



Testimony

Testimony to the Texas House Committee on Business & Industry

by the Honorable Zach Whiting, David Dunmoyer, and Caroline Welton

Data privacy and consumer protection: Evaluate the overall state of data privacy and online consumer protections in Texas and study the related laws and legislative efforts of other states. Make recommendations to ensure consumer data protections and online privacy.

Dear Speaker Phelan, Chairman Turner, and Members,

Thank you for highlighting data privacy and consumer protection as part of your interim charges. The Texas Public Policy Foundation's Better Tech for Tomorrow initiative is actively researching both issues. We recently published an extensive research paper on data privacy and will soon publish a research paper on consumer protection to better protect children online.

This testimony is drawn from and a distillation of the research and includes several policy solutions for legislators to consider in the upcoming session. On data privacy, the authors encourage the Legislature to adopt a digital bill of rights. On consumer protection, the authors encourage the Legislature to treat social media platforms like a harmful product and prohibit companies from granting access to children.

Data Privacy

Problem

The size, scope, and granularity of data collection practices have dramatically increased over the last decade. As the business model of social media companies rapidly evolved from the outward facing mission of connecting people online to collecting and selling user data, users have lost any digital agency that may have once existed. Moreover, entities of all sizes have found additional ways to commodify harvested user data, making it a common practice targeted at unwitting users. In Texas, users generally have little knowledge of how their personal information is used, are rarely given the choice to consent to data collection, seldom can view personal information that is collected about them, and are subject to personal information being stored with inadequate safeguards, all while bad actors continue to use deceptive means of collecting personal information that may be used for purposes that have not been conveyed to the user.¹

Unpacking the types of data companies have on users reveals how stunning the encroachment on Texans' privacy has become. A non-exhaustive sampling of the variety of data companies have includes sent and received emails; social media posts, comments, and engagement; time spent viewing content; purchasing habits; search history; personal appearance; voice; facial movements; photos stored in your phone; physical location; personally identifiable information (or PII) such as driver's license numbers, social security numbers, phone numbers, and your address; and even more granular data like heart rate, gait, breathing patterns, and temperature.²

As indicated by the Texas Privacy Protection Advisory Council, the overwhelming majority of Texans are unaware of where this data goes and what it is used for. One of the more prominent "black boxes" occurs through the data broker model. Data brokers collect personal information, bundle it together, and sell to third-party buyers. They cunningly employ data scrubbing tactics to scour through personal information users provide while using services like social media, search engines, news sites, apps, and more, and work with major companies to buy user data. By tracking users online and offline, these data brokers assemble incredibly thorough data profiles on individuals, whereupon users are sorted into

neatly organized categories that are packaged and sold to third parties. This data has been sold to governments, nefarious actors/criminals, and predatory advertisers, among others—any interested buyer is eligible.

Solution

Currently, only five states have enacted data privacy laws. Texas can be a nationwide leader on this issue and pass the most comprehensive data privacy law in the nation. A data privacy law is not about helping or harming any particular company or industry. Rather, it emphasizes the personal, private property aspects of data and clarifies how entities can use the data they collect. To truly reflect this in a legislative solution, Better Tech for Tomorrow recommends the following provisions for a digital bill of rights:

The Right to Know. Individuals should have the right to know, specifically by requiring data controllers to inform users on what data is being collected, the source of the information, the purpose for collection, and the third parties that have been given access to one's information. This right will provide the animating principle of transparency that is key to Texans' understanding of how the data collection processes affect them and will shine a light on the black box that is the final location of their data.

The Right to Correct Inaccurate Information. If a consumer notes that personal information collected by a business is inaccurate, businesses are required to rectify the issue after notice from an individual. It is important for both consumers and businesses to have correct information, because inadequate or false user information might result in unreliably tailored services and potentially harmful consequences.

The Right to Delete any Personal Information. Deletion rights should be reserved for any user data, including personally identifiable information. Consumers should have the right to know what data is being collected and, therefore, could determine what personal information is being stored to then have it deleted if they so choose.

The Right to Data Portability. Texans should have the right to obtain and reuse their personal data for their own purposes across different services—also known as the right to data portability. This would allow users to access personal data such as browsing history, location data, raw data processed by smart devices, and data on social networking sites, for example. They would then be able to use it for personal use, storing, or transmission to another data controller.

