The American Consumer Institute
Center for Citizen Research

Before the Department of Justice
Washington DC, 20530

In the Matter of the Request for Comment on Workshop on Promoting Competition in Artificial Intelligence
(Released July 15, 2024)

Comments of the American Consumer Institute

The American Consumer Institute is a nonprofit 501(c)(3) education and research organization. Its mission is to identify, analyze, and protect the interests of consumers in legislative and rulemaking proceedings across various industries, including technology. The American Consumer Institute hereby submits these comments in response to the above-captioned proceeding.

Government Policy Threats to Artificial Intelligence Competition

Artificial intelligence (AI) has the power to reform government policies, spur competition in industries across the country, and even save lives—if government lets it. With more than "5,500 new AI-related companies in the U.S. since 2013,"[1] the United States is a leader in the globally competitive artificial intelligence marketplace. Panelists at the May 30th Department of Justice (DOJ) *Workshop on Promoting Competition in Artificial* rightly suggest many solutions to ease data flows—but past agency and policymaker actions threaten to unintentionally make a dynamic marketplace in AI more static and less competitive.

The DOJ should avoid mirroring global and domestic data privacy regulations that entrench dominant market positions of large technology incumbents. There are three primary mechanisms through which this occurs. First, a heavy regulatory landscape creates expensive and messy compliance costs that disproportionately impacts smaller companies. Second, data privacy laws and proposed agency regulations (if enacted) shrink data pools, restrict access to information, and harm smaller firms. Third, poorly designed competition enforcement policies threaten the scale and viability of competition in the artificial intelligence ecosystem. If policymakers and regulators fail to avoid this policy pattern, they risk intensifying the problems they seek to solve.

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[1] S&P Global, Investment and Talent Are the Keys to Unlocking AI's Potential, July 9, 2024, https://www.spglobal.com/ratings/en/research/articles/240709-investment-and-talent-are-the-keys-to-unlocking-ai-s-potential-13169403.

Data Limitations and Privacy Laws as a Threat to AI Competition

Competing approaches to data privacy—both in how information should be accessed and protected—differ in legislative intent and economic effect. The United States establishes sectoral privacy protections that address consumer harms mostly on a case-by-case basis, providing more protections for sensitive data types like health information. Europe takes a different tack by regulating all data the same. The U.S. approach to privacy has spurred online market dominance by promoting a competitive marketplace of experimentation and change.

Generative artificial intelligence models rely on large volumes of data to operate.[2] The more tailored and varied American approach to privacy gives the United States a leg up in artificial intelligence technology innovation by easing access to data. But the advantages of data do not go on in perpetuity and diminish in value once enough is secured. As technology experts at the International Center for Law and Economics and the Macdonald-Laurier Institute put it, "being the firm with the *most* data appears to be far less important than having *enough* data."[3] Once a critical mass of data is achieved, other margins for competition—for example, model improvements and algorithm refinement—become more pronounced.[4]

Although the DOJ panel may worry that technology firms will leverage data access to entrench dominant market positions,[5] large volumes of data may not confer the market-dominating benefits many assume. *How* data is used is more important than securing the largest quantity of it.[6] Still, panelists should worry that state and federal data privacy laws and other barriers to data access shrink the available data pool of information for everyone, and pinch smaller businesses that must spend time and resources to comply. This makes securing *enough* data more difficult and expensive—especially for startups and fledgling AI firms with thin profit margins. Smaller businesses and startups often struggle to source plentiful, quality data, unlike larger firms that can rely on streams of data from larger customer bases.[7]

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[2] Megan Crouse "Generative AI Defined: How it Works, Benefits and Dangers" TechRepublic, June 21, 2024, https://www.techrepublic.com/article/what-is-generative-ai/.

[3] Geoffery A. Manne, Dick Auer, Aaron Wudrick, Mario A. Zúñiga "ICLE and Macdonald-Laurier Institute Comments to Competition Bureau Canada Consultation on AI and Competition" International Center for Law and Economics, https://laweconcenter.org/resources/icle-and-macdonald-laurier-institute-comments-on-competition-bureau-canada-consultation-on-artificial-intelligence-and-competition/.

[4] *Ibid.*

[5] U.S. Department of Justice, Antitrust Division, Workshop on Promoting Competition in Artificial Intelligence, May 30, 2024, https://www.justice.gov/atr/event/workshop-promoting-competition-artificial-intelligence.

