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ARTIFICIAL INTELLIGENCE, NOT ARTIFICIAL LITIGATION

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For the Progressive Policy Institute

United States-based companies have become world leaders in generative artificial intelligence (AI), which is transforming our lives—from creating better health care diagnostics and treatment to spurring new areas of economic growth. However, even when developed, deployed and used properly, AI can make mistakes. And, some people will use AI for nefarious purposes. These dynamics have led federal and state governments to actively consider how best to regulate generative AI to reduce these risks without impeding the pathways to innovation.

The federal government started this regulatory effort in 2023 with an Executive Order instructing agencies to develop policies to strike this balance. The current President built on this Order by prioritizing an environment in which American AI innovation can flourish.[1] In the states, Colorado became the first to enact a broad AI-specific law in 2024,[2] giving the state attorney general authority to issue AI regulations. This year, Texas adopted a narrower framework.[3] In addition, the California General Assembly passed an AI bill last year, but Governor Newsom vetoed it, opting to allow more time to get this balance right.[4] Governor Youngkin in Virginia did the same this year.[5] In other states, major AI bills have been introduced, but none have been enacted.

Given the economic and national security imperative with AI, state leaders from both political parties have appreciated that getting AI regulation right is critical and that doing the wrong thing poses a risk to the nation as a whole. They have also made clear that while AI may be new, it is just a tool. The fraudulent, unfair or deceptive use of AI—just as with any other software—is already unlawful. State law enforcement officers already have the tools to protect their people.

Accordingly, one of the most controversial ideas making the rounds in the states is introducing what has been called "vigilante actions" or, in legal terminology, private rights of action, for AI enforcement. In these suits, private, for-profit lawyers—not government prosecutors—would be allowed to sue anyone they claim violated the law, regardless of

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[1] *See* Executive Order on Advancing United States Leadership in Artificial Intelligence Infrastructure, The White House, Jan. 14, 2025.

[2] *See* Colo. Rev. Stat. §§ 6-1-1702.1, 6-1-1703.1.

[3] *See* Tex. Bus. & Com. §551.001 et. seq.

[4] *See* Veto Message on S.B. 1047, Office of Cal. Gov. Newsom, Sept. 29, 2024.

[5] *See* Veto Message on H.B. 2094, Office of Va. Gov. Youngkin, Mar. 24, 2025.

how speculative the assertion or whether anyone was harmed. The lawyers would then keep the statutory penalties for themselves.

Federal and state policymakers have learned the hard lesson that when private lawyers can make money enforcing regulations, they do not necessarily make decisions that are in the public interest. They will often generate high-dollar litigation over minor, technical violations—including when the alleged violation did not harm anyone and even when the violation may not have actually occurred. When similar private rights of action have been included in other regulatory regimes, their trail has been littered with these types of abusive lawsuits, as well as settlements focused on generating money for lawyers, not providing value to consumers, employees or anyone else.

This white paper details the history of private rights of action, how they have led to lawsuit abuse, and why they are neither needed, nor appropriate for regulating AI. Private litigation should stay in its lane. It should be reserved only for seeking remedies for people injured from alleged wrongdoing. And, as Massachusetts Attorney General Campbell made clear last year, people already have robust avenues for seeking such remedies when it comes to AI.[6] Creating more ways for private lawyers to sue over AI is not needed and will cause more harm than good.

I. THE AI REGULATORY ENFORCEMENT CHALLENGE: FACILITATE BENEFITS AND MINIMIZE RISK

As a threshold matter, it is important to understand what legislators are seeking to regulate with AI. In Europe and the U.S., this effort is largely focused on situations where AI produces "content, decisions, predictions, or recommendations" that inform decisions over a person's health care services, employment status, insurance policies, or other financial or critical services.[7] European regulators term AI systems used for these purposes "High-Risk Artificial Intelligence Systems" (HRAIS). Many state proposals have mirrored this terminology, though not necessarily the substantive definitions. Their key concern, aside from catching bad actors, is to minimize unlawful outcomes—including discrimination, privacy and intellectual property violations—from AI's use.

