Senator Anne Carney
Senate Chair of the Joint Standing Committee on Judiciary
21 Angell Point Road
Cape Elizabeth, ME 04107

Representative Matt Moonen
House Chair of the Joint Standing Committee on Judiciary
53 Thomas St., #3
Portland, ME 04102

Representative Margaret O'Neil
21 Sheila Circle
Saco, ME 04072

RE: LD 1977 – Oppose

Dear Senator Carney, Representative Moonen, and Representative O'Neil:

On behalf of the advertising industry, we write to oppose LD 1977, the "Data Privacy and Protection Act."[1] As presently drafted, LD 1977 contains provisions that are significantly out-of-step with privacy laws in other states. The bill's terms are so onerous that they threaten to completely outlaw routine and beneficial data processing practices, such as data processing for legitimate and responsible advertising. Instead of proceeding with the divergent approach represented in LD 1977, we ask the legislature to harmonize its approach with other state privacy laws.

As the nation's leading advertising and marketing trade associations, we collectively represent thousands of companies across the country. These companies range from small businesses to household brands, long-standing and emerging publishers, advertising agencies, and technology providers. Our combined membership includes more than 2,500 companies that power the commercial Internet, which accounted for 12 percent of total U.S. gross domestic product ("GDP") in 2020.[2] By one estimate, over 20,000 jobs in Maine are related to the ad-subsidized Internet.[3] Below we provide a non-exhaustive list of concerns with LD 1977. We would welcome the opportunity to engage with you further on the issues with the bill and the benefits of data-driven digital advertising we outline here:

- **Maine Should Take Steps to Harmonize its Approach to Privacy with Other State Laws**
- **The Bill Would Ban Commercial Speech in the Form of Targeted Advertising by Prohibiting the Use of the Very Data Needed for that Type of Advertising**
- **The Bill Diverges from Existing Privacy Laws Because It Requires Controllers to Disclose the Names of Specific Third-Party Partners**
- **A Private Right of Action Is an Inappropriate Form of Enforcement for Privacy Legislation**

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[1] Maine LD 1977 (131st Leg., Second Reg. Sess., 2023), located here
[2] John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, INTERACTIVE ADVERTISING BUREAU, 15 (Oct. 18, 2021), located at https://www.iab.com/wp-content/uploads/2021/10/IAB_Economic_Impact_of_the_Market-Making_Internet_Study_2021-10.pdf (hereinafter, "Deighton & Kornfeld 2021").
[3] *Id*. at 127.

- **The Data-Driven and Ad-Supported Online Ecosystem Benefits Maine Residents and Fuels Economic Growth.**

We and the companies we represent, many of whom do substantial business in Maine, strongly believe consumers deserve meaningful privacy protections supported by reasonable laws and responsible industry policies, which is why we support a national, preemptive standard for data privacy at the federal level. In the absence of such a preemptive federal law, it is imperative for states to work to harmonize privacy standards to provide even protections for consumers and ease costs of operationalizing privacy requirements. Adopting a deviating approach, like that contained in LD 1977, would significantly impede Maine consumers from reaching products and services they rely upon and expect and would decimate the small and mid-size business community in the state.

I. Maine Should Take Steps to Harmonize its Approach to Privacy with Other State Laws

In the current absence of a national standard for data privacy at the federal level, it is critical for legislators to seriously consider the costs to both consumers and businesses that will accrue from a patchwork of differing privacy standards across the states. Harmonization with existing privacy laws is critical to minimizing costs of compliance and fostering similar consumer privacy rights for consumers. One way that LD 1977 presently diverges from existing state privacy laws is that it does not address the concept of pseudonymous data. Most state privacy laws recognize the privacy benefits of "pseudonymous data," which is typically defined to include personal data that cannot be attributed to a specific natural person without the use of additional information. These other laws exempt this data from consumer rights to access, delete, correct, and port personal data, provided that this data is kept separately from information necessary to identify a consumer and is subject to effective technical and organizational controls to prevent the controller from accessing such information. We ask you to amend LD 1977 and harmonize it with other privacy laws to exempt pseudonymous data from consumer rights of access, correction, deletion, and portability.

