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National Telecommunications and Information Administration
1401 Constitution Ave., NW
Washington, DC 20230

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RE: National Telecommunications and Information Administration Privacy, Equity, and Civil Rights Request for Comment, NTIA–2023–0001

We thank the National Telecommunications and Information Administration (“NTIA”) for the opportunity to provide the following input in response to the agency’s request for comment (“RFC”) on the intersection of privacy, equity, and civil rights.¹ We strongly encourage the NTIA to ensure its report to the Biden-Harris Administration (“Administration”) provides a fulsome discussion of the benefits that accrue to diverse communities from responsible uses of data; how existing federal civil rights statutes provide robust protections related to discriminatory uses of data; and options to expand on existing protections while preserving responsible uses of data that benefit society, such as the approach contained in the Privacy for America *Principles for Privacy Legislation* (the “*Principles*”).² Ultimately, we ask NTIA to issue recommendations that will buttress and improve upon existing civil rights protections in ways that will not unreasonably restrict access to data that substantially benefits all of America.

Privacy for America is a coalition of top trade organizations and companies representing a broad cross-section of the American economy. We oppose illegal discrimination and applaud the NTIA’s efforts to examine consumer privacy through the lens of equity and civil rights. However, we submit that access to data does *not* inherently create discriminatory outcomes. It is the nefarious and discriminatory *use* of data—not the availability of data itself—that should be subject to appropriate limitations, guardrails, and enforcement to deter and disincentivize discriminatory and harmful ends. In fact, proper use of data may be particularly important in counteracting the deleterious impacts of marginalization and discrimination.

Responsible data use powers the American economy and offers substantial benefits to consumers of all backgrounds, including marginalized and disadvantaged communities. Existing law provides a strong foundation of protections against discrimination. Those laws should be leveraged to their fullest extent to deter and prevent inequities that result from discriminatory uses of data. To the extent that gaps exist, policymakers should look to proposed legislative models,

¹ National Telecommunications and Information Administration Privacy, Equity, and Civil Rights Request for Comment, 88 Fed. Reg. 3714 (proposed Jan. 20, 2023) (hereinafter, “RFC”).

² Privacy for America, *Principles for Privacy Legislation*, located at <https://www.privacyforamerica.com/overview/principles-for-privacy-legislation/>.

such as Privacy for America’s *Principles*, to impose supplementary protections and create new avenues for enforcement against discriminatory uses of data.

Our comments below first describe the extensive landscape of discrimination protections contained in bedrock federal civil rights statutes and how those statutes are currently working to deter and prevent misuses of data that result in civil rights violations and illegal discrimination. We then explain benefits that consumers and the marketplace gain from the responsible use of data, including benefits that are uniquely situated to consumers in disadvantaged and marginalized communities. Finally, we discuss the approach to data use set forth in Privacy for America’s *Principles*, and we suggest that the *Principles* should be used as a model for building on the solid equity and civil rights protections that already exist in federal law.

I. Existing civil rights laws provide tools to protect consumers against uses of data that result in civil rights abuses or illegal discrimination.

The very first question in the RFC asks how regulators, legislators, and other stakeholders should approach civil rights and equity implications of commercial data “collection and processing.”³ Although modern data uses may present new means for bad actors to discriminate, underlying discrimination itself cannot be reduced to a matter of mere data collection alone, and several legal tools are already at enforcers’ disposal to prevent and deter uses of data that result in illegal discrimination. We encourage NTIA to promote more effective enforcement of existing civil rights statutes to address potential discrimination through the collection and processing of data.⁴ Fundamentally, how we address illegal discrimination and inequities in digital and online commercial spaces should reflect how these problems have been addressed traditionally: by looking to robust, preemptive, federal laws that clearly define prohibited conduct, and leveraging those laws to their fullest extent to root out and deter illegal discrimination.