The Right to Opt Out. Texans should have the right to opt out of the sale or dissemination of their personal information. Specifically, consumers should be able to direct a business that collects, sells, or shares personal data to not sell, share, or use this information for targeted ads. Of course, this right strikes at the core of consumer control over their data, as well as ownership in the sense that businesses will have to defer to individual users rather than engage unfettered with few consequences.

The Right to Not Be Discriminated Against. A bonus consideration is the right not to be discriminated against for exercising any of the aforementioned rights. For example, if a user decides to opt out from the sale of their data by a business, the business may not discriminate in any form—including, but not limited to, denying goods or services to the consumer, charging different rates for goods or services, etc. Embedded within is a right to post-facto opt out of personal data collection. Personal data ownership should stay with the individual and be conceived as being “on loan” to the third party which can be recalled at any time.³

Carefully crafting the scope, application, and enforcement of the Texas digital bill of rights is key to both protecting the private property of Texans, while ensuring undue harm does not impact small businesses. This legislation would apply to for-profit businesses that conduct business in Texas, have more than 50 employees, and collect personal identifying information of more than 5,000 individuals, households, or devices. In addition, businesses satisfying one of the following thresholds fall under the purview of the act: a business with annual gross revenue exceeding \$25 million or that derives 50% or more of its revenues by processing personal identifying information. As for enforcement, our research has outlined provisions for the attorney general to have enforcement powers and take action against entities that violate the act, while allowing Texans a private right of action in instances where security breaches caused by a business's negligence and lack of due diligence impact sensitive information.

Passing a digital bill of rights in Texas' 88th Legislature would be a step in the right direction toward affording Texans data privacy while protecting an asset that is *their* property. Ultimately, the plan outlined above considers components of other states' digital bills of rights and the European Union's General Data Protection Regulation (GDPR), incorporating the elements that strengthen these rights for Texans, while omitting those that diminish the potency of such a legislative solution. In addition, it takes into account the work of Rep. Capriglione's previously introduced digital bill of rights, other lawmakers who have championed data privacy, as well as the recommendations of the Texas Privacy Protection Advisory Council.

Consumer Protection

Technology and culture often move faster than parents and policymakers can keep up. Decades-old federal and state privacy and consumer protection laws need to be updated and strengthened to better protect children online. The state has a significant interest in protecting citizens from harmful products. Accordingly, legislators should treat social media platforms like an age-limited harmful product and prohibit companies from granting access to children.

Harms of social media

Academic research, polling, cultural trends, common sense, and tragic examples demonstrate that the harms of social media far outweigh any purported benefits. In the last decade, researchers began recognizing a marked increase in “rates of depression, anxiety, loneliness, dissatisfaction with life, self-harm, suicide attempts and suicides.”⁴ More than a dozen studies, experiments, and comparative literature reviews have found an association between harm and screen time and social media use. The remarkable increase in time spent in front of screens, online, and on social media not only presents significant opportunity costs, but it is also linked with serious harms to children: addiction,⁵ depression,⁶ anxiety,⁷ stress,⁸ poor sleep,⁹ social and relational problems,¹⁰ body dysmorphia,¹¹ cyberbullying,¹² self-harm,¹³ suicide,¹⁴ crime,¹⁵ violence,¹⁶ child sexual abuse material,¹⁷ and human trafficking.¹⁸ Our forthcoming research paper is full of dozens of tragic examples of lives harmed and even ended because of social media. This testimony will discuss but a few of the problems.

Social media products and their underlying business models are built to be addictive. Researchers have classified social networking site addiction as a behavioral addiction which shares common characteristics with substance abuse.¹⁹ Recent data appears to bear this out. *Forbes* reports that the average American spends 3.5 hours per day—or 1,300 hours per year—on social media.²⁰ An August 2022, Pew poll found that “[f]ully 35% of teens say they are using at least one of them [YouTube, TikTok, Instagram, Snapchat or Facebook] ‘almost constantly.’”²¹ Facebook researchers heard from one 22-year-old female respondent: “I’m on Facebook every day, every moment. Literally, every moment; just not when I’m in the shower. ... I lose the notion of time.”²²

A *Wall Street Journal* series called “The Facebook Files” has provided valuable, in-depth coverage of harms. Even social media companies know their products are harmful. Internal research at Facebook and Instagram shows their products are harmful to children.²³ Furthermore, some tech executives do not allow their children to use social media products.²⁴