Compliance costs associated with divergent privacy laws are significant. To make the point: a regulatory impact assessment of the California Consumer Privacy Act of 2018 concluded that the initial compliance costs to California firms would be $55 billion.[4] Another recent study found that a consumer data privacy proposal in a different state considering privacy legislation would have generated a direct initial compliance cost of $6.2 billion to $21 billion and an ongoing annual compliance costs of $4.6 billion to $12.7 billion for the state.[5] Other studies confirm the staggering costs associated with varying state privacy standards. One report found that state privacy laws could impose out-of-state costs of between $98 billion and $112 billion annually, with costs exceeding $1 trillion dollars over a 10-year period, and with small businesses shouldering a significant portion of the compliance cost burden.[6] Maine should not add to this compliance bill for businesses and should instead opt for an approach to data privacy that is in harmony with already existing state privacy laws.

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[4] *See* State of California Department of Justice Office of the Attorney General, *Standardized Regulatory Impact Assessment: California Consumer Privacy Act of 2018 Regulations*, 11 (Aug. 2019), located at https://www.dof.ca.gov/Forecasting/Economics/Major_Regulations/Major_Regulations_Table/documents/CCPA_Regulations-SRIA-DOF.pdf.

[5] *See* Florida Tax Watch, *Who Knows What? An Independent Analysis of the Potential Effects of Consumer Data Privacy Legislation in Florida*, 2 (Oct. 2021), located at https://floridataxwatch.org/DesktopModules/EasyDNNNews/DocumentDownload.ashx?portalid=210&moduleid=34407&articleid=19090&documentid=986.

[6] Daniel Castro, Luke Dascoli, and Gillian Diebold, *The Looming Cost of a Patchwork of State Privacy Laws* (Jan. 24, 2022), located at https://itif.org/publications/2022/01/24/looming-cost-patchwork-state-privacy-laws (finding that small businesses would bear approximately $20-23 billion of the out-of-state cost burden associated with state privacy law compliance annually).

II. The Bill Would Ban Commercial Speech in the Form of Targeted Advertising by Prohibiting the Use of the Very Data Needed for that Type of Advertising

The bill flatly prohibits use of sensitive data for targeted advertising.[7] "Sensitive data" under the bill includes "information identifying an individual's online activities over time and across 3rd party websites or online services," which is the very data that permits targeted advertising to function.[8] By banning use of such data in targeted advertising, the bill would impermissibly burden commercial speech by flatly outlawing targeted advertising entirely, without exceptions.

The bill's proposed ban of targeted advertising is likely unintended, however, because it also attempts to permit targeted advertising and transfers of covered data to third parties upon a consumer's opt in consent to such activity. As discussed in more detail in Section V below, the data-driven and ad-supported online ecosystem is powered by targeted advertising. This ecosystem benefits consumers and fuels economic growth and competition. Companies, nonprofits, and government agencies alike use data to send varying groups of individuals specific, relevant messages through targeted advertising functionalities. Tailored messaging provides immense public benefit by reaching individual consumers with information that is relevant to them in the right time and place. Legal requirements that limit entities' ability to use data responsibly to reach consumers with important and pertinent messaging, such as those set forth in LD 1977's opt-in consent requirements, can have unintended consequences and, ultimately, serve as a detriment to consumers' health and welfare.