As policymakers on both continents have found, settling on a framework for regulating AI is not easy. AI's use and adaptability to a wide range of circumstances is its biggest strength, but makes a regulatory approach difficult to attain. Developers create models suitable for a variety of tasks, and deployers put the models to use for their specific needs. Thus, when an AI model is put into circulation—particularly when open-sourced—the developers and deployers have limited input or control over how others will modify, use,

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[6] *See* *AG Campbell Issues Advisory Providing Guidance On How State Consumer Protection and Other Laws Apply to Artificial Intelligence*, Mass. Office of the Attorney General, Apr. 16, 2024.

[7] *See, e.g.,* Regulation (EU) 2024/1234 of the European Parliament and of the Council of 12 Mar. 2024 on artificial intelligence (Artificial Intelligence Act), art. 3(1), 2024 O.J. (L 123) 1.

or even misuse their models. They cannot anticipate, let alone mitigate, every way in which a model may cause errors or reach wrong outcomes.

Accordingly, when an error has occurred, state investigators typically start by trying to identify where and how the problem arose. They may want to know whether the developer, deployer, or user exercised due care or employed proper risk management. Regulators can then adjust their enforcement strategy to meet the circumstances.

For example, if investigators find a developer or deployer is not complicit in a user's wrongdoing, the response may be to give the developer or deployer the opportunity to correct the model to stop such risks from recurring. Similarly, the response to outcomes caused during model development may be to give the user the opportunity to cure any risks or injuries, particularly if not intentional. When developers, deployers or users are not at fault for erroneous outcomes, penalizing them would not achieve the same goal as penalizing bad actors. For these reasons, determining whether and how much of a fine to impose requires prosecutorial judgment, not a for-profit motive.

In this way, the job of government regulators is distinct from the role of private lawyers. Private lawyers traditionally represent individuals seeking compensation for injuries allegedly caused by unlawful conduct. In these actions, their for-profit motives more readily align with their clients' interests. And, as the Attorneys General in Massachusetts and Oregon explained last year, existing laws already provide sufficient avenues for securing these remedies.[8] State unfair and deceptive trade practices acts make it unlawful to falsely advertise the quality of the AI, supply a defective AI system, misrepresent its performance, and use audio or video content (such as deepfakes) that can deceive. Similarly, if someone is discriminated against in a job application, suffers a data privacy loss or other AI injury, they can sue under the laws designed to remedy those harms.[9]

The current legal system's distinct lanes for government and private lawyers works. A state attorney general can investigate an error and pursue fines and corrective actions as

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[8] *See* Guidance from Attorney General Ellen Rosenblum: What You Should Know About How Oregon's Laws May Affect Your Company's Use of Artificial Intelligence, Or. Dep't of Justice, Dec. 24, 2024; Attorney General Advisory on the Application of the Commonwealth's Consumer Protection, Civil Rights, and Data Privacy Laws to Artificial Intelligence, Mass. Office of the Attorney General, Apr. 16, 2024.

[9] State and federal regulators have explained how the equality (or anti-discrimination) laws under their purview guard against AI-related discrimination. *See HHS Issues New Rule to Strengthen Nondiscrimination Protections and Advance Civil Rights in Health Care*, U.S. Dep't of Health & Human Services, Apr. 26, 2024; *Attorney General Platkin and Division on Civil Rights Announce New Guidance on Algorithmic Discrimination, Creation of Civil Rights Innovation Lab*, N.J. Office of the Attorney General, Jan. 9, 2025. And private parties have also brought claims alleging discrimination based on decisions made with AI. *See, e.g.,* Order, *Mobley v. Workday, Inc.*, No. 23-cv-00770-RFL (N.D. Cal. July 12, 2024).

needed,[10] and private lawyers can help people who have suffered injuries from the alleged violation seek compensation for their losses.[11] New private rights of action are not needed for either purpose.

II. PRIVATE RIGHTS OF ACTION NOT TIED TO HARM HAVE A LONG HISTORY OF LITIGATION ABUSE AND, IF INTRODUCED HERE, WILL CREATE A NEEDLESS TOLL ON AMERICAN AI INNOVATION

When private rights of action have been authorized for law enforcement—not just giving injured people access to just compensation—the result has not been pretty. It has led to profit-seeking, lawyer-generated litigation that has little to no social benefit.