Child sexual abuse material (CSAM) and human trafficking are other horrors disseminated on social media. The United States increased its share of CSAM material from 21% in 2020 to 30% in 2022.²⁵ By the end of September 2021, the amount of CSAM removals eclipsed all of 2020, with Facebook, Instagram, YouTube, and TikTok removing more than 126 million posts.²⁶ *The New York Times* wrote that CSAM reports increased from 3,000 in 1998 to 1 million in 2014 to more than 150 million in 2021.²⁷

The Polaris Project released a report about how social media is used to recruit, control, and carry out trafficking operations.²⁸ Furthermore, despite pleadings from former Facebook employees, leaked internal documents show that by 2019, “Facebook hadn’t implemented systems to find and remove the [human] trafficking posts.”²⁹

Furthermore, online challenges encourage kids to cut, burn, starve, or choke themselves, ingest dangerous products, and even commit suicide.³⁰ Lalani (age 8) and Arriani (age 9) strangled themselves to death participating in the “Blackout Challenge” on TikTok.³¹

The ultimate harm of social media is suicide. Suicide is the second leading cause of death in children aged 10 to 18. According to the CDC, rates of suicide among children aged 14 to 18 increased by more than 67% over the period from 2009 to 2018. During 2018, 95,000 children aged 14 to 18 visited an emergency room for self-harm related injuries and

more than 2,000 committed suicide.³² BYU researchers conducted a 10-year study and “found that while social media use had little effect on boys’ suicidality risk, for girls there was a tipping point.”³³ However, boys are not immune. Ian, a 16-year-old boy, died playing Russian Roulette while on Snapchat.³⁴

The problem with federal law

The Children’s Online Privacy Protection Act (COPPA) was enacted in 1998. The law places limitations on data collection and content directed at children under age 13 without verifiable parental consent. Unfortunately, it is an outdated, flawed law that is poorly enforced. The law includes a preemption provision which is an affront to federalism and handcuffs state efforts to protect children from online harms.

This means, for example, that the Texas Legislature can only prohibit social media companies from granting access to those aged 13 to 18—but not to those aged 0 to 13. If such a law were adopted, the preemptive verifiable parental consent provisions of COPPA would remain in place, leaving the youngest of children vulnerable to continued exploitation and predation online. Congress must fix this inconsistency, and our forthcoming research paper suggests several ways to do so. However, state legislators need not wait on a feckless Congress and should take strong action to protect children online and on social media.

State solution

As a matter of public policy, the state places numerous age limitations on behaviors such as smoking, drinking, gambling, entering an enforceable contract, voting, joining the military, and driving, among others.³⁵ This policy proposal would recognize a social media platform as an age-limited product harmful to children.

As we discuss in detail in our forthcoming research paper, under this proposal, social media companies would be prohibited from granting access to children.³⁶ The onus is on the provider to verify age and identity and deny access to anyone who they cannot verify. Therefore, in order to create and use a social media account, one who has reached the age of majority would necessarily have to seek verification of one’s age and identity. This is not uncommon nor unreasonable. For example, IDs for age or identity verification are required in various contexts: voting, boarding a plane, purchasing an age-limited product, checking into a hotel, opening a bank account, applying for a passport, and starting a job, among others.

Yet in the online space, privacy and security issues are a legitimate concern. Regardless of the type of information prof-fered to verify age and identity, providers must ensure privacy and security for users, must have clear and transparent data collection practices, any information provided must be used for verification purposes only, cannot be used for pecuniary purposes, and must be deleted upon verification.

Sincerely,

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However, this suggestion is a bonus consideration because it presents constitutional questions that need further exploration. The state has a legitimate interest in protecting consumers unfair, deception, and discriminatory business practices. For example, the California Consumer Privacy Act's non-discrimination provision is still enforced in California. How such a provision in a Texas digital bill of rights squares with state, federal, and case law is something that could be considered by the courts if the law is challenged.
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ABOUT THE AUTHORS



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David has a BA in strategic communication from Texas Christian University and despite his current ties to UT, considers himself a Horned Frog first. When he's not working to bring sound technology policy to the Lone Star State or studying for his classes you can find him playing guitar, reading, or exercising.



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Prior to joining the Foundation, he served as a state senator in his native state of Iowa. In the senate, Zach championed conservative values, protected personal liberties, and worked to reduce the size and scope of government. He served as assistant majority leader, chair of the Labor and Business Relations Committee, and vice chair of the Administrative Rules Review Committee.

Prior to the senate, Zach worked as a legislative assistant and policy advisor to a member of Congress. He graduated summa cum laude with a B.A. in political science from Stetson University and earned a J.D. from the Regent University School of Law.



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