Ad-technology systems and processes enable everything from public health messaging to retailer messaging. They allow timely wildfire warnings to reach local communities and facilitate the dissemination of missing children alerts, among a myriad of other beneficial uses with the very same technology and techniques used for targeted advertising.[9] In accordance with responsible data use, uses of data for targeted advertising should be subject to notice requirements and effective opt out controls. Opt-in consent requirements tend to work to the advantage of large, entrenched market players at the expense of smaller businesses and start-up companies. To ensure uses of data to benefit Maine residents can persist, and to help maintain a competitive business marketplace, we ask you amend the bill to: (1) remove "information identifying an individual's online activities over time and across 3rd party websites or online services" from the bill's "sensitive data" definition, and (2) permit consumers to opt out of targeted advertising rather than requiring them to opt in to such activity, an approach that reflects the requirements of a majority of states with privacy laws across the nation.[10]

III. The Bill Diverges from Existing Privacy Laws Because It Requires Controllers to Disclose the Names of Specific Third-Party Partners

Another way LD 1977 diverges from existing state privacy laws is that it would require covered entities and service providers to disclose "the name of each data broker to which the covered entity or service provider transfers covered data" in a privacy policy.[11] In addition, the bill would require covered entities to give consumers the option to obtain the names of third parties or service providers to which covered data was transferred in exchange for consideration in response to an access

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[7] LD 1977 at § 9605(5).
[8] *Id.* at § 9602(13)(O).
[9] *See* Digital Advertising Alliance, *Summit Snapshot: Data 4 Good – The Ad Council, Federation for Internet Alerts Deploy Data for Vital Public Safety Initiatives* (Sept. 1, 2021), located at https://digitaladvertisingalliance.org/blog/summit-snapshot-data-4-good-%E2%80%93-ad-council-federation-internet-alerts-deploy-data-vital-public.
[10] *See, e.g.*, Cal. Civ. Code § 1798.135; Va. Code Ann. § 57.1-577(A)(5); Colo. Rev. Stat 6-1-1306(1)(a); Conn. Gen. Stat. § 42-518(a)(5); Utah Rev. Stat § 16-61-201(4) (effective Dec. 31, 2023).
[11] LD 1977 at § 9608(1)(D).

request.[12] Other state privacy laws require companies to disclose the *categories* of third parties to whom they transfer personal data rather than the specific names of such third parties themselves.[13] Requiring documentation or disclosure of names of entities would be operationally burdensome, as covered entities change business partners frequently, and companies regularly merge with others and change names.

For instance, a covered entity or service provider may engage in a data exchange with a new business-customer on the same day it responds to a consumer disclosure request. This requirement would either force the covered entity to refrain from engaging in commerce with the new business-customer until its privacy policy is updated or risk violating the law. This is an unreasonable restraint. From an operational standpoint, constantly updating a list of all data brokers a covered entity works with would take significant resources and time away from companies' efforts to comply with other new privacy directives in LD 1977. Covered entities and service providers may be forced to jeopardize new business opportunities and relationships just to compile, maintain, update, and distribute these ephemeral lists.

International privacy standards like the European Union's General Data Protection Regulation ("GDPR") also do not require burdensome disclosures of specific third parties in response to data subject access requests, according to the text of the law. Mandating that companies disclose the names of their third-party partners could obligate companies to abridge confidentiality clauses they maintain in their contracts with partners and expose proprietary business information to their competitors. Finally, the consumer benefit that would accrue from their receipt of a list of data brokers to whom a covered entity or service provider discloses data would be minimal at best. The benefit would be especially insignificant given LD 1977 already requires controllers to disclose *categories* of third-party partners in privacy notices for consumers.[14] For these reasons, we encourage you to reconsider this onerous language, which severely diverges from the approach to disclosures taken in existing state privacy laws. To align LD 1977 with other state privacy laws, the bill should require disclosures of the categories of third parties rather than the names of such entities themselves.

IV. A Private Right of Action Is an Inappropriate Form of Enforcement for Privacy Legislation

As presently drafted, LD 1977 allows for private litigants to bring lawsuits.[15] We strongly believe private rights of action should have no place in privacy legislation. Instead, enforcement should be vested with the Maine Attorney General ("AG") alone, because such an enforcement structure would lead to stronger outcomes for Maine residents while better enabling businesses to allocate resources to developing processes, procedures, and plans to facilitate compliance with new data privacy requirements. AG enforcement, instead of a private right of action, is in the best interests of consumers and businesses alike.