In these litigations, lawyers have largely conducted their own research to identify technical errors and recruited a few plaintiffs to front large class actions. In many cases, the overwhelming majority of the class members had no idea they were part of a lawsuit or the subject of a violation because they had no injury. Nevertheless, the lawyers filed claims on their behalf, along with thousands of other such individuals. In the 1990s, one well-known class action lawyer famously quipped that he had "the greatest practice of law in the world" because he had "no clients."[12]

In instances where plaintiffs' lawyers were able to allege minor violations that were widespread, they would threaten tens of millions of dollars of fines—even though whether the violations occurred was speculative at best, and nobody was harmed.

A. Federal Courts Are Not Supposed to Allow Private Rights of Action for Uninjured Plaintiffs, But the Lucrative Nature of the Cases Means They Keep Getting Filed

Many people in Congress and federal courts have spent the past several decades trying to get rid of victimless private rights of action, but these lawsuits have proven difficult to exterminate. For years, private lawyers have alleged violations of federal statutes as class actions. By aggregating the claims of thousands of individuals, they hoped to avoid having to prove that each individual class member was harmed. In short, they litigated the mass, not the merits, to drive settlements.

The first major episode of this type of litigation abuse occurred in the 1990s with securities litigation. Securities class action abuse became so problematic that the President signed

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[10] *See* Consumer Protection 101, Nat'l Ass'n of Attorneys General. There is also a federal analog, Section 5 of the Federal Trade Commission Act, which the Federal Trade Commission uses to police AI and privacy practices. *See* *FTC Enforcement Trends: From Straightforward Actions to Technical Allegations*, IAPP, May 2024.

[11] *See* Unfair and Deceptive Acts and Practices, Digital Library, Nat'l Consumer Law Ctr.

[12] 141 Cong. Rec. 192, S17933 at S17956-57 (Dec. 5, 1995).

the Private Securities Litigation Reform Act to stop this abuse.[13] This law required that each plaintiff in a securities case at least had to identify the statement they alleged was false or misleading and show actual loss. This fix largely worked, bringing needed sanity to securities class actions.

As a result, though, many lawyers pivoted. They began targeting other federal statutes—including the Telephone Consumer Protection Act (TCPA), Americans with Disabilities Act (ADA), and the Fair Credit Reporting Act (FCRA)—to generate paydays.[14] The ease of asserting no injury claims under these laws, and failure or inability of courts to meaningfully constrain them, has permitted a cottage industry of law firms and professional plaintiffs to emerge and engage in such abuse.[15]

For example, under the TCPA, a consumer can recover up to $1,500 per unsolicited call or text message without any limit, regardless of whether it caused any inconvenience or damage.[16] Plaintiffs' lawyers have asserted violations to pursue huge consumer class actions—even when companies are sending texts to their own customers who consented to receive them.[17] TCPA claims have increased sharply in the past few years. In 2024, 2,788 TCPA cases were filed, which represented a 67% increase from 2023 filings.[18] In the first quarter of this year, 507 TCPA class actions were filed, representing a 112% increase from the same period in 2024.[19]

With the ADA, some individuals with no injury have become professional litigants, looking for any minor violation they could find, such as a bathroom mirror an inch too high, knowing most small business owners could not afford the expense or media coverage of defending the lawsuit and would settle.[20] One self-described "tester" of ADA compliance filed more than 600 lawsuits in a five-year period against hotels over their websites—even

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[13] 1995, Pub. L. No. 104-67, H.R. 1058, 109 Stat. 737.

[14] *See, e.g.,* Stuart L. Pardau, *Good Intentions and the Road to Regulatory Hell: How the TCPA Went from Consumer Protection Statute to Litigation Nightmare*, 2018 U. Ill. J.L. Tech. & Pol'y 313 (2018).

[15] *See id.* at 322 (stating with respect to TCPA that "[w]hat was once a 'cottage industry' is now one of the most lucrative areas for the plaintiffs' bar").

