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**MEMORANDUM: STRENGTHENING THE SENATE AV START ACT  
(S. 1885) AND HOUSE SELF DRIVE ACT (H.R. 3388)**

*Both bills need stronger liability and safety protections for consumers*

**Introduction**

Both the House and Senate have taken steps to address the nascent but quickly-developing autonomous vehicle industry. On September 6, 2017, the House passed H.R. 3388, the SELF DRIVE Act. On November 28, 2017, the Senate Committee on Commerce, Science, and Transportation reported out the AV START Act, S. 1885. Recently, there have been some major developments regarding autonomous vehicles that shed light on deficiencies in both bills that we hope the House and Senate will address.

**Summary**

Autonomous vehicle (AV) technology is both promising and problematic. It has great potential but it is also new, complicated and dangerous. While we are by no means AV experts, we share a number of concerns raised by those who are, including several U.S. Senators,<sup>1</sup> many safety organizations and other authorities in the field.<sup>2</sup> This memo addresses three specific areas of concern: liability and forced arbitration; state authority and transparency; and cybersecurity.

In the area of liability, we commend the House and Senate's intent to preserve state tort law and civil remedies. However, the bills' failure to ban the use of forced arbitration clauses threatens to completely undermine Congress' intent regarding liability. The legislation's failure to mandate stricter transparency and data collection also raises both safety and liability concerns. And the bills do not properly ensure the power of state and local governments to maintain control over traffic safety and other local concerns. Finally, the legislation's "hands-off" approach to

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<sup>1</sup> [https://www.feinstein.senate.gov/public/\\_cache/files/f/1/f168c367-bec0-48cc-9220-6a13cbd9dd27/D00752809320841613B5F03BB8517FC2.03.14.2018-av-start-act-letter.pdf](https://www.feinstein.senate.gov/public/_cache/files/f/1/f168c367-bec0-48cc-9220-6a13cbd9dd27/D00752809320841613B5F03BB8517FC2.03.14.2018-av-start-act-letter.pdf);  
<https://www.blumenthal.senate.gov/newsroom/press/release/ten-senators-seek-information-from-autonomous-vehicle-manufacturers-on-their-use-of-forced-arbitration-clauses>

<sup>2</sup> <http://saferoads.org/2018/03/05/letter-to-senate-leaders-on-driverless-car-bill/>;  
<http://www.consumerwatchdog.org/sites/default/files/2018-02/LtrSenate020918.pdf>;  
<https://www.autosafety.org/wp-content/uploads/2018/03/Consumer-group-letter-regarding-protection-from-forced-arbitration-in-sales-of-AVs.pdf>; <http://consumersunion.org/wp-content/uploads/2017/11/Letter-to-Senate-on-AV-bill-11-14-17-FINAL.pdf>

cybersecurity is extremely problematic given the hacking and malware risks, particularly in these early stages as companies rush to be the first on the road with such cars.

Auto companies have a long history of cutting safety corners to save money, and the companies involved in this technology show no signs of operating any differently. As Uber’s former autonomous vehicle head, Anthony Levandowski, put it in a series of 2016 texts to former Uber CEO Travis Kalanick: “I just see this as a race and we need to win, second place is first loser,” and “We do need to think through the strategy to take all the shortcuts we can find.”<sup>3</sup> That is why it is urgent that Congress strengthens and improves these bills.

### **Liability and Arbitration**

We commend both the House and Senate bills for explicitly preserving state civil remedies for victims of AV crashes. However, the House language (“compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law”) should be clarified to reflect the Senate’s more complete definition of protected state claims (based on “common law or under a State statute authorizing a civil remedy for damages or other monetary relief).

As important as it is to establish a strong safety regime for AV cars, it is also true that a regulated AV vehicle will still present many risks to the public, particularly in light of new dangers introduced by this new and imperfect technology and as competing developers dangerously race to be first on the road. Right now, there are differences in state laws regarding responsibility for failures when they occur. But these laws will continue to evolve as states decide what is best for their own drivers, roadways and general population. Indeed, providing a civil remedy in the event of a car accident, injury or fatality is one of the most basic and traditional of state functions. As the conservative House Liberty Caucus wrote last year in the context of another tort bill, this is “an essential power reserved to the states.”<sup>4</sup>