The private right of action in LD 1977 will create a complex and flawed compliance system without tangible privacy benefits for consumers. Allowing private actions will flood Maine's courts with frivolous lawsuits driven by opportunistic trial lawyers searching for technical violations, rather than focusing on actual consumer harm.[16] Private right of action provisions are completely divorced

[12] *Id.* at § 9611(1)(A)(2)(b).
[13] *See, e.g.,* Cal. Civ. Code § 1798.110; Va. Code Ann. § 59.1-578(C); Colo. Rev. Stat. § 6-1-1308(1)(a); Conn. Gen. Stat. § 42-520(c)(5); Utah Rev. Stat § 16-61-302(1)(a) (effective Dec. 31, 2023).
[14] LD 1977 at § 9608(1)(D).
[15] *Id.* at § 9620(2).
[16] A select few attorneys benefit disproportionately from private right of action enforcement mechanisms in a way that dwarfs the benefits that accrue to the consumers who are the basis for the claims. For example, a study of 3,121 private

from any connection to actual consumer harm and provide consumers little by way of protection from detrimental data practices.

Additionally, a private right of action will have a chilling effect on the state's economy by creating the threat of steep penalties for companies that are good actors but inadvertently fail to conform to technical provisions of law. Private litigant enforcement provisions and related potential penalties for violations represent an overly punitive scheme that do not effectively address consumer privacy concerns or deter undesired business conduct. They expose businesses to extraordinary and potentially enterprise-threatening costs for technical violations of law rather than drive systemic and helpful changes to business practices. A private right of action will also encumber businesses' attempts to innovate by threatening companies with expensive litigation costs, especially if those companies are visionaries striving to develop transformative new technologies. The threat of an expensive lawsuit may force smaller companies to agree to settle claims against them, even if they are convinced they are without merit.[17]

Beyond the staggering cost to Maine businesses, the resulting snarl of litigation could create a chaotic and inconsistent enforcement framework with conflicting requirements based on differing court outcomes. Overall, a private right of action would serve as a windfall to the plaintiff's bar without focusing on the business practices that actually harm consumers. We therefore encourage legislators to remove the private right of action from the bill and replace it with a framework that makes enforcement responsibility the purview of the AG alone.

V. The Data-Driven and Ad-Supported Online Ecosystem Benefits Maine Residents and Fuels Economic Growth

Over the past several decades, data-driven advertising has created a platform for innovation and tremendous growth opportunities. A recent study found that the Internet economy's contribution to the United States' GDP grew 22 percent per year since 2016, in a national economy that grows between two to three percent per year.[18] In 2020 alone, it contributed $2.45 trillion to the U.S.'s $21.18 trillion GDP, which marks an eightfold growth from the Internet's contribution to GDP in 2008 of $300 billion.[19] Additionally, more than 17 million jobs in the U.S. were generated by the commercial Internet in 2020, 7 million more than four years prior.[20] More Internet jobs, 38 percent, were created by small firms and self-employed individuals than by the largest Internet companies, which generated 34 percent.[21] The same study found that the ad-supported Internet supported 21,371 full-time jobs

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actions under the Telephone Consumer Protection Act ("TCPA") showed that approximately 60 percent of TCPA lawsuits were brought by just forty-four law firms. Amounts paid out to consumers under such lawsuits proved to be insignificant, as only 4 to 8 percent of eligible claim members made themselves available for compensation from the settlement funds. U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl* at 2, 4, 11-15 (Aug. 2017), located here.

[17] For instance, in the early 2000s, private actions under California's Unfair Competition Law ("UCL") "launched an unending attack on businesses all over the state." American Tort Reform Foundation, *State Consumer Protection Laws Unhinged: It's Time to Restore Sanity to the Litigation* at 8 (2003), located here. Consumers brought suits against homebuilders for abbreviating "APR" instead of spelling out "Annual Percentage Rate" in advertisements and sued travel agents for not posting their phone numbers on websites, in addition to initiating myriad other frivolous lawsuits. These lawsuits disproportionately impacted small businesses, ultimately resulting in citizens voting to pass Proposition 64 in 2004 to stem the abuse of the state's broad private right of action under the UCL. *Id.*

[18] Deighton & Kornfeld 2021 at 5.

