



April 29, 2024

The Honorable Cathy McMorris Rodgers
Chair
U.S. House Committee on Energy
& Commerce
Washington, DC 20515

The Honorable Frank Pallone
Ranking Member
U.S. House Committee on Energy
& Commerce
Washington, DC 20515

RE: American Privacy Rights Act 2024 Discussion Draft

Dear Chair Rodgers, Ranking Member Pallone, and members of the Committee on Energy & Commerce:

My name is Karen Harned and I serve as Executive Director of Citizens for Legal Reform, a 501(c)(4) organization that is dedicated to preserving the separation of powers and the accountability of the political branches at all levels of government in the United States. CLR opposes laws that delegate law enforcement power to litigants who are not actually injured by the people or organizations whom they are suing. CLR believes such laws are unconstitutional, eviscerate political accountability, and undermine the rule of law.

CLR applauds Chair McMorris Rodgers and the Committee for its work so far in developing a legislative framework designed to safeguard the personal information of all Americans. We understand that data and personal information are integral to the functioning of our economy but also can easily be exploited by bad actors. With that as background, while CLR appreciates the important policy objectives the American Privacy Rights Act seeks to achieve, it believes only government officials, who are accountable to the people, should be charged with enforcing the law.

Consequently, as you consider the American Privacy Rights Act, CLR urges you not to authorize individuals to function as private Attorneys General who may sue to enforce statutory violations even when they have not suffered any actual injury.

Constitutional and Policy Concerns with Citizen Enforcement of Public Laws

CLR appreciates the need for private plaintiffs to have the ability to sue to vindicate their rights when they have suffered actual harm by a person or entity who has acted illegally. But, as previously mentioned, there are significant constitutional and policy concerns with laws that rely in whole or in part on citizen enforcement.

First, there is a serious question about whether such enforcement mechanisms are constitutional. Under Article II of the United States Constitution, only the President has the power and responsibility to direct the actions of those who execute and enforce the

law. The Vesting Clause makes clear that the “executive Power” vests exclusively in the President.¹ The Take Care Clause requires the President “take Care that the Laws be faithfully executed.”² Finally, the Appointments Clause provides for the President to appoint Officers of the United States, and provides that Congress may vest the appointment of “inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”³ Taken together, these three clauses make it clear that the power to enforce federal law – and the accountability for enforcement decisions – lies solely with the Executive Branch.

In *Transunion LLC v. Ramirez*, the Supreme Court held that in order to have standing to sue, a plaintiff must show actual injury – a statutory violation alone is not enough.⁴ In that opinion, Justice Kavanaugh explained that, “[a] regime where Congress could freely authorize *unharm*ed plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch’s Article II authority.”⁵

Second, private enforcement provisions eviscerate political accountability, which is a vital part of our representative democracy. Private parties empowered to enforce public laws have largely unchecked enforcement power because they are not accountable to voters or elected officials when they use a law for unintended purposes. Voters cannot vote them out of office, and legislators cannot meaningfully use standard tools like oversight hearings or appropriations to guide enforcement. Because of this, private enforcement provisions are often abused by financially or ideologically motivated private plaintiffs and their attorneys, who can enforce the law for any reason (*e.g.*, to force defendants into settlements in unmeritorious cases; because the defendant is business competitor to the plaintiff; because the plaintiff disagrees with the enforcement priorities of the current Executive; or simply because the plaintiff dislikes the defendant) without accountability to anyone.

Third, laws and law enforcement must be predictable, and penalties must correlate to the severity of the statutory violation committed. Individuals and businesses complying with the law often rely on the executive’s interpretation of the law through, among other things, formal rulemaking and guidance documents. But when individuals are given broad authority to enforce general welfare statutes, they often will advance novel legal theories that, when successful, lead to unpredictable results. Moreover, citizen enforcement of public laws leaves no room for enforcement discretion, which is vital to just public policy and preserving liberty.⁶ To the individual suing, they are the hammer and every statutory violation – no matter how small – is a nail.

¹ U.S. Const. art. II, § 1.

² *Id.* art. II, § 3.

³ *Id.* art. II, § 2.

⁴ *Transunion LLC v. Ramirez*, 594 U.S. 413, 426-27 (2021).

⁵ *Id.* at 429.

⁶ *United States v. Texas*, 599 U.S. 670, 679-80 (2023) (“[T]he Executive Branch must prioritize its enforcement efforts [to] constantly react and adjust to the ever-shifting public-safety and public-welfare needs of the American people.”); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (explaining decision to “refus[e] to institute proceedings” is part of the Executive Branch’s Article II powers); *In re Aiken*, 725 F.3d 255, 264 (D.C. Cir. 2013) (Kavanaugh, J.) (“One of the greatest unilateral powers a President possesses

Problematic Private Rights of Action in the APRA

CLR appreciates the efforts of the Committee to limit the scope of the private rights of action in the APRA by targeting citizen enforcement to specific provisions of the Act.⁷ However, section 19 in the APRA discussion draft still creates an enforcement structure for certain provisions that would deputize the plaintiff's bar and private citizens to act as roving, unaccountable "private attorneys general."