[6] Geoffery A. Manne, Dick Auer, Aaron Wudrick, Mario A. Zúñiga "ICLE and Macdonald-Laurier Institute Comments to Competition Bureau Canada Consultation on AI and Competition" International Center for Law and Economics, https://laweconcenter.org/resources/icle-and-macdonald-laurier-institute-comments-on-competition-bureau-canada-consultation-on-artificial-intelligence-and-competition/

[7] Min Jun Jung and Nathan Lindfors, Startups and AI Policy: How to Mitigate Risks, Seize Opportunities, and Promote Innovation, Engine, September 8, 2023, https://www.engine.is/news/category/startups-and-ai-policy-how-to-mitigate-risks-seize-opportunities-and-promote-innovation; and Kartik Hosanagar, How to Kickstart an AI Venture

Consumer data privacy laws enable consumers to access and delete information, thereby shrinking data pools further even as compliance costs grow and disproportionately harm smaller, data-reliant businesses. These data privacy laws require businesses of all sizes to "create additional data inventory and mapping to accommodate access and deletion requests, create consent management systems, and update their privacy policies, all of which must be routinely updated to accommodate new privacy rules."[8] Business must purchase hardware and software to become compliant with emergent data privacy rules. Then they must hire engineers, data privacy officers, and lawyers to comply and adapt to emergent regulations as they come online.

Unlike larger technology companies that boast multi-billion-dollar budgets, the average seed-level startup annual budget is only $655,000 per year, so compliance costs soak up a larger total share of smaller business budgets.[9] Gal Ringel, co-founder and CEO of the data company Mine, concludes that a single data subject access request costs $1,400.[10] Even as few as 100 requests, could soak up more than one-fifth of an average seed-level startup's annual budget.[11] So it is unsurprising that a 2022 Oxford study found the European General Data Protection Regulation (GDPR) caused exposed business sales to drop 2 percent and profits to drop 8.1 percent—with increased market shares of large technology companies offsetting the compliance costs of regulatory compliance.[12]

As compliance and development costs rise, revenues recede as rising costs erode remaining business margins.[13] Research finds that a third of the online applications in the Google Play Store left the market in Europe and the rate of new entry fell by half after enactment of GDPR.[14] And as compliance costs rise, access to capital falls. Angel and venture capital investment fuels the growth, performance, and longevity of new and emergent startups that depend on capital investment to get off the ground—with angel-backed startups 14 percent more likely to survive

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Without Proprietary Data, Medium, February 16, 2021, https://towardsdatascience.com/how-to-kickstart-an-ai-venture-without-proprietary-data-13d1502051f2.

[8] Logan Kolas, Key Principles for State Data Privacy Laws, The Buckeye Institute, October 12, 2023, https://www.buckeyeinstitute.org/library/docLib/2023-10-Key-Principles-for-State-Data-Privacy-Laws-policy-report.pdf.

[9] Min Jun Jung and Nathan Lindfors, Startups and AI Policy: How to Mitigate Risks, Seize Opportunities, and Promote Innovation, Engine, September 8, 2023, https://www.engine.is/news/category/startups-and-ai-policy-how-to-mitigate-risks-seize-opportunities-and-promote-innovation.

[10] James Spiro "Attempting a 'data detox' in today's digital world" CTech August 20, 2021 https://web.archive.org/web/20210830083108/https:/www.calcalistech.com/ctech/articles/0,7340,L-3916609,00.html.

[11] Logan Kolas, A Healthcare World Reimagined, The Buckeye Institute, April 1, 2024, https://www.buckeyeinstitute.org/library/docLib/2024-04-01-A-Healthcare-World-Reimagined-How-Big-Government-Threatens-Healthcare-AI-and-What-to-Do-About-It-policy-report.pdf.

[12] Chinchih Chen, Carl Benedikt Frey, and Giorgio Presidente, Privacy Regulation and Firm Performance: Estimating the GDPR Effect Globally, working paper, Oxford Martin School, University of Oxford, January 6, 2022, https://www.oxfordmartin.ox.ac.uk/publications/privacy-regulation-and-firm-performance-estimating-the-gdpr-effect-globally.

[13] *Ibid.*

[14] Rebecca Janßen, Reinhold Kesler, Michael E. Kummer, Joel Waldfoge "GDPR and the Lost Generation of Innovative Apps" working paper National Bureau of Economic Research 2022, https://www.nber.org/system/files/working_papers/w30028/w30028.pdf.

18 months than those without angel support[15]—but GDPR has cut that lifeline by as much as half and has increased vendor market concentration by 17 percent.[16]

Unfortunately, rather than learn from heavy data regulatory regimes, the Federal Trade Commission (FTC) looks to be repeating these mistakes through its competition rulemaking process.