In addition, there are clear safety reasons why state civil remedies must be protected. Besides the specific AV concerns raised by the aforementioned Uber texts, we know that auto companies have a long and sordid history of cutting safety corners and weighing the potential costs of liability to determine whether a dangerous vehicle should be redesigned or removed from the market, or an unsafe practice should be stopped.<sup>5</sup> The recent GM ignition switch scandal – in which GM concealed information about a lethal defect for years until it was uncovered in a civil lawsuit, and misled the bankruptcy court about it – showed what lengths car companies will go

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<sup>3</sup> <http://www.consumerwatchdog.org/sites/default/files/2018-03/NHTSAcomments032018.pdf>

<sup>4</sup> <http://thehill.com/blogs/floor-action/house/339947-house-votes-to-limit-medical-malpractice-lawsuits>;  
<https://www.facebook.com/libertycaucus/photos/a.519545221443743.1073741825.241021382629463/1429927993738790/?type=3&permPage=1>

<sup>5</sup> This “cost/benefit” process was first brought to public attention in the famous 1981 Ford Pinto exploding gas tank case, where Ford knew its gas tank design was flawed but decided not to make necessary design changes, instead finding it cheaper to pay liability claims.  
[http://wadsworth.com/philosophy\\_d/templates/student\\_resources/0534605796\\_harris/cases/Cases/case67.htm](http://wadsworth.com/philosophy_d/templates/student_resources/0534605796_harris/cases/Cases/case67.htm). GM did something similar when it determined that paying liability claims for “burned deaths” caused by fuel tank design defects was cheaper than making their cars safe. <http://www.cnn.com/US/9909/10/ivey.memo/>

in order to avoid accountability and compensating customers injured or killed in crashes.<sup>6</sup> It is critical that state liability laws be preserved and we fully support Congress' intent to do so.

That said, forced arbitration could undermine this entire liability structure no matter how expressly the law attempts to preserve states' rights. Companies like Uber currently use such clauses to keep many kinds of disputes out of court.<sup>7</sup> Arbitration means that disputes are resolved in secretive, rigged proceedings that the company controls, which keeps information hidden from regulators and the public.<sup>8</sup> As long as forced arbitration clauses are considered legal, an at-fault company can decide whether to compel their use in an individual case. In the recent Uber autonomous car crash where an innocent pedestrian was killed, Uber quickly and confidentially settled with the family before a lawsuit was filed.<sup>9</sup> But we do not know how Uber might have responded to an actual lawsuit.

We support the many Senators who are now trying to determine whether Uber and other manufacturers intend to use forced arbitration clauses in autonomous vehicle contracts and the intended scope of such clauses.<sup>10</sup> However, we believe the bill must expressly ban such clauses in autonomous car disputes, particularly when those disputes involve auto accidents, injuries or deaths. That is why we strongly support Senator Blumenthal's amendment to ban forced (pre-dispute) arbitration clauses to resolve claims, to wit:

If a contract involving the manufacture, sale, lease, or use of a highly automated vehicle provides for the use of arbitration to resolve a dispute, arbitration may be used to resolve a dispute only if, after the controversy arises, both parties consent in writing to use arbitration to resolve the dispute.

Arbitration voluntarily agreed to by both parties after the dispute arises may be perfectly appropriate to resolve a case involving an automated car. However, the decision to forgo a judge or jury must be voluntary and not forced onto harmed individuals by companies who are at fault.

### **Regulatory Preemption and Transparency**

The preemption language in both the House (Sec. 3) and Senate (Sec. 3) bills needs significant improvement. We share the concerns expressed by several Senators that "the bill indefinitely preempts state and local safety regulations even if federal safety standards are never developed."

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<sup>6</sup> <https://apnews.com/111b3e8bae5945d09caf775781538234/appeals-court-opens-door-more-gm-ignition-switch-lawsuits>

<sup>7</sup> <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-uber-arbitration-20170821-story.html>;  
<https://www.epi.org/blog/uber-and-arbitration-a-lethal-combination/>

<sup>8</sup> For more information, see <https://centerjd.org/content/faq-vanishing-rights-and-remedies-under-forced-arbitration>

<sup>9</sup> <https://www.reuters.com/article/us-autos-selfdriving-uber-settlement/uber-avoids-legal-battle-with-family-of-autonomous-vehicle-victim-idUSKBN1H5092>

<sup>10</sup> <https://www.blumenthal.senate.gov/newsroom/press/release/ten-senators-seek-information-from-autonomous-vehicle-manufacturers-on-their-use-of-forced-arbitration-clauses>

And more specifically, “The bill must also make clear that it will not interfere with traffic laws and other traditional state or local responsibilities, which are essential to public safety.”<sup>11</sup>

As students at a New York City law school, we are fully aware of the risks and dangers presented by this technology as it interacts with motorists and pedestrians in a dense, heavily-populated city. Local authorities must have wide leeway to determine what safety rules make sense here and in every local jurisdiction in the nation, including traffic and licensing.