[16] *See* 47 U.S.C. § 227(b)(3).

[17] *See, e.g., Wakefield v. ViSalus, Inc.*, 2020 WL 4728878 (D. Or. Aug. 14, 2020) ($925,220,000 verdict), *vacated*, 51 F.4th 1109 (9th Cir. 2022) (affirming liability; remanding for due-process analysis of damages); *Perez v. Rash Curtis & Assocs.*, 2020 WL 1904533 (N.D. Cal. Apr. 17, 2020) ($267,349,000 award), *on remand*, 2021 WL 4503314 ($75,600,000 settlement); Scott Shaffer, *A New Wave of TCPA 'Gotcha' Lawsuits Emerges*, Advertising Law Blog, May 9, 2025.

[18] *See* TCPA Class Action Filings Explode, TCPAWorld, Mar. 6, 2025.

[19] *See* The TCPA Landscape in 2025: Key Developments and Compliance Priorities, Bradley Arant Boult Cummings LLP, May 14, 2025.

[20] *See* Helia G. Hull, *Vexatious Litigants and the ADA: Strategies to Fairly Address the Need to improve Access for Individuals with Disabilities*, 26 Cornell J. of L. & Pub. Pol'y 71 (2016).

though she had no intent to stay at the hotels.[21] The U.S. Supreme Court granted review to determine if she had standing to bring such no-injury claims. However, while the case was pending, the tester withdrew her ADA cases and promised not to file additional claims—leading the Court to dismiss the case as moot.[22]

On other occasions, the Supreme Court has been quite clear that Article III of the Constitution, which establishes the federal court's jurisdiction, confers standing to a plaintiff to bring a lawsuit only if he or she has sustained a "concrete and particularized" injury from the misconduct alleged.[23] The mere fact that a statutory violation may have occurred, that the alleged violation may have increased some *risk* of harm, or that the statute included fines for enforcement is not enough. Private actions are supposed to seek redress of actual injuries to access the federal courts.

In 2016, the Supreme Court addressed this scenario with direct parallels to AI. That case, *Spokeo, Inc. v. Robins*, involved alleged violations of a federal privacy statute that included penalties as an enforcement mechanism.[24] Spokeo, an internet company, collected data on people from across the Internet and displayed results on its website. The plaintiff alleged that some of the data on him was wrong, which would be a violation of the FCRA. However, he alleged no injury. He also sued for all people whose profiles had similar errors, seeking per-incident fines that would amount to hundreds of millions of dollars. The Supreme Court held that the case should be dismissed for lack of Article III standing. It explained that a "bare procedural violation[] divorced from any concrete harm" does not give someone the right to sue.[25]

Here is how the Supreme Court explained this concept in *TransUnion v. Ramirez*,[26] where the Supreme Court explained that even if someone has a qualifying injury, they cannot file a class action for those who do not:

> Suppose that a woman drives home from work [near] a reckless driver who is dangerously swerving across lanes. The reckless driver has exposed the woman to a risk of future harm, but the risk does not materialize and the woman makes it homes safely . . . [T]hat would ordinarily be cause for celebration, not a lawsuit. But if the reckless driver crashes into the woman's car, the situation would be different and (assuming a cause of action) the woman could sue the driver for damages.[27]

Requiring people to have real-world harms to sue also safeguards the integrity of the courts. As the Supreme Court has explained time and again, this rule protects the judiciary

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[21] *See Acheson Hotels, LLC v. Laufer*, 601 U.S. 1 (2023).

[22] *See id.* at 22.

[23] *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560-61 (1992).

[24] *Spokeo, Inc. v. Robins,* 578 U.S. 330 (2016).

[25] *Id*. at 341.

[26] *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 419-20 (2021).