The RFC asks commenters to discuss how existing laws and regulations address privacy harms experienced by underserved or marginalized groups.⁵ Over the past 60 years, Congress has enacted several laws that protect consumers from misuses of data that have the effect of illegal discrimination or civil rights violations. Such protections exist in the Civil Rights Act of 1964, the Fair Housing Act, the Fair Credit Reporting Act, the Equal Credit Opportunity Act, and the Americans with Disabilities Act, in addition to other statutes.⁶ Against the backdrop of these more specific federal civil rights and anti-discrimination laws, other generally applicable laws, like the Federal Trade Commission (“FTC”) Act, provide yet another avenue for relief related to unfair and deceptive practices that may result in civil rights violations or illegal discrimination.⁷

These existing federal laws have been and continue to be used by various enforcement bodies as statutory “hooks” to bring lawsuits to deter uses of data that result in or further

³ RFC, Question 1(a) at 3718.

⁴ *Id.* at Question 4(c) at 3719.

⁵ *Id.* at Question 4 at 3719.

⁶ *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.; Fair Housing Act, 42 U.S.C. § 3601 et seq.; Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq.; Equal Credit Opportunity Act, 15 U.S.C. § 1691 et seq.; Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.

⁷ FTC Act, 15 U.S.C. § 45.

discrimination.⁸ They have also led to significant, beneficial changes to business practices by incentivizing companies to: (1) set written policies mandating compliance with the laws; and (2) create internal safeguards to prevent unintentional violations.⁹ Moreover, federal agencies created by these foundational civil rights statutes are actively pursuing strategic enforcement approaches to combat misuses of data in the modern economy. For example, the Equal Employment Opportunity Commission, which was created by the Civil Rights Act of 1964, released a draft 2023-2027 Strategic Enforcement Plan stating the agency intends to “combat employment discrimination” by “recogniz[ing] employers' increasing use of automated systems, including artificial intelligence or machine learning, to target job advertisements, recruit applicants, and make or assist in hiring decisions.”¹⁰ In these ways, existing civil rights laws have been applied to the online environment. Those laws provide technology-neutral protections for consumers as data is collected or processed in vital contexts, such as housing and employment.

In its report, we encourage NTIA to examine ways to apply federal civil rights laws that currently exist to pursue claims related to misuses of data in both offline and online spaces. Rather than attempt to reinvent the wheel by creating a new legal regime or by unreasonably restricting commercial entities from collecting data, the NTIA should recommend that the Administration leverage and build on the tools it already has to combat inequity, civil rights abuses, and illegal discrimination in commercial data use.

II. Responsible uses of data benefit marginalized, disadvantaged, and underserved communities in a variety of ways.

While the NTIA asks several questions related to ways commercial data uses “harm” or “negatively” affect underserved or marginalized communities,¹¹ the RFC is devoid of questions related to how uses of data empower those communities and provide access to and awareness of opportunities specific to such communities. In fact, marginalized and underserved communities derive significant and particularized benefits from the data-driven economy and responsible data use. Access to and use of data allow personalized messages to reach underserved communities with information and opportunities they otherwise may not have known about; drive contributions to charitable organizations; and empower companies and other organizations to increase diversity and inclusion (“DEI”) efforts, as well as identify inequitable practices and rectify them.

⁸ See, e.g., Press Release, Department of Justice, *Justice Department Secures Groundbreaking Settlement Agreement with Meta Platforms, Formerly Known as Facebook, to Resolve Allegations of Discriminatory Advertising* (June 21, 2022), <https://www.justice.gov/opa/pr/justice-department-secures-groundbreaking-settlement-agreement-meta-platforms-formerly-known>; see also Press Release, Office of the Massachusetts Attorney General, *AG Reaches Settlement with Advertising Company Prohibiting ‘Geofencing’ Around Massachusetts Healthcare Facilities* (Apr. 4, 2017), <https://www.mass.gov/news/ag-reaches-settlement-with-advertising-company-prohibiting-geofencing-around-massachusetts-healthcare-facilities>.

⁹ See, e.g., *Job Post Discrimination Policy*, LINKEDIN (last updated December 2022), <https://www.linkedin.com/help/linkedin/answer/a1335725?trk=hc-articlePage-sidebar>; LinkedIn Advertising Policies, LINKEDIN (last updated October 28, 2022), <https://www.linkedin.com/legal/ads-policy>; *Fair Housing Policy – Equal Opportunity in Housing Statement*, RENTERS WAREHOUSE, located <https://www.renterswarehouse.com/fair-housing-policy>; *Fair Housing is Everyone’s Right!*, CRAIGSLIST, located <https://www.craigslist.org/about/FHA>.

