



As advocates for Americans seeking fair and equal access to justice and accountability, the American Association for Justice (AAJ) is honored to join Senate Majority Leader Schumer, as well as Senators Heinrich, Rounds, and Young in this critically important conversation to discuss the future of Artificial Intelligence (AI).

AI will undoubtedly play a pivotal role in the daily lives of all Americans. We already depend on AI technologies to make more informed decisions regarding our health, finances, and workplaces. As our dependence on AI grows, we must work to ensure that these systems are safe by creating legislative, regulatory, and accountability regimes. Without public accountability, there is no safety.

Big Tech has violated the public trust, and as many of the same behemoths seek to win the lead position in AI, we can't make the same mistake again of exempting AI from the accountability mechanisms that hold every other industry in check.

Before going any further, AAJ must also recognize that AI holds the promise of delivering significant efficiencies for so many industries, including for members of the legal community. For example, in the future, when a corporate bad actor seeks to make a case go away by burying a victim in discovery and document production, AI could play a crucial role in culling through materials more quickly, and in so doing, help that victim to level the playing field when up against a much more powerful entity.

AI is still a very new and quickly evolving technology, and reports of its failures have already led to a public discussion of when and how AI companies should be held legally accountable in the event of major harms such as data breaches, medical misdiagnoses, racial and gender discrimination, and sexual harassment and exploitation through the creation of deepfakes. The potential for harm is enormous and while public regulators should play a crucial role in setting standards to avoid these harms, protecting and preserving the right of Americans to file cases directly against AI companies when AI fails is essential to incentivizing AI companies to act in the best interests of the American public.

Currently, an American's right to seek accountability in the courts, though limited in some unfortunate ways, represents a meaningful check against abuses by Big Tech. Big Tech accepts fines from agencies like the FTC as the cost of doing business. But just like tobacco, opioids, massive banking fraud, and countless other harms perpetrated by law-breaking corporations over decades—change only comes when lawsuits, or the potential to file a lawsuit, acts as a powerful incentive for industry to alter its practices.

This is a critical moment for AI because it is a relatively new technology. Policymakers have a critical opportunity to create structures now that could help incentivize AI companies to do the right thing from the start before tragedies caused by widespread and systemic corporate

misconduct cause harm to so many Americans. The fact is, when corporations know that Americans can file a case against them in a public court of law, even if that right is not yet utilized, industry is powerfully incentivized to create safe and transparent systems from the start, before the need for a lawsuit ever arises.

Recent examples highlight the need for AI accountability, including the case of the human resource technology company, Workday. According to recent reports, Workday has been accused of age, racial, and disability discrimination. Job applicants who were repeatedly denied employment have alleged that the company's artificial intelligence systems and screening tools "rely on algorithms and inputs created by humans who often have built-in motivations, conscious and unconscious, to discriminate."¹

Similarly, earlier this year, it was widely reported that a bug in Chat GPT's AI source code reportedly resulted in a breach of sensitive data, exposing the names, email addresses, and credit card numbers of some of their subscribers. These reports indicated that Chat GPT relied on OpenAI to store user information and chat history.²

And just last month in San Francisco, news reports told the horrifically tragic story of an automobile that struck a woman in a hit-and-run accident, threw her into the path of a driverless vehicle, which then also ran over her. According to reports, the driverless vehicle braked sharply, remained in position, and then parked on top of her as she screamed in agony.³ We can only expect more of these senseless and avoidable horrors to occur if we do not act quickly and intentionally to ensure that Americans have the right to seek justice and public accountability when they suffer unnecessary and devastating harm.

Since 1946, AAJ has advocated for Americans victimized by unfair, deceptive, and abusive products and practices. We welcome innovation and we are excited to see what the future of AI holds, but we know that it cannot thrive at the expense of Americans' access to justice and public accountability. Protecting the right of Americans to seek accountability for harmful AI products furthers the American bedrock principles of privacy and autonomy in the face of new technology. AAJ is honored to participate in this historic forum and share the following recommendations on issues to be addressed in meaningful federal AI legislation.

Protect the Right of Americans to Hold AI Developers and Deployers Accountable

While federal oversight is important, it is limited by resources and dependent upon the Administration that controls it. Federal oversight must work hand in hand with citizen enforcement mechanisms, so individuals are empowered to hold AI developers and deployers accountable and are not forced to wait for government action to address any limitations. Americans must be empowered to obtain justice directly, without being dependent on overburdened regulators or prosecutors to attempt to obtain justice for them. Legislation must also clearly state that violations of individual rights, including inadequate privacy practices, poor

¹ <https://www.kron4.com/news/bay-area/workday-sued-on-suspicion-of-discrimination-in-hiring-practices/>

² <https://news.trendmicro.com/2023/05/13/openai-chatgpt-data-breach/>

³ <https://www.newsweek.com/driverless-car-robotaxi-hits-traps-woman-san-francisco-1831779>

data security standards, or data breaches are tangible harms that give rise to a citizen's ability to enforce their rights directly when they are hurt by AI deployers and developers.