Section 19 does not itself limit private actions to individuals who suffer an actual injury from an alleged violation of the APRA's substantive terms. Although section 19 allows for recovery of "actual damages" for individuals who do suffer harm, there is no requirement in that section for any individual to prove actual damages to obtain other statutory remedies, including injunctive relief and – critically – attorney's fees and other litigation costs. Any limitation must therefore come from the substantive sections themselves, and CLR finds three substantive provisions that private individuals may enforce in the discussion draft especially concerning because they impose no injury requirement.

Section 4(a) Notice Violations: Under this section, citizens would be permitted to sue to enforce requirements that each covered entity and service provider make "publicly available, in a clear, conspicuous, not misleading, easy-to-read, and readily accessible manner, a privacy policy that provides a detailed and accurate representation of the covered entity or service provider's data collection, processing, retention, and transfer activities." Nothing in this section limits a violation – or the enforcement of a violation – to someone who was harmed by the lack of a publicly available notice of a privacy policy. Moreover, most, and arguably all, of the criteria set forth in section 4(a) for judging a privacy policy are subjective in nature and could invite litigation (*e.g.*, arguing a policy is not "easy-to-read"). To the extent the Federal Trade Commission issues clarifying regulations of what is required to be in a privacy policy, any mistaken omission of a particular requirement would expose the covered entity/service provider to a lawsuit. Accordingly, not only are citizens empowered to sue to enforce this section regardless of whether they incurred any actual harm, but the vagueness of the statutory terms would encourage unscrupulous attorneys and plaintiffs to seek out marginal violations and pressure settlements.

Section 11(d) Due Diligence Violations: Citizen enforcement also would be permitted to ensure that a covered entity exercises reasonable due diligence (1) in selecting a service provider and (2) deciding to transfer covered data to a third party. Whether a covered entity acted with due diligence in selecting a service provider is subjective. An individual who has experienced no actual injury could nonetheless sue under this provision and allege lack of due diligence was used simply because the individual does not like the company who the covered entity chose to serve as the service provider or transfer data to. Moreover, the FTC would have up to two years after enactment to publish guidance

under the Constitution . . . is the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior.").

⁷ American Privacy Rights Act, §19 (a)(1).

regarding how a covered entity is to comply with this section. As before, an uninjured individual could sue under this provision asserting that the covered entity did not act with appropriate due diligence and is encouraged to do so given section 16's attorneys' fees provision.

Section 13(a) Civil Rights Enforcement: Finally, citizen enforcement is permitted to ensure a covered entity or service provider does not "collect, process, retain or transfer covered data in a manner that discriminates in or otherwise makes unavailable the equal enjoyment of goods or services on the basis of race, color, religion, national origin, sex, or disability." While CLR appreciates the need to ensure that the civil rights of individuals are not violated, anti-discrimination statutes are not immune from enforcement actions by uninjured individuals. The Americans with Disabilities Act, for example, allows for citizen enforcement. Over the last three decades we have seen thousands of lawsuits filed by uninjured "tester" plaintiffs alleging business do not meet ADA accessibility standards and engaging in abusive sue-and-settle tactics.⁸

As the Committee and Congress consider this legislation, CLR recommends Congress ensure that only government officials, who are directly accountable to the people, are empowered to enforce the statute. To the extent a private right of action remains in the bill, it should be limited to those individuals who have suffered an actual injury.

Thank you for your consideration. If you have any questions, please contact me at 202-886-4651.

Karen R. Harned
Executive Director

⁸ Minh Vu, Kristina Launey, & Susan Ryan, *ADA Title III Federal Lawsuits Numbers Are Down But Likely To Rebound in 2023*, Seyfarth Shaw (Feb. 14, 2023), bit.ly/42e1o5c; Bob Blum, *The Ninth Circuit Recently Undercut Defenses Against ADA 'Serial Plaintiffs'*, DAILY J. (Feb. 17, 2023), bit.ly/3BZT3Ym; see also Brief of Amicus Curiae Center for Constitutional Responsibility in Support of Petitioner, *Acheson Hotels, LLC v. Laufer*, 22-429 (U.S.) (June 12, 2023), available at <https://tinyurl.com/CCRLauferAmicus> (discussing abusive litigation tactics present with ADA tester claims).