[27] *Id*. at 436-37.

and defendants from prolonged, expensive litigation, along with what the Supreme Court has termed *in terrorem* settlements over cases that are theoretical in nature.[28] Often in these cases, defendants "feel it economically prudent to settle and to abandon a meritorious defense,"[29] allowing the lawyers to "extort settlements from innocent companies."[30] Justice Ginsburg observed that this risk is heightened when "a class action poses the risk of massive liability unmoored to actual injury."[31]

Despite these and other Supreme Court rulings, no-injury class actions keep getting filed because of the potential for a big payout.[32] Plaintiff lawyers have been creative in how they define injury in an effort to justify their lawsuits. Some courts still allow these lawsuits and liberally certify them as class actions. Indeed, two federal circuits have held that, despite the Supreme Court's rulings above, merely receiving a qualifying call or text is injury enough to bring a TCPA claim.[33] When facing these lawsuits, defendants often do not have the temperament or resources to fight the cases through trial and appellate process—which can take years and millions of dollars—in hopes of quashing the no-injury lawsuits. They have to settle, which in turn feeds the next litigation.

B. States with Private Rights of Action for Uninjured Plaintiffs Foster Litigation Abuse

In the U.S., there is even less of a backstop preventing injury litigation. Access to state courts is not limited by the U.S. Constitution's injury requirement, allowing lawyer-generated actions to flourish where allowed—including when similar claims are barred at the federal level.

Take consumer protection acts. When Congress established the Federal Trade Commission (FTC) to police deceptive sales practices, it rejected the use of private rights of action. Members of Congress appreciated that these lawsuits would be driven by attorneys who made their vocation "hunting up and working such suits."[34] So, Congress focused on government enforcement, giving the FTC the authority to pursue injunctions to stop misleading conduct and impose financial penalties only when a business

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[28] *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting the "risk of 'in terrorem' settlements that class actions entail").

[29] *Coopers & Lybrand v. Livesay* 437 U.S. 463, 476 (1978); *accord Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975).

[30] *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 149 (2008).

[31] *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co*., 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting).

[32] *See* Philip S. Goldberg & Andrew J. Trask, *No-Injury and Piggyback Class Actions: When Product-Defect Class Actions Do Not Benefit Consumers*, 19 U. Mass. L. Rev. 181, 183 (2024).

[33] *Melito v. Experian Mktg. Solutions, Inc.*, No. 17-3277-cv(L), 2019 WL 1906087, at *5 (2nd Cir. Apr. 30 2019).

[34] 51 Cong. Rec. 13,113, at 13,120 (1914) (statement of Sen. Stone).

disobeyed such an order. Private lawsuits seeking statutory penalties without injury are not permitted under federal law.

By contrast, most states included private rights of action in their consumer protection acts. Initially, the intention was often good: to encourage consumers to seek recompense for small, *actual* losses from deceptive conduct. At the same time, states authorized their departments of justice to pursue fines, for example $500 every time an entity engaged in a misleading act, even if nobody was injured. This division of responsibility made sense: law enforcement is for governments, suing for injuries is for private litigation. However, this line became blurred in some instances, as private lawyers were given the ability to seek per-incident fines, irrespective of any harm to their clients.

California became the epicenter for such spurious lawsuits in the 1990s. Private lawyers there realized they could allege insignificant but widespread violations. They would identify every advertisement, mailer or other place where the alleged misrepresentation appeared, and then multiply that number by the per-incident fine. They demanded *substantial* amounts of money—untethered from any actual harms. Then-California Supreme Court Justice Janice Brown explained that some lawyers filed these claims based on mere speculation that something was deceptive.[35] The premise was that merely filing claims with high potential penalties would generate settlements.

For example, lawyers sued auto dealers for using the abbreviation APR instead of spelling out "Annual Percentage Rate,"[36] travel agents for not posting their license numbers on websites, and nail salons that used the same nail polish bottle for multiple customers.[37] In one lawsuit, Subway was sued for tens of millions of dollars in per-incident fines because its "foot-long" subs sometimes came out of the oven at 11 ½ inches.[38] Outrage from these lawsuits led the public to pass Proposition 64 in 2004, which reduced the potential for litigation abuse by requiring injury in fact and the loss of money or property to bring a state consumer protection act claim.

