



Testimony in Opposition to House Bill No. 376 (“The Ohio Personal Privacy Act”)

By David A. Straite, CIPP/US, Partner with DiCello Levitt Gutzler LLC

Co-Lead Counsel in: *In re Facebook Internet Tracking Litig.*, 5:12-MD-2314 (N.D. Cal.); *In re Google “Real Time Bidding” Consumer Privacy Litig.*, 5:21-CV-2155 (N.D. Cal.); *Calhoun v. Google LLC*, 5:20-CV-5146 (N.D. Cal.)

Before the Ohio House Government Oversight Committee

December 9, 2021

Chair Wilken, Vice-Chair White, Ranking Member Brown, and Members of the House Government Oversight Committee:

Thank you for the opportunity to submit written testimony to the Committee. My name is David Straite, a partner with the law firm of DiCello Levitt Gutzler LLC. I am a Certified Information Privacy Professional and attorney with more than 25 years of practice. I litigate every day in the trenches against Big Tech to protect the privacy rights of consumers. I am also one of the few remaining Republicans left in the class action plaintiff bar, and a former member of the Federalist Society. My professional focus on privacy rights coupled with my life-long respect for limited government, rights of individuals and the importance of liberty give me an unusual perspective.

I applaud the good Members of the House for considering legislation to return power to the people of Ohio that for too long has been taken by large technology companies. But this bill in its current form does the opposite: it entrenches the power of a few large companies Silicon Valley and will make it harder, not easier, to hold them to account when they take Personal Data without consent.

During my years litigating against companies like Facebook, Google, Apple and Yahoo (among others), I have seen the truth revealed in the internal documents, emails and even candid text messages exchanged by employees of these companies. These include communications to and from CEOs and other senior executives. They were produced in litigation under seal and I cannot discuss specifics. But no matter which Big Tech company we are talking about, these documents make crystal-clear that consumer privacy is not respected. These companies instead focus enormous resources on gathering as much of your data as possible to tilt the playing field in their favor. The more information they can track, the more power they have over you, and the more power to dictate what is seen and heard online.

House Bill 376, if passed in its current form, would be viewed nationally as the most pro-Silicon Valley “privacy” bill in the country. Here are just some of the provisions that privacy advocates will scratch their heads about:

1. ***The definition of Personal Data excludes de-identified data.*** This is an unfortunate exclusion because the most insidious way Big Tech tracks consumers across the Internet is through pseudonymous identifiers, such as browser IDs, device IDs and IP addresses, which of course are easily re-linked to you. The definition also excludes ***inferred*** data; thus if a Big Technology company creates a profile of an Ohio resident with “inferences” about your tastes and beliefs, that secret profile (accurate or not) might govern news feeds or targeted advertising for years to come. But there is nothing in this bill that would allow the consumer to object.
2. ***The prohibition against the sale of Personal Data has so many exclusions as to make it meaningless.*** For example, it excludes business-to-business transactions, which Big Tech will be tempted to argue exempts all sales to other businesses – an exception that swallows the rule. The bill also excludes some of the most sensitive Personal Data such as health information. Thus if a hospital purposefully leaked your cancer diagnosis to Facebook, this bill might not offer any protections.
3. ***The bill excludes activities claimed to prevent “fraud,” or to preserve the “integrity” of a system – or even more generally, to “improve products.”*** Having seen internal documents myself for more than decade at these companies, I have no doubt that data collectors will attempt to justify any and all tracking as an effort to prevent “fraud” or protect the integrity of the system. But the “system” here is the system of online data tracking. By definition, a system of surveillance is “improved” if the tracker knows more about the people being surveilled. This issue is playing out right now in Europe: Facebook places pseudonymous trackers on your computer even if you are not a subscriber and tracks your movements across the Internet. When regulators sued to stop it, Facebook argued that the tracking was just being used to stop “fraud” and to protect the integrity of the system. The defense so far has failed. But it might work in Ohio if this bill were to pass.
4. ***The bill excludes tracking practices that are ostensibly “compatible” with the provision of a service requested by an Ohio consumer.*** This is perhaps the most worrisome exclusion, because data trackers always justify their spying with the argument that the data is being gathered to make other services more “relevant” – meaning, more closely aligned with your private behavior on the Internet. Any Big Tech company violating this bill will attempt to avoid liability under this exception.

The bill also prohibits victims from enforcing their rights in court, and instead shifts the enforcement burdens to the Attorney General (and thus to the taxpayers). The bill has the appearance of giving consumers at least some control over their private personal data, but if these new rights are violated, only government is allowed to protect you. You are not allowed to protect yourself. Worse, the budget is capped at \$250,000 annually. As a data privacy litigator, I know that Big Tech will hire the most powerful law firms and often spend several million dollars to

defend just a single case. The Attorney General would be hopelessly out-gunned and Ohio consumers would suffer.

You own your data. Finally, it is important to note the national trend over the past 10 years in the courts recognizing a property interest in Personal Data. Even Mark Zuckerberg admitted before Congress that “you own your data.” Whether it be your personal identifiers, biometrics, credit information, web browsing information or private communications, ***your data has value and you own it.*** Not Silicon Valley, not government, but YOU. So if a company copies your data without consent, that is stealing. You have a right to sue to stop future stealing, and to force the return of any unjust profits earned on your data. But if this bill passes, not in Ohio. Big Tech argue that only the Attorney General can enforce your property rights. Are any other property rights exclusively enforceable by government? In this way, no bill would be better than this bill.

The lives of Ohioans, like all of our lives, are increasingly governed by decisions made in a small valley in Northern California, using personal data taken from us without our consent or knowledge. It is the largest transfer of wealth in history, and the greatest concentration of corporate power in more than a century. House Bill 376 will make it harder, not easier, to fight back.

I respectfully urge the House to pause and consider changes to the bill. Thank you for the opportunity to share these concerns.