Harms Must be Clearly Defined

Congress should specifically define actionable harms. Too often, victims of AI defects find themselves with hardly any guidance on which entity bears responsibility for the harm caused. Also, Big Tech has historically hidden behind the argument that certain harms, such as privacy violations, do not constitute legally actionable harm. Clearly Big Tech has never considered the practical reality of Americans who've had their personal financial information stolen or seen their child sexually exploited by the use of deepfakes. These harms are real to the American public and Congress must say so. Meaningful legislation should define the types of fundamental harms Congress is intending to address including data breaches, discrimination, personal injury, and sexual exploitation.

Action by Congress should also carefully contemplate how to address a certain reality: harms that we have traditionally seen perpetrated by human actors will, in the future, occur by the actions of AI systems. And in the future, a developer of an AI may not be the commercial deployer of any AI system's application. AI licensors and licensees will likely enter into contracts that create a legally complicated web of liabilities passed back and forth, which will be very difficult for victims to decipher.

In the context of autonomous vehicles, we have seen efforts by Big Tech to argue that the many decades of precedent related to automobile liability should be thrown out the window and every crash should become a product liability case against the technology itself. This would hurt victims by creating drastically higher barriers to justice.

In the future, if a worker gets fired due to a biased decision of an AI human resources application, or if evidence arises showing that AI banking software systematically denies credit to a certain class of consumers unfairly, or an AI medical application misses a clearly obvious diagnosis, the businesses that chose to turn these decisions over to AI should not be able to evade responsibility to victims. Likewise, legal responsibility should also fall on any company that develops or trains an AI system improperly, such that it causes harm to an individual.

Preserving State Laws

Congress must protect state laws, including state statutes and state common law, when creating federal legislation. State remedies and private rights of action must be preserved as they are the primary ways Big Tech is genuinely incentivized to follow the law. States like California and Illinois have led the way in enacting laws that regulate the collection, use, and protection of personal and biometric data. Several other states have followed suit with privacy protections tailored to the needs of their citizens, and more bipartisan laws are being introduced every legislative session. These laws provide meaningful privacy protections and should not be displaced by a federal bill. State common law and state privacy laws continue to serve as the crucial laboratories of democracy, and while not as direct as statutes with damages provisions,

state common law has evolved to meet present day challenges. Congress must not inhibit states' rights, and hindering state efforts to take on Big Tech at this juncture would be short-sighted.

Ban Forced Arbitration and Class Action Waivers

Forced arbitration strips individuals of their right to hold corporations accountable in court. Arbitration is “forced” when individuals must surrender their fundamental right to decide how to exercise their rights, whether that is in a public court or in arbitration, before any harm occurs. Forced arbitration provisions are slipped into almost all technology-based company’s take-it-or-leave-it terms and conditions, which are intentionally too burdensome for most Americans to read or comprehend. These predatory practices essentially serve as a type of blanket corporate immunity that allows Big Tech to avoid accountability. Invariably, corporations choose arbitrators who favor their interests, making the process inherently biased against victims. In fact, Americans are more likely to be struck by lightning, than to prevail against forced arbitration against a corporation.

Just as Congress did last year by restoring the rights of sexual harassment and assault survivors to decide the method by which they want to seek accountability from perpetrators, legislation in the AI space must similarly address forced arbitration so that Americans’ right to hold entities accountable when they are hurt is not only theoretical but is a right that can be actually realized.

Prohibit Section 230 Immunity for AI

For nearly 30 years Section 230 immunity has allowed Big Tech to absolve itself of responsibility for massive and systemic harm. This kind of government overreach must not be granted to AI. Section 230 continues to stand in the way of millions of Americans’ pursuit of justice when they’re hurt by Big Tech. Meaningful AI legislation must prioritize the rights and safety of the American people over the corporate profits of Big Tech. We strongly support legislation authored by Senators Hawley and Blumenthal to make clear that AI does not get this blanket immunity.

Conclusion

We strongly support the mission and charge of the AI Insight Forum to create meaningful, innovative, and bipartisan strategies to address the future of AI. We look forward to a continued and open dialogue on our shared goals of protecting American rights and ensuring corporate accountability. Congress must act now to pass legislation that provides every American with direct access to civil justice when they are hurt by AI. It is our honor to share AAJ’s guiding principles on how to make that legislation a reality.