¹⁰ U.S. Equal Employment Opportunity Commission, *Draft Strategic Enforcement Plan Fiscal Years 2023 – 2027*, 88 Fed. Reg. 1379 (proposed Jan. 10, 2023).

¹¹ See, e.g., RFC, Question 1(d), 1(e), 2, at 3718; RFC, Question 3(a), 3(e), 4, 4(a) at 3719.

The RFC asks how “specific data collection and use practices potentially create or reinforce discriminatory obstacles for marginalized groups regarding access to key opportunities,”¹² but numerous examples suggest otherwise. The use of data by companies enables personalized messaging, allowing consumers to learn about opportunities they are uniquely qualified for and resources that are available to them in an efficient manner. For example, marginalized communities may not be aware of specific discounts or better prices for goods and services absent targeted messages, driven by data. One study found that restrictions on advertising related to eyeglasses caused the least educated consumers to pay the highest prices for vision aids.¹³ Similarly, targeted, data-driven messaging permits underserved communities to receive important health-related information. In 2021, the Centers for Disease Control worked with the Ad Council to develop a campaign specifically to further public education about the COVID-19 vaccine for Black and Hispanic communities, who had been hit hardest by the pandemic.¹⁴ Another study showed that a 1980s Kellogg advertising campaign was particularly effective at increasing fiber consumption “among racial minorities and single parent households.”¹⁵ Indeed, studies show that targeted, personalized, data-driven messaging is particularly important to underserved and disadvantaged groups.¹⁶ If access to basic demographic information like race and ethnicity were unavailable to deliver these messages to the right groups at the right time, members of these groups would be worse off without a countervailing benefit from the limitation.

Access to data also permits charities to attract donors that contribute to their missions, and to raise awareness of those missions in their target communities which include minority groups. For example, when the United Negro College Fund (“UNCF”) partnered with the Ad Council to run a data-driven public service advertising campaign to attract donors, “contributions to the UNCF doubled in the first five years of the campaign” even though “the nation was in the midst of a business recession.”¹⁷ Revenues from the campaign enabled the UNCF to “enroll an impressive 35% of all [Black individuals] attending 4-year colleges,” and contributions to UNCF continued steadily thereafter, representing a 250% increase over a ten-year period.¹⁸ The use of data, including information about race and ethnicity, enables this kind of outreach by charities and organizations that serve marginalized or underserved groups.

Data access also allows entities and industries to further DEI efforts and identify unintentional inequitable practices. For instance, access to data permitted the Insights Association

¹² *Id.* at Question 2(c),

¹³ Lee Benham & Alexandra Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J.L. & ECON. 421 (1975).

¹⁴ Ad Council, *The Ad Council and COVID Collaborative Reveal ‘It’s Up To You’ Campaigns to Educate Millions of Americans about COVID-19 Vaccines* (Feb. 25, 2021), <https://www.adcouncil.org/press-releases/the-ad-council-and-covid-collaborative-reveal-its-up-to-you-campaigns-to-educate-millions-of-americans-about-covid-19-vaccines>.

¹⁵ Pauline M. Ippolito & Alan D. Mathios, Fed. Trade Comm’n, *Health Claims in Advertising and Labeling: A Study of the Cereal Market*, xvii (1989), <https://www.ftc.gov/sites/default/files/documents/reports/health-claims-advertising-and-labeling-study-cereal-market/232187.pdf>.

¹⁶ J. Howard Beales & Andrew Stivers, *An Information Economy Without Data*, 24 (2022), <https://www.privacyforamerica.com/wp-content/uploads/2022/11/Study-221115-Beales-and-Stivers-Information-Economy-Without-Data-Nov22-final.pdf>.

¹⁷ Advertising Educational Foundation, AEF, the ANA Educational Foundation, *United Negro College Fund*, (last visited Feb. 8, 2023), <https://aef.com/classroom-resources/social-responsibility/ad-council-campaigns-made-difference/united-negro-college-fund/>.