Today, Illinois's Biometric Information Privacy Act (BIPA) is the poster child for no-injury lawsuit abuse by private lawyers seeking statutory penalties. As in California, this outcome was not intended. The Illinois General Assembly provided a private right of action to only those persons "aggrieved" by a BIPA violation.[39] The understanding at the time was that to be aggrieved, the violation must have caused them harm. In those situations, the aggrieved individuals could seek $1,000 fines *per violation* when a company did not provide proper disclosures when using biometric data. It did not matter

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[35] *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1106, 1107-08 (1998) (Brown, J., dissenting).

[36] *See* John Wildermuth, *Measure Would Limit Public Interest Suits*, S.F. Chron., May 31, 2004, at B1; Walter Olson, *Stop the Shakedown*, Wall St. J., Oct. 29, 2004, at A14.

[37] *See* Amanda Bronstad, *Nail Biter*, L.A. Bus. J., Dec. 16, 2002, at 12.

[38] *See* Nadia Arumugam, *Why Lawsuits Over Subway's Short Footlong Sandwiches Are Baloney*, Forbes, Jan. 27, 2013.

[39] *See* 740 Ill. Comp. Stat. Ann. 14/20(a).

if the plaintiffs fully acknowledged, the violation was not intentional. The BIPA world changed when the Illinois Supreme Court held in 2019 that "aggrieved" meant just denial of a BIPA statutory right.[40] No injury? No problem.

This ruling led to an explosion of no-injury lawsuits alleging inadvertent errors that escalated into the millions—and billions—of dollars. In the year before this ruling, there were 9 BIPA cases in Illinois. In the year after, there were 134, with more than 200 the next year.[41] These cases became large quickly, posing existential threats to some companies. In one notorious case, the fast-food restaurant White Castle faced *$17 billion* in potential per-incident liability when lawyers filed a class action alleging it provided 9,500 employees in Illinois inadequate disclosures every day their fingerprints were scanned on the job.[42] Companies in these situations often have no choice but to settle—and favorably for the lawyers. A study of BIPA class actions found that average payouts to plaintiffs were merely $506, compared to $11.5 million for the lawyers.[43]

Finally, private rights of action untethered to actual harm can lead to duplicative "piggy-back" class actions—which can happen at the federal or state level. In these cases, it may be true that a company created a risk of harm, but it fixed the issue—either on its own accord or in conjunction with federal or state regulators through a recall or other customer satisfaction program. These lawsuits provide no real-world benefits because the plaintiffs never had an injury, the injury was remedied, or the risks could be remedied by partaking in the customer-satisfaction program.[44] The private rights of actions merely duplicate—or worse, interfere with—those remedies.

Private lawsuits following these models would impose major costs on American AI companies—without any benefit to consumers, employees and other members of the public. The result would impede AI innovation, reduce AI options where the litigation is allowed, and make it harder for American AI companies to compete with foreign companies not subject to this litigation abuse.

III. BALANCING AI INNOVATION WITH PROTECTING CONSUMERS FROM AI ERRORS REQUIRES PROSECUTORIAL JUDGMENT OF GOVERNMENT ENFORCEMENT, NOT FOR-PROFIT LAWSUITS

To avoid these abusive private lawsuits and potential adverse consequences for the American AI marketplace, states should provide government lawyers the exclusive authority to enforce any AI regulatory regime the government enacts—again, to the extent

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[40] *Rosenbach v. Six Flags Entm't Corp*., 129 N.E.3d 1197, 1206 (Ill. 2019).

[41] *See* Kaitlyn Harger, *Who Benefits from BIPA?: An Analysis of Cases Brought Under Illinois' State Biometric Law*, Chamber of Progress (Apr. 2023).

[42] *See Cothron v. White Castle System, Inc.*, 216 N.E. 3d 918, 929 (Ill. 2023).

[43] *See* Harger, *supra*, at 1, 20.

[44] *See* Goldberg & Trask, *supra*, at 198-99.

any such new regulations are needed. Although there have been questionable state attorney general actions, overall, government enforcement tends to be less speculative and entrepreneurial than private lawsuits. Regulators typically prioritize reaching outcomes that balance fines, deterrence, consumer protection, and innovation so that they can advance the best interests of their citizenry.[45]

In part, this is because states typically start with an investigation to assess whether the company is out of compliance, whereas private lawyers sue first and ask questions later. With AI, as discussed above, determining compliance may not be straightforward. It may take considerable resources and analyses to identify where an AI error occurred, whether the process followed adhered to the applicable standards of care, and which remedies are most appropriate. When needed, the state can sign a consent order with the company to cure the risks caused by the AI. The order can also clarify the law, provide notice to the industry of what behaviors are expected, and emphasize the state's public policy priorities for AI to facilitate broader compliance.