Another area that needs strengthening is data collection and transparency. The legislation mentions data in a few sections (Senate Secs. 5, 12, 13; House Secs. 4, 6, 8) but none provides what California is currently doing, *i.e.*, collecting and releasing crucial data about crashes to the public.<sup>12</sup> Currently, 20 companies provide data to California’s Department of Motor Vehicles, and this publicly-available data has been crucial for understanding the technology’s impact on drivers, roadways and the general population. We know from these reports, for example, that currently these cars “cannot go more than 5,596 miles in the best-case scenario without a human driver taking over the wheel. In most cases, the vehicles cannot travel more than a few hundred miles without needing human intervention. The recent fatal incident on March 18, 2018, that took the life of an innocent pedestrian confirms the information revealed in this data.”<sup>13</sup>

The bills should be amended to ensure that state data collection laws, such as California’s, are not preempted. In addition, the legislation should provide that this data is collected nationally and released publicly and not only during the testing phase, but also once vehicles are widely deployed.<sup>14</sup> Consumers Union also recommends that the bill be changed to require NHTSA to “establish a publicly available database with basic, but essential, data on all AVs. Such a database will give consumers relevant vehicle information on the level of automation, exemptions from safety standards, and the operational design domain, including limitations and capabilities, with which the AV is equipped. . . . This data will also facilitate evaluation and research of the safety performance of AVs by NHTSA and independent research groups.”<sup>15</sup>

Whatever data is collected should be available to officials at all levels – federal, state and local. Detailed data will also be critical to parties after crashes occur, so it is clear who or what company should be held accountable. Otherwise, liability will be impossible to determine, victims will be unable to be compensated and the deterrent function of the civil justice system will fail to promote safety.

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<sup>11</sup> [https://www.feinstein.senate.gov/public/\\_cache/files/f/1/f168c367-bec0-48cc-9220-6a13cbd9dd27/D00752809320841613B5F03BB8517FC2.03.14.2018-av-start-act-letter.pdf](https://www.feinstein.senate.gov/public/_cache/files/f/1/f168c367-bec0-48cc-9220-6a13cbd9dd27/D00752809320841613B5F03BB8517FC2.03.14.2018-av-start-act-letter.pdf)

<sup>12</sup> See, e.g., <http://www.consumerwatchdog.org/sites/default/files/2018-03/NHTSAcomments032018.pdf>. California law requires that if any accident occurs in California during the testing conditions the manufacturer has 10 business days to file a report with the California Department of Motor Vehicles (CDMV). California redacts any information that is not appropriate for disclosure under the California Public Record Act. California also requires that auto manufacturers submit an annual report summarizing the disengagement of technology for autonomous vehicles on public roads. These disengagements reports are made public.

<https://www.dmv.ca.gov/portal/dmv/detail/vr/autonomous/testing>

<sup>13</sup> <http://www.consumerwatchdog.org/sites/default/files/2018-03/NHTSAcomments032018.pdf>

<sup>14</sup> Ibid.

<sup>15</sup> <http://consumersunion.org/wp-content/uploads/2017/11/Letter-to-Senate-on-AV-bill-11-14-17-FINAL.pdf>

## Cybersecurity

There are probably few things more frightening to the everyday person than a cybercriminal or terrorist remotely taking control of their car. Vehicles are already being used as weapons in terrorist attacks.<sup>16</sup> In fact, one incident recently took place not far from our law school.<sup>17</sup> It is no surprise that a recent online survey conducted by the University of Michigan Transportation Research Institute found that “76-88 percent of people are at least slightly concerned that self-driving vehicles could be hacked to cause crashes, or disable many vehicles simultaneously or the vehicles’ main traffic-management systems. More than 40 percent are very or extremely concerned.”<sup>18</sup> Those concerns exist even today, with conventional vehicles becoming more and more dependent on software and network connectivity. But the risk of hackers and malware attacks will grow exponentially with the expansion of self-driving technology, which relies heavily on vehicle-to-vehicle communication and the continuous broadcasting of data.