¹⁸ *Id.*

to complete a first-of-its-kind DEI census report on the research and analytics workforce.¹⁹ The report identified that nearly twice as many men as women in that specific work force held board positions and earned the highest salary levels.²⁰ In addition, the report found that the percent of Black and Hispanic individuals in the research and analytics profession lagged behind their representation of the U.S. workforce.²¹ Taking learnings from that DEI research, the industry launched a fellowship program, began remote apprenticeships, and provided DEI toolkits to attempt to improve representation in the industry.²² Efforts such as these create and increase opportunities for disadvantaged communities, yet they would not be possible without the ability to collect, analyze, and share data associated with such communities.

The Administration itself has recognized the value of demographic data use for DEI efforts and has implemented policies to leverage such data to further equitable ends. Building on a 2021 Executive Order aimed at advancing racial equity and support for underserved communities throughout the federal government, the Administration published a new executive order in February 2023 to renew its commitment to equity and advancing representation in the federal government.²³ To advance these goals, the federal government must collect and use demographic data about individuals in underserved and marginalized communities. Similarly, the private sector needs access to and use of such data to promote equity. Restricting access to that type of demographic data by determining it to be too “sensitive” in nature would, perhaps counterintuitively, undercut the ability of the government, industry, and others to pursue the goals of the Administration’s Executive Order.

Access to data and use of data by the private sector provides measurable benefits to marginalized and underserved communities by, for example, increasing relevant messaging and advertising, furthering charitable missions, and supporting DEI initiatives to make institutions more equitable. Data provides disadvantaged communities with myriad benefits that should be acknowledged and discussed in the NTIA’s report to the Administration, and NTIA should avoid recommending unreasonable restrictions on access to the underlying data that enables such positive outcomes.

III. The value of data to consumers and the economy should not be diminished by overbroad and restrictive rules.

The responsible collection, use, and sharing of data powers the economy in a variety of ways that also create opportunities for marginalized communities. Supporting economic development and expansion in human potential, data is a key factor in promoting equity and civil rights. Privacy standards that advance equity and civil rights can and should acknowledge the value of data to consumers and the economy in order to preserve these benefits, which include,

¹⁹ Insights Association, *Diversity, Equity, and Inclusion in the Insights Profession*, https://share.hsforms.com/1djUbZ7tGRuy1OJr8Fe_13w4d6qf.

²⁰ *Id.*

²¹ *Id.*

²² Insights Association, *IDEA Council*, <https://www.insightsassociation.org/IDEA-Council>.

²³ Exec. Order No. 13,985, 3 C.F.R. 2021 Comp., p. 409-413 (Jan. 25, 2021); *see also* The White House, *Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government* (Feb. 16, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/16/executive-order-on-further-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

contributing to the U.S. economy as a whole and improving consumers' livelihoods while supporting safe economic interactions, permitting access to free or low-cost resources, and supporting small and mid-sized businesses, which make up the majority minority-owned businesses.

The responsible use of data in the marketplace is foundational to the modern economy, increasing gross domestic product ("GDP"), providing jobs, and helping consumers safely engage in this economy.²⁴ All Americans benefit from millions of jobs stemming from the data economy. In 2020, more than 17 million people in the U.S. were employed in jobs generated by the free flow of data.²⁵ Of those jobs, more were created by small firms and the self-employed (38%) than by the largest firms (34%).²⁶ Additionally, businesses apply and use data to better consumers' lives—for example, by improving protections for consumers as they engage with the economy. Fraud detection and control tools use data to discover and prevent unauthorized uses of personal information. Banks and other financial institutions as well as the healthcare industry use data-driven fraud detection and prevention to reduce consumers harms, like fraudulent purchases or falsified medical claims.²⁷ Fraud prevention is particularly impactful for marginalized communities, as the FTC recognizes the disproportionate negative effects fraud has on these communities.²⁸

Data provides other intangible but important benefits to consumers beyond growing the U.S. economy, supporting jobs, and promoting safe economic interactions. Research shows that digital goods, like access to online search engines and encyclopedias, generate a large amount of consumer welfare and value that current U.S. GDP does not capture.²⁹ Access to data empowers all consumers to use the Internet and its countless products and services for free or at a very low cost. The benefits that free Internet access provide to all Americans cannot be overstated. Largely because of open flows of data across the Internet, consumers of all economic and social backgrounds can reach resources, content, news, education, videos, music, art, and more without facing many obstacles. Accordingly, data has aided in leveling the playing field in terms of individuals' access to informational resources and learning, limiting the potential gatekeeping of knowledge online behind paywalls or other significant barriers to access.