Take, for example, allegations of discrimination in an AI-generated insurance contract. The state attorney general's office can identify the process the company followed to generate the contract, whether that process complied with the law, provide guidance on how the processes should be refined, and clarify standards of care learned from that episode to protect against similar discriminatory outcomes. If the regulator finds the company engaged in misconduct, the regulator can impose penalties. But, the use of AI should not lead to financial penalties and other relief absent a showing that the AI was used maliciously and caused specific, identifiable harm.

This model has proven successful with data privacy.[46] Some states have pilot programs where government regulators hold pre-lawsuit consultations with companies after an investigation so they can cure the violation, thereby giving consumers immediate access to redress at no cost to them. In California, Attorney General Bonta stated that his office brought companies into compliance with the California Consumer Privacy Act in 75 percent of the cases where it issued cure notices.[47] General Bonta also said this process helped it distinguish good-faith actors who cooperated in identifying and fixing violations from bad-faith actors who needed penalties. Most companies were operating in good

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[45] This approach tracks how the United States has approached privacy at the federal level for sensitive data, as neither the Health Insurance Portability and Accountability Act (medical data) nor the Gramm-Leach Bliley Act (financial data) include private rights of action. *See* GLBA / HIPAA Privacy Comparison Chart, Nat'l Ass'n of Ins. Comm'rs (2020).

[46] For example, Texas has filed a lawsuit alleging violations of the state's privacy law, while California regulators have focused on negotiated settlements to redress harms. *See Attorney General Ken Paxton Sues Allstate and Arity for Unlawfully Collecting, Using, and Selling Over 45 Million Americans' Driving Data to Insurance Companies*, Tex. Office of the Attorney General, Jan. 13, 2025; Stipulated Final Order, In the Matter of Am. Honda Motor Co., Inc., No. ENF23-V-HO-2 (Cal. Privacy Prot. Agency, Feb. 12, 2025).

[47] *See* Joe Duball, *California Attorney General Offers CCPA Enforcement Update, Launches Reporting Tool*, IAPP, July 20, 2021.

faith, so the government was "not seeing resistance, stiff-arming or foot-dragging" when it came to these curative actions.[48] This approach makes sense.

In Colorado, the legislature followed this approach in its new AI law. The Attorney General can request information from companies to assess compliance, and companies have a rebuttable presumption against being penalized if they operated within the regulatory framework.[49] Similarly, in Utah, companies that voluntarily submit their AI information to the newly-created Office of Artificial Intelligence Policy are eligible for "regulatory mitigation."[50] These laws recognize that a company ought not be punished when not engaging in wrongdoing. However, they do not go far enough. Complying with the law should provide a complete safe harbor—not just a rebuttable presumption that can be taken away—if the goal is to facilitate compliance and prevent speculative litigation in this growing and critical field.

These outcomes are far more efficient and effective than for-profit litigation. Government actions are faster, can limit punishment to bad actors, and can lead to better consumer remedies.

IV. STATES SHOULD CONTINUE REJECTING PRIVATE RIGHTS OF ACTION NOT TIED TO ACTUAL INJURIES

The good news is that state policymakers have largely tried to balance innovation with consumer protection in regulating AI. As California Governor Newsom said in vetoing California's AI legislation, "[a]daptability is critical as we race to regulate a technology still in its infancy."[51] States should gravitate around common principles so developers, deployers, and users can engage with AI across the country in a consistent manner.

In 2025, state legislatures saw more than 1,000 AI-related bills, each with different areas of scope, definitions, and enforcement mechanisms. Significant care is necessary to ensure that effective and efficient regulatory approaches are adopted and at the same time do not undercut the adoption of innovative technologies. That also is the goal of the Executive Order on Removing Barriers to American Leadership in Artificial Intelligence,[52] which provides that a state's regulatory regime will be considered when awarding AI-related funding.