In a September 2017 *Wall Street Journal* article, “The Dangers of a Hackable Car,”<sup>19</sup> even Elon Musk warned of the likelihood of a “fleetwide hack” once cars become fully autonomous. The paper wrote,

[S]ecurity experts paint a grim picture of what might lie ahead. They see a growing threat from malicious hackers who access cars remotely and keep their doors locked until a ransom is paid. Cybercriminals also could steal personal and financial data that cars are starting to collect about owners.

Or they might get even more ambitious. Some experts warn of a day when millions of fully internet-connected vehicles will be at risk of being hijacked remotely. A mass hack could be catastrophic for the self-driving cars of the future, especially if those cars don’t have steering wheels or other backup systems to let drivers take manual control.

Criminal or terrorist behavior isn’t the only cyber risk. As Advocates for Highway Safety put it in their statement to the Senate Commerce Committee, potential problems also include “global position system (GPS) signal loss or degradation.” Indeed, “there is a widespread consensus that action is needed immediately to minimize risks.”<sup>20</sup>

Both the House (Sec. 5) and Senate (Sec. 14) car bills take a very “hands-off” approach to this problem, giving manufacturers wide leeway to develop a cybersecurity plan with the bills containing no standards whatsoever. As several Senators<sup>21</sup> and safety groups have said, such an

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<sup>16</sup> For example, on July 14, 2016, a cargo truck was driven into a crowd killing over 80 people celebrating Bastille Day in Nice, France. <http://www.bbc.com/news/world-europe-36801671>

<sup>17</sup> <https://www.cnn.com/2017/10/31/us/new-york-shots-fired/index.html>

<sup>18</sup> <http://ns.umich.edu/new/releases/24535-hack-my-car-most-believe-it-can-happen>

<sup>19</sup> <https://www.wsj.com/articles/the-dangers-of-the-hackable-car-1505700481>

<sup>20</sup> <http://saferoads.org/2018/01/24/advocates-statement-on-autonomous-vehicles-to-the-senate-commerce-committee/>

<sup>21</sup> [https://www.feinstein.senate.gov/public/\\_cache/files/f/1/f168c367-bec0-48cc-9220-6a13cbd9dd27/D00752809320841613B5F03BB8517FC2.03.14.2018-av-start-act-letter.pdf](https://www.feinstein.senate.gov/public/_cache/files/f/1/f168c367-bec0-48cc-9220-6a13cbd9dd27/D00752809320841613B5F03BB8517FC2.03.14.2018-av-start-act-letter.pdf)

approach is a big mistake. Advocates for Highway Safety have recommended,<sup>22</sup> for example, that “the legislation should require NHTSA to establish a minimum performance standard to ensure cybersecurity protections are required” for these cars. “Considering the recent record of high-profile cyber-attacks, allowing manufacturers merely to have a cybersecurity plan in place is grossly inadequate to ensure that AVs are protected against potentially catastrophic cyber-attacks and breaches.” As the group recently wrote, “A plan, as currently required by the bill, is insufficient and should be replaced with a directed rulemaking to be completed within three years.”<sup>23</sup>

Other security experts have had more detailed recommendations. For example, the Center for Democracy & Technology says, “Specific areas for consideration include, but are not limited to: development of minimum ‘safe’ software development standards, development of agreed upon software testing standards, and allocation of liability to developers of ‘faulty’ or ‘defective’ software.”<sup>24</sup>

One thing is clear: Congress should not allow AV cars on the road unless and until certain cyber protections are in place. Otherwise, the risks to the public are far too great.

For more information, please contact students Dennis Futoryan (liability and arbitration), Alexander Davis (regulatory preemption and transparency), and Meenka Maharaj (cybersecurity), or Adjunct Professor and Executive Director of the Center for Justice & Democracy at New York Law School, [joanned@centerjd.org](mailto:joanned@centerjd.org).

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<sup>22</sup> <http://saferoads.org/2018/01/24/advocates-statement-on-autonomous-vehicles-to-the-senate-commerce-committee/>

<sup>23</sup> <http://saferoads.org/2018/03/19/letter-to-senate-on-deadly-takata-airbags-driverless-cars/>

<sup>24</sup> <https://cdt.org/blog/three-core-security-privacy-issues-of-connected-vehicles/>