)
foundations. As we, Accountable Tech and EPIC emphasize in the ‘Zero Trust AI Framework’, data minimization rules are essential levers at a time when AI is tipped to further exacerbate information asymmetries between individuals and communities, on the one hand, and the large corporations that create and collect data about them which has increasing power over their lives, on the other. We will come back to this in point 3.

b. **Prohibition against use of data in ways that discriminate**: ADPPA includes a prohibition on the use of personal data in ways that discriminate. It is now well documented that AI systems are routinely, and often structurally, biased in ways that entrench and embed historical inequities in sensitive social domains like healthcare, hiring, education, housing, and criminal justice. This should not come as a

surprise, given that these systems necessarily draw their map of “the world” from data that reflects discriminatory histories and sentiments. As recently highlighted in the factsheet accompanying the Biden Administration’s Blueprint for an AI Bill of Rights, several federal agencies are already applying existing laws and mechanisms to address algorithmic discrimination in housing, employment, and other opportunities. The ADPPA’s civil rights provision would provide an additional means of redress contra AI systems that perpetuate discrimination.

c. **Impact Assessments:** ADPPA also includes a mandate for impact assessments or audits of AI systems in order to proactively identify and mitigate harms, including relating to discrimination, privacy, and security. These evaluations go beyond conventional privacy impact assessments that assess systems against relatively narrow privacy and security criteria, in favor of a more expansive stocktaking that require companies to evaluate whether particular groups will be harmed as a result of the design or use of the AI system. Researchers such as Dr. Alex Hanna and Dr. Mehtab Khan, for example, have put forward a multi-layered framework to scrutinize the multiple complex layers of large scale AI models.

While such evaluations are positive in theory, we must proceed with a note of caution: there is a significant risk that any audit or evaluation standard can devolve into a superficial checkbox exercise, more useful in offloading liability than in protecting the public. This, unless it is structured deliberately to avoid such a trap:

- Meaningful assessments that mandate evaluation happen **before** products are made available or in use in the public domain, and are subject to evaluation on an ongoing basis while in operation. It is essential that the criteria for such evaluations are not limited to narrow technical parameters or be tested only under so-called “laboratory-like conditions”.

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Evaluations must be conducted by independent, disinterested and adequately resourced and protected third parties such as researchers, civil society, or the appropriate federal agencies, by charging that such evaluations are subject to both regulatory and public scrutiny.

There must be real consequences for a failure to mitigate or prevent harms that are identified. This includes strict penalties but also, crucially, abandoning systems that are designed in ways that make such harms inevitable.

d. Individual data rights: Finally, ADPPA also includes a suite of data rights that allow individuals the right to access, correct, port, and delete their information (along with a private right of action). Data rights are a crucial complement to the proactive obligations of data minimization, as they empower individuals to ascertain the nature and scale of commercial surveillance, and to act on such information to correct, order deletion, or otherwise seek redress if they believe any other obligations owed to them under the Act have not been fulfilled. In California, under the California Consumer Privacy Act, individuals are empowered to require businesses to share what information they hold about them, opt-out of the sale of their information, to ask for the deletion of such information, and even sue a business directly if it fails to implement reasonable security measures and their data is compromised in a breach. Companies like Walmart have already reported 55,351 requests under CCPA to stop the sale of personal information, 16,375 to access, and 2,542 to delete personal information— a large majority of these requests have been fulfilled.

2. As it stands today, there is no large-scale AI without Big Tech given their stronghold on access to both data and computational resources. To prevent further concentration of power in the AI industry, privacy and competition goals must be advanced in concert.

Large-scale AI depends principally on data and compute resources (this includes both hardware components such as chips, as well as cloud computing) as essential inputs. Big Tech companies are already positioned at a considerable advantage at many points in the AI stack. Currently, the largest consumer technology companies such as Google, Microsoft, and Amazon dominate access to such compute resources (and other companies, as a rule, depend on them for these resources). This is closely related to these companies’ pre-existing data advantage, which enables them to collect and store large amounts of good-quality data about millions and billions of people via their vast market penetration. This data advantage can give models developed by Big Tech companies an edge over those developed without the benefit of such data. Even if alternative models do avail themselves of similar computational power. Indeed, access to high quality data can result in smaller models (those trained on less data and requiring less