Competition Agency Meddling in Privacy Threatens Competition and Creates Unintended Consequences

In August of 2022, the FTC issued an *Advanced Notice of Proposed Rulemaking (ANPRM)* that would redefine data collection as *commercial surveillance*—a rhetorical move that demonized pro-consumer, pro-competition data usage, and that signaled a desire to expand the scope and scale of the FTC.[17] Then in February of 2024, Chair Kahn suggested that health, location, and web browsing history data be "off limits" for AI model training—a much more aggressive move than even legislature-led efforts to curtail health data usage.[18] Importantly, data bias problems often derive from incomplete or inaccurate datasets—a well-known problems that companies have been working to solve for decades.[19]

Dandelion Health, a venture-backed startup co-founded by panelist Professor Ziad Obermeyer, is working to create large, de-identified datasets in the healthcare industry that can reduce bias.[20] Although billions of dollars have been plowed into algorithmic fairness efforts to reduce bias in algorithms and implementation, insufficient data access has pushed the application of these algorithms outside of the "testing" phase of trial-and-error and into the "use" phase where these technologies are being deployed in real-world medical applications. In other words, insufficient

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[15] Laurent Belsie "How Angel Investors Help Startup Firms," The Digest, National Bureau of Economic Research March 10, 2016 https://www.nber.org/digest/mar16/how-angel-investors-help-startup-firms.

[16] Jian Jia, Ginger Zhe Jin, Liad Wagman "The Short-Run Effects of GDPR On Technology Venture Investment", working paper, National Bureau of Economic Research, November 2028. https://www.nber.org/system/files/working_papers/w25248/w25248.pdf; Garrett A. Johnson, Scott K. Shriver, Samuel G. Goldberg "Privacy & market concentration: Intended & unintended consequences of the GDPR" Management Science November 15, 2019 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3477686.

[17] Will Rinehart, Taylor Barkley, and Aubrey Kirchhoff, Public Interest Comment on the FTC Trade Regulation Rule on Commercial Surveillance and Data Security, R111004, The Center for Growth and Opportunity, November 21, 2022, https://www.thecgo.org/research/public-interest-comment-on-the-ftc-trade-regulation-rule-on-commercial-surveillance-and-data-security/.

[18] Leah Nylen "Health, Location Data Should Be 'Off Limits' for AI, FTC Chair Says," *Bloomberg*, February 27 2024 https://www.bloomberg.com/news/articles/2024-02-27/ftc-s-khan-health-location-data-should-be-off-limits-for-ai?embedded-checkout=true.

[19] Alexandra George, Thwarting Bias in AI Systems, Carnegie Mellon University's College of Engineering, December 11, 2018 https://csd.cmu.edu/news/thwarting-bias-in-ai-systems; Miana Massey, Maryland Researchers Working to Correct Potential Bias in Artificial Intelligence, *CBS News*, February 20, 2023, https://www.cbsnews.com/baltimore/news/maryland-researchers-working-to-correct-potential-biases-in-artificial-intelligence/.

[20] Kate Jennings, How This Startup is Using 10 Million Patient Records to Reduce Bias in Healthcare AI, *Forbes*, December 21, 2023, https://www.forbes.com/sites/katiejennings/2023/12/21/how-this-startup-is-using-10-million-patient-records-to-reduce-bias-in-healthcare-ai/.

data access in healthcare means performance issues are sometimes not caught until algorithms are already in use.[21] Had more data been available ahead of time, companies could have tested and vetted these algorithms more thoroughly before use in real-world health settings.

Consumers rightly prioritize healthcare privacy, but many state and federal laws and regulations create barriers to heath information access. Accessing health data is famously messy and complicated. The data varies by location and type.[22] States and localities often operate independently creating data silos.[23] If universities, companies, public schools, hospitals, or nonprofit organization receive federal support, they must then spend years and hundreds of thousands of dollars contending with government bureaucracy, where they must defend research and algorithms in front institutional review boards (IRBs) that can approve, modify, or reject the research.[24]

National data privacy laws like the Health Insurance Portability and Accountability Act (HIPAA) and the many state laws governing health information shrink these data pools further and restrict access to it, thereby risking increased bias in healthcare use-cases. Through the privacy law, My Health, My Data,[25] the state of Washington sets a default national standard for health data use. The definitions in this Euro-style law are vague and broad enough to rope in businesses that mostly operate outside of the healthcare space and that conduct business operations beyond the state of Washington.[26] Although California is generally considered the most complicated and onerous state data privacy law, Washington goes further by requiring companies to seek affirmative, opt-in consent and then including private right of action provisions that threaten to unleash expensive, messy, and frivolous lawsuits.[27] Since the law operates like the European framework, the anti-competitive effects are likely to mirror those in Europe—squeezing startups and smaller businesses while digging regulatory moats around larger technology companies.