It should be clear at this point that introducing private rights of action in state legislation should be a non-starter. Indeed, when state bills seeking to regulate AI have included

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[48] *See id.* (quoting Attorney General Bonta).

[49] The Colorado Attorney General can request, among other details, any impact assessments or related documentation. *See* Colo Rev. Stat. § 6-1-1703(9).

[50] Utah Code Ann. § 13-72-302.

[51] Veto Message on S.B. 1047, Office of Cal. Gov. Newsom, Sept. 29, 2024.

[52] President Donald J. Trump, Removing Barriers to American Leadership in Artificial Intelligence, THE WHITE HOUSE (Jan. 23, 2025), Jan. 23, 2025.

private rights of action, they have failed. Numerous states have debated legislation that included a private right of action against companies that used AI in a manner resulting in discrimination, but ultimately, they were not adopted.[53] For example, when an AI bill was introduced in Vermont's legislature, the first action on the bill was to remove the private right of action.[54]

The Vermont proposal came a year after the state's legislature considered a private right of action in a data privacy law. The legislature passed a limited right of action that would start in 2027, expire in 2029, and apply only to data brokers and companies processing data on at least 100,000 residents. The governor vetoed the bill, saying the private right of action would make Vermont "more hostile than any other state to many businesses," (2) will "negatively impact mid-sized employers," and (3) "is generating significant fear and concern among many small businesses."[55]

It is also important for legislatures to expressly state that private rights of action are not permitted to enforce any new AI regulation—only to seek recompense for an individual person's wrongfully caused harm under existing laws that already provide such rights. Affirmative statements are needed because, as in Illinois or with recent federal TCPA rulings, courts can *imply* the existence of a private right of action when a statute is silent or rule that the violation is injury enough.[56] The "far better course," the U.S. Supreme Court stated years ago, is for legislatures to specify when it "intends private litigants to have a cause of action to support their statutory rights."[57] Moreover, even if businesses eventually win on this critical point, years may have passed, and the economic damage is done.

Finally, state Attorneys General should join their colleagues in Massachusetts and Oregon in clarifying that when a person is injured by AI, no new ways to sue are needed: they can pursue the same actions and civil remedies as if the harms were from solely human-orchestrated actions. Discrimination, fraud, and misrepresentation are already actionable. An additional concern is that allowing no-injury class actions could unintentionally bar an actually injured person from bringing a lawsuit. If the class action settlement incorporated his or her claim and offered a modest payout, the settlement may have extinguished his or her ability to recover for the actual harms.

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[53] *See, e.g.*, H.B. 3835, Okla. Reg. Sess. (2024); H.B. 7521, R.I. Reg. Sess. (2024).

[54] *See* S. 71, Vt. Reg. Sess. (2025).

[55] Veto Message on H. 121, Office of Vt. Gov. Scott, June 13, 2024.

[56] *See, e.g.*, *Findling v. Group Health Plan, Inc.*, 998 N.W.2d 1 (Minn. 2024) (finding Minnesota's Private Attorney General statute provides an implied private right of action for individuals to compel their health care providers to produce medical records as required by the Minnesota Health Records Act).

[57] *Cannon v. Univ. of Chicago*, 441 U.S. 667, 717 (1979).

CONCLUSION

The need for American leadership in the AI revolution is important, and the stakes are high. With AI, allowing private rights of action untethered to actual injuries can irreparably tilt the much-needed public policy balance between innovation and enforcement out of kilter—and for no societal benefit. The risk is that we drain resources and limit the development of American AI companies, and that consumers are driven to less expensive and less safe foreign AI systems.

Rather, the goal of state legislation should be to create an enforcement method that facilitates compliance, allows companies to cure technical violations, and gives states the authority to pursue bad actors. Other laws already provide avenues for people with concrete injuries to be compensated appropriately. Providing private rights of action that exceed such a compensatory purpose will become fodder for class action abuse and, therefore, will hinder, not advance, these vital goals.

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