²⁴ See JOHN DEIGHTON & LEORA KORNFELD, *THE ECONOMIC IMPACT OF THE MARKET-MAKING INTERNET* 5, IAB (Oct. 18, 2021), https://www.iab.com/wp-content/uploads/2021/10/IAB_Economic_Impact_of_the_Market-Making_Internet_Study_2021-10.pdf.

²⁵ *Id.*

²⁶ *Id.* at 6.

²⁷ See, e.g., M. Sathyapriya & Dr. V. Thiagarasu, *Big Data Analytics Techniques for Credit Card Fraud Detection: A Review*, 6 INT'L J. OF SCIENCE & RSCH 206, (2017), <https://www.ijsr.net/archive/v6i5/ART20173111.pdf>; P. TRAVAILLE ET AL., *ELECTRONIC FRAUD DETECTION IN THE U.S. MEDICAID HEALTHCARE PROGRAM: LESSONS LEARNED FROM OTHER INDUSTRIES* (2011).

²⁸ See Federal Trade Commission, *Serving Communities of Color, A Staff Report on the Federal Trade Commission's Efforts to Address Fraud and Consumer Issues Affecting Communities of Color* (Oct. 2021), https://www.ftc.gov/system/files/documents/reports/serving-communities-color-staff-report-federal-trade-commissions-efforts-address-fraud-consumer/ftc-communities-color-report_oct_2021-508-v2.pdf.

²⁹ ERIK BRYNJOLFSSON ET AL., *USING MASSIVE ONLINE CHOICE EXPERIMENTS TO MEASURE CHANGES IN WELL-BEING* (Apr. 9, 2019), <https://www.pnas.org/doi/10.1073/pnas.1815663116>.

Research finds that the ad-supported Internet provided consumers with goods and services worth roughly \$30,000 per year (in 2017 dollars).³⁰ These significant benefits stack on top of the specific gains made by marginalized communities from data-driven practices discussed in Section II. Significant disruptions to the free flow of data, even if done for the stated purpose of protecting civil rights, could unintentionally and disproportionately harm those unable to pay for content in comparison to those with sufficient resources to replace formerly ad-supported services.

An open data ecosystem—one that is competitive and lively without unreasonable barriers to entry—is particularly beneficial to marginalized communities. In 2016, the Census Bureau found that almost all (99.9%) minority-owned employer businesses were small businesses.³¹ Data-supported content helps consumers and publishers—especially communities’ favorite mom-and-pop shops, diverse bloggers covering issues of particular importance for their communities, and other small businesses—connect with prospective customers. Data-driven methods allow for customization that improves the consumer experience and connects customers with relevant, new small businesses. These methods empower small businesses, and maintaining the ability of these small companies to engage in reasonable data use will bolster competition, increase the number of outlets available to consumers, and diversify the marketplace so small businesses can compete.³²

In a survey of 30,500 small businesses, 72% reported that data-driven advertising is important to the success of their business.³³ 76% of small businesses surveyed stated that personalized ads, which are dependent on data including demographic data, help them find new customers.³⁴ For small businesses using data-driven advertising, sales growth was 16% greater than for small businesses that did not use data-driven practices.³⁵ These benefits from responsible data use are enjoyed in significant part by minority communities, given their overrepresentation among small business owners. Additionally, women-owned businesses were more likely than their counterparts to use certain digital technologies to support their businesses, and similarly, Black-owned businesses in the U.S. were more likely to use certain digital technologies than were U.S. small businesses generally.³⁶ Data-driven practices thus create efficiency and new opportunities for small enterprises—in some cases, especially for business run by members of marginalized communities that may often seek to efficiently direct their advertising to members of their own

³⁰ J. Howard Beales & Andrew Stivers, *An Information Economy Without Data*, 2 (2022),

<https://www.privacyforamerica.com/wp-content/uploads/2022/11/Study-221115-Beales-and-Stivers-Information-Economy-Without-Data-Nov22-final.pdf>.