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40 EPIC, California Consumer Privacy Act (CCPA) https://epic.org/california-consumer-privacy-act-ccpa/#:~:text=Sample%20form%3A,here%5D%20has%20collected%20about%20me.
computational power for training) that perform better than larger models trained without such quality data. OpenAI has reportedly already used YouTube data to train its models, which leaves the door open for Google to use data not only from YouTube, but from Gmail, Google Drive, and all its other services. Similarly, Microsoft can potentially use data from its enterprise services, and AWS from its cloud services. Each of these companies has also forged partnerships and acquisitions in specific sectors that give them access to troves of sensitive data, such as in the electronic health records space. Repositories of publicly available data currently available online, is also likely to soon dwindle or become less valuable in comparison to proprietary datasets held by these companies. This is because the publicly available data will already have been used, and because newly produced data on the internet is starting to be protected more by platforms who recognize its value and want exclusive access. We’re already seeing this happen – Reddit, Stack Overflow and X have already implemented some protections against free use of data from their platforms.

In fact, today’s AI boom should be understood as driven at its core by commercial data surveillance, that led to the infrastructural dominance of a small handful of firms across our digital lives. Unlike other actors that must largely rely on third-party intermediaries to access data, large firms are exploiting the fact that they directly control the vast majority of the environment in which data is collected: they are able to take advantage of the network effects associated with the scale at which they operate by collecting, analyzing, and using data within platforms they wholly own and control. This is a product of a self reinforcing feedback loop, which over time has led to these firms being so dominant and pervasive that it is virtually impossible not to use their systems.

The push to build AI at larger and larger scale only increases the demand for the very same resources that these firms have steadily accumulated and are best positioned to further

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consolidate. While all others are increasingly relegated to the status of clients and renters, buying and leasing resources from the handful of Big Tech companies that control them. This market reality must inform any privacy and AI-specific regulatory efforts. Privacy and competition law are too often siloed from one another, leading to interventions that could easily compromise the objectives of one issue over the other. And firms are, in turn, taking advantage of this to amass information asymmetries that contribute to further concentration of their power.

3. Legally binding data minimization rules that tackle unfettered first-party data collection as well as limit secondary uses of data for training AI are a key way forward. Without these, we risk a race to the bottom with consumer privacy and competition as the biggest losers.

With these points in hand, I would conclude by highlighting that data minimization rules are particularly potent levers to address both privacy and competition harms that are likely to be exacerbated as AI systems proliferate. This includes both the general mandates that limit excessive or unanticipated collection, use, and retention of data as well as more specific restrictions such as regulating secondary uses of data collected from consumers in one context for the purpose of training AI models.

The FTC has already outlined this principle in its recent Amazon Alexa case, and the Commission’s Advanced Notice of Proposed Rulemaking (ANPRM) on Commercial Surveillance also contemplates similar data minimization rules. Several civil society organizations including EPIC, Accountable Tech, and the Center for Democracy & Technology have endorsed legislative proposals that would encode data minimization mandates, including

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49 Sarah Myers West, “Competition authorities need to move fast and break up AI,” Financial Times, April 17, 2023, https://www.ft.com/content/638b5be7-fab7-4fe6-a0cf-7dabefcdd722.
50 Udbhav Tiwari, “Competition should not be weaponized to hobble privacy protections on the open web,” April 22, Mozilla, https://blog.mozilla.org/netpolicy/2022/04/12/competition-should-not-be-weaponized-to-hobble-privacy-protections-on-the-open-web/.
restricting the use of data for targeted advertising,\textsuperscript{56} or a narrower version that limits the use of sensitive data for all secondary purposes, including advertising;\textsuperscript{57} restricting the collection and use of biometric information for particular groups such as children;\textsuperscript{58} and in certain contexts such as workplaces,\textsuperscript{59} and schools.\textsuperscript{60}

The key lesson of the last decade has been understanding that control over data is about power asymmetries, and since companies have clear commercial benefit from widening this asymmetry, regulation is essential to protect the public from harms. As we recently argued, alongside Accountable Tech and EPIC, if we want the future of AI to protect civil rights, advance democracy, and improve people’s lives, we must fundamentally change the incentive structure that shapes AI development. Passing strong federal privacy legislation is a critical and overdue step in that direction.\textsuperscript{61}


\textsuperscript{57} Electronic Privacy Information Center (EPIC) and Consumer Reports, How the FTC Can Mandate Data Minimization through a Section 5 Unfairness Rulemaking, January 2022, \url{https://epic.org/documents/how-the-ftc-can-mandate-data-minimization-through-a-section-5-unfairness-rulemaking}.


\textsuperscript{61} “Zero Trust AI Governance”, Accountable Tech, AI Now Institute, and EPIC, August 10, 2023, \url{https://ainowinstitute.org/publication/zero-trust-ai-governance}. 