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[21] *Ibid.*

[22] Michelle A. Williams and Gabriel Siedman, Filling the Gaps in U.S. Health Data, Harvard Public Health, January 17, 2024, https://harvardpublichealth.org/policy-practice/the-u-s-public-health-data-system-is-weak-heres-how-we-fix-it/.

[23] *Ibid.*

[24] Health and Human Services (HHS), Evaluation Brief, January 2008, https://www.acf.hhs.gov/sites/default/files/documents/cb/understanding_the_irb.pdf; Institutional Review Boards (IRBs) and Protection of Human Subjects in Clinical Trials, U.S. Food and Drug Administration (FDA), September 11, 2019, https://www.fda.gov/about-fda/center-drug-evaluation-and-research-cder/institutional-review-boards-irbs-and-protection-human-subjects-clinical-trials; Oliver Mitchell, Regulatory Challenges Holding Back Healthcare AI, The Robot Report, https://www.therobotreport.com/regulatory-challenges-holding-back-healthcare-ai/.

[25] Washington My Health My Data Act, Washington State Legislature (Last visited March 27, 2024), https://app.leg.wa.gov/RCW/default.aspx?cite=19.373&full=true.

[26] Mike Hintze "The Washington My Health My Data Act - Part 1: An Overview" Hintze Law April 10, 2023 https://hintzelaw.com/blog/2023/4/9/wa-my-health-my-data-act-pt1-overview.

[27] Robert Bateman "Washington's My Health My Data Act vs. California's CCPA" Privado July 10 2023 https://www.privado.ai/post/my-health-my-data-act-vs-ccpa#:~:text=7.,meet%20the%20CCPA's%20compliance%20requirements; Mike Hintze "The Washington My Health My Data Act - Part 1: An Overview" Hintze Law April 10, 2023 https://hintzelaw.com/blog/2023/4/9/wa-my-health-my-data-act-pt1-overview.

These laws and norms have contributed to a "firewall" where databases and the experts that understand the technology to leverage it exist in separate ecosystems, or "enclaves," to borrow the terminology of Professor Obermeyer.[28] Policymakers and competition enforcers should be exploring ways to safely and securely ease data access barriers while respecting the longstanding American healthcare data privacy regime—not looking for avenues to restrict access further.

Fortunately, many of the panelists recognize this reality, suggesting policy solutions to empower consumers to make protected data more accessible. Here, policymakers would be wise to listen. Unfortunately, the rapid expansion of state data privacy laws largely does the opposite by creating rights to access and delete information—creating a mirage of consumer empowerment, making data scarcer, and further complicating access to health information. Rather than repeating European mistakes, a better approach to data policy would seek options that empower consumers to safely make data access more available and plentiful. But the FTC instead signals an opposing approach.

Focus on Size Threatens AI Competition

In January, the FTC intensified its focus on artificial intelligence through its inquiry into market concentration through Amazon's, Google's, and Microsoft's investments into startup companies Anthropic and OpenAI.[29] Amid antitrust scrutiny, Microsoft recently announced that it would quit its board seat on OpenAI, citing improvements in governance at OpenAI.[30]

FTC Chair Kahn's meddling in the AI ecosystem is ill-advised, but unsurprising insofar as the Kahn-led FTC has routinely attempted to bend antitrust rules and market definitions to fit a "big is bad" narrative that targets technology companies.[31] In the eyes of Chair Kahn, the emergence of artificial intelligence is an opportunity to not "repeat the mis-steps of the past with AI" that allegedly enabled the market concentration failures of the internet.[32]

Unfortunately, the legal remedies are often worse than the disease. Antitrust enforcers can bring complaints for anti-competitive practices against companies that must abandon, settle, or defend

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[28]U.S. Department of Justice, Antitrust Division, Workshop on Promoting Competition in Artificial Intelligence, 2:32:20, May 30, 2024, https://www.justice.gov/atr/event/workshop-promoting-competition-artificial-intelligence.

[29] "FTC Launches Inquiry into Generative AI Investments and Partnerships " Federal Trade Commission January 25 2024 https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-launches-inquiry-generative-ai-investments-partnerships; Karen M. Lent et al. "FTC Opens Inquiry Into AI Partnerships, Signaling Intensified Focus on Emerging Tech" Skadden February 6, 2024 https://www.skadden.com/insights/publications/2024/02/ftc-opens-inquiry-into-ai-partnership.