³¹ Nora Esposito, *Small Business Facts, Spotlight on Minority-Owned Employer Businesses*, U.S. SMALL BUSINESS ADMINISTRATION (May 2019), <https://cdn.advocacy.sba.gov/wp-content/uploads/2019/05/31131339/Small-Business-Facts-Spotlight-on-Minority-Owned-Employer-Businesses.pdf>.

³² DAA, Study: *Online Ad Value Spikes When Data Is Used to Boost Relevance* (Feb. 10, 2014), <https://digitaladvertisingalliance.org/press-release/study-online-ad-value-spikes-when-data-used-boost-relevance>; SBE Council, *Online Advertising Delivers BIG Benefits for Small Businesses* (Sept. 10, 2019), <https://sbecouncil.org/2019/09/10/online-advertising-delivers-big-benefits-for-small-businesses/>.

³³ See DELOITTE, DYNAMIC MARKETS: UNLOCKING SMALL BUSINESS INNOVATION AND GROWTH THROUGH THE RISE OF THE PERSONALIZED ECONOMY at 27 (May 2021), https://scontent-bos5-1.xx.fbcdn.net/v/t39.8562-6/10000000_4303078769743544_7237603050373993547_n.pdf?_nc_cat=109&ccb=1-7&_nc_sid=ad8a9d&_nc_ohc=diYsZTH66PEAX_6cORb&_nc_ht=scontent-bos5-1.xx&oh=00_AfAlddtVvwNhD6amBfDnljWEW3VTNTzhgjXULbzMJn1mg&oe=63FB1089.

³⁴ *Id.*

³⁵ *Id.* at 2.

³⁶ *Id.* at 9.

communities who are more likely to need or desire the unique products and services offered by these small and mid-sized businesses.

IV. Privacy for America's *Principles* provide a model for expanding on existing civil rights and discrimination protections.

The RFC asks commenters to discuss “principles” that should guide the Administration in addressing “disproportionate harms experienced by underserved or marginalized groups due to commercial data collection, processing, and sharing.”³⁷ As discussed above, the NTIA’s report should catalog existing federal civil rights laws and explain how they are presently being used to deter misuses of data that further inequity or result in illegal discrimination. In addition, the report should address the significant and substantial benefits that marginalized and disadvantaged communities receive from commercial uses of data, and the report should recognize that unreasonable restrictions on data (even if created for noble purposes) will cause significant harm to the communities such restrictions seek to protect.

Should the NTIA recommend specific measures for additional protections related to equity and civil rights in data use in its report, the agency should emulate the approach in Privacy for America’s *Principles*. The *Principles* would define certain misuses of data to be “per se” unreasonable and flatly prohibited and would provide additional authority for the FTC and state attorneys general to bring enforcement actions to police such data misuses in the marketplace. The *Principles* would, for example, prohibit uses of data to discriminate or make eligibility determinations for employment, credit, health care treatment, insurance, education admissions, financial aid, and housing contexts.³⁸ The *Principles* would also bar charging an individual a higher price for any product or service based in whole or in part on personal information relating to the individual’s race, color, religion, national origin, sexual orientation, or gender identity.³⁹

With a focus on comprehensive, preemptive, federal privacy standards, the *Principles* provide an ideal model to follow to ensure privacy protections also establish strong, consistent protections for equity and civil rights. By advocating for standards aligning with the balanced approach articulated in the *Principles*, the NTIA can build on well-established civil rights and anti-discrimination standards to ensure consumers retain access to the significant benefits of the data-driven economy, including the benefits that specifically accrue to disadvantaged communities, while championing further protections against misuses of data that result in civil rights violations or illegal discrimination.

Sincerely,

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³⁷ RFC, Question 5 at 3719.

³⁸ Privacy for America Principles, Part I, Section 3(A).

³⁹ *Id.* at Part I, Section 3(B).