[30] Kelvin Chan "Microsoft quits OpenAI board seat as antitrust scrutiny of artificial intelligence pacts intensifies" Associated Press July 10, 2024, https://apnews.com/article/microsoft-openai-artificial-intelligence-b5b91accc60ada508278fc1152ced186.

[31] Rea S. Hederman Jr., Logan Kolas "A Healthcare World Reimagined: How Big Government Threatens Healthcare AI and What to Do About It" The Buckeye Institute, April 1, 2024, https://www.buckeyeinstitute.org/library/docLib/2024-04-01-A-Healthcare-World-Reimagined-How-Big-Government-Threatens-Healthcare-AI-and-What-to-Do-About-It-policy-report.pdf.

[32] Rana Foroohar, *The Great US-Europe Antitrust Divide*, FT (Feb. 5, 2024), https://www.ft.com/content/065a2f93-dc1e-410c-ba9d-73c930cedc14.

their marketplace activity in court. As tech-related skepticism replaces the consumer welfare standard under the Biden administration's FTC and DOJ, companies are increasingly abandoning pro-competitive merger activity even as the administration's courtroom success rate dwindles.

As research from the American Consumer Institute details, competition litigation is twice as likely under the Biden administration, success has fallen by more than a third, and abandonment rates have tripled in the face of messy and expensive court activity.[33] The FTC's decision to investigate firms before alleged harm materializes—extending oversight to screenings instead of mergers and acquisitions—does not bode well for American AI startups that need investment capital to get off the ground or expand business activity.

Artificial intelligence requires a massive amount of energy, data, computing power, as well as the work of many skilled experts and technicians.[34] Deep learning, or the method of using massive amounts of data to train AI, inherently uses a lot of computational power, especially the large general purpose AI that is receiving the most attention.[35]

Obtaining the necessary computational power has been key to companies looking to get started as 80 percent of capital spent on AI has gone towards attaining the necessary computational power.[36] This has translated into significant financial cost to build these models as ChatGPT4 is estimated to have cost over $100 million to train. [37] In addition to training, generative AI also requires computational power whenever it answers a question, becoming a major cost in its own right as usage goes up. [38] The hardware needed to run these models is also a significant investment with the current standard Nvidia 8-GPU H100 server costing around $300,000 to $400,000.[39]

Major companies, such as the ones antitrust regulators are targeting in their investigation, are the only ones with the resources needed to develop and run these models.[40] They, in turn, are dependent on the expertise of people in the startups they acquire or partner with.[41] While the future is unpredictable and new technology could emerge to change how large language models are developed, the current reality is that AI innovation depends on the resources of large

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[33] Isaac Schick "Shift in Antitrust Enforcement Strategy under Current Administration Yields Lower Success Rates in Court" The American Consumer Institute March 4, 2024 https://www.theamericanconsumer.org/2024/03/shift-in-antitrust-enforcement-strategy-under-current-administration-yields-lower-success-rates-in-court/.

[34] Prajaktha Gurung, "Big Companies Are Acquiring AI Startups In Droves," *Analytics India Magazine* August 24, 2021, https://analyticsindiamag.com/big-companies-are-acquiring-ai-startups-in-droves/.

[35] Jai Vipra, Sarah Myers West "Computational Power and AI" *AI Now Institute,* September 27, 2023, https://ainowinstitute.org/publication/policy/compute-and-ai.

[36] *Ibid.*

[37] *Ibid.*

[38] *Ibid.*

[39] Nvidia H100 GPUs: Supply and Demand, updated November 2023, https://gpus.llm-utils.org/nvidia-h100-gpus-supply-and-demand/

[40] Amba Kak, Sarah Myers West, Meredith Whittaker "Make no mistake—AI is owned by Big Tech" *MIT Technology Review* December 5 2023 https://www.technologyreview.com/2023/12/05/1084393/make-no-mistake-ai-is-owned-by-big-tech/.

[41] Prajaktha Gurung, "Big Companies Are Acquiring AI Startups In Droves," Analytics India Magazine August 24, 2021, https://analyticsindiamag.com/big-companies-are-acquiring-ai-startups-in-droves/.

companies. Preemptive regulatory actions risk upending AI development and destroying the potential benefits that could result.

Conclusion

American consumers benefit from technological innovation, competitive industries, and economies of scale. Technological innovation in artificial intelligence depends on sufficient data access. State data privacy laws and near-sighted regulations threaten to needlessly limit technology's access to data with downstream effects on artificial intelligence competition. As enforcement agencies crack down on perceived market threats, they should focus these efforts on known problems. A failure to do this, risks destroying a promising industry before it has an opportunity to get off the ground.

Respectfully submitted,

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