[19] *Id*.

[20] *Id*.

[21] *Id*. at 6.

across Maine, more than double the number of Internet-driven jobs from 2016.[22]

A. Advertising Fuels Economic Growth

Data-driven advertising supports a competitive online marketplace and contributes to tremendous economic growth. Overly restrictive legislation that significantly hinders certain advertising practices, such as third-party tracking, could yield tens of billions of dollars in losses for the U.S. economy—and, importantly, not just in the advertising sector.[23] One recent study found that "[t]he U.S. open web's independent publishers and companies reliant on open web tech would lose between $32 and $39 billion in annual revenue by 2025" if third-party tracking were to end "without mitigation."[24] That same study found that the lost revenue would become absorbed by "walled gardens," or entrenched market players, thereby consolidating power and revenue in a small group of powerful entities.[25] Smaller news and information publishers, multi-genre content publishers, and specialized research and user-generated content would lose more than an estimated $15.5 billion in revenue.[26] According to one study, "[b]y the numbers, small advertisers dominate digital advertising, precisely because online advertising offers the opportunity for low cost outreach to potential customers."[27] Absent cost-effective avenues for these smaller advertisers to reach the public, businesses focused on digital or online-only strategies would suffer immensely in a world where digital advertising is unnecessarily encumbered by overly-broad regulations.[28] Data-driven advertising has thus helped to stratify economic market power and foster competition, ensuring that smaller online publishers can remain competitive with large global technology companies.

B. Advertising Supports Maine Residents' Access to Online Services and Content

In addition to providing economic benefits, data-driven advertising subsidizes the vast and varied free and low-cost content publishers offer consumers through the Internet, including public health announcements, news, and cutting-edge information. Advertising revenue is an important source of funds for digital publishers,[29] and decreased advertising spends directly translate into lost profits for those outlets. Revenues from online advertising based on the responsible use of data support the cost of content that publishers provide and consumers value and expect.[30] And, consumers tell us that. In fact, consumers valued the benefit they receive from digital advertising-subsidized online content at $1,404 per year in 2020—a 17% increase from 2016.[31] Another study found that the free and low-cost goods and services consumers receive via the ad-supported Internet amount to approximately $30,000 of value per year, measured in 2017 dollars.[32] Legislative frameworks that inhibit or restrict digital advertising can cripple news sites, blogs, online encyclopedias, and other vital information repositories, and these unintended consequences also translate into a new tax on consumers. The effects of such legislative frameworks ultimately harm consumers by reducing the

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[22] *Compare id.* at 127 (Oct. 18, 2021) *with* John Deighton, Leora Kornfeld, and Marlon Gerra, *Economic Value of the Advertising-Supported Internet Ecosystem,* INTERACTIVE ADVERTISING BUREAU, 106 (2017), located here (finding that Internet employment contributed 9,850 full-time jobs to the Maine workforce in 2016 and 21,371 jobs in 2020).
[23] *See* John Deighton, *The Socioeconomic Impact of Internet Tracking* 4 (Feb. 2020), located here.
[24] *Id*. at 34.
[25] *Id*. at 15-16.
[26] *Id*. at 28.
[27] J. Howard Beales & Andrew Stivers, *An Information Economy Without Data*, 9 (2022), located here.
[28] *See id.* at 8.
[29] *See* Howard Beales, *The Value of Behavioral Targeting* 3 (2010), located here.
[30] *See* John Deighton & Peter A. Johnson, *The Value of Data: Consequences for Insight, Innovation & Efficiency in the US Economy* (2015), located here.
[31] Digital Advertising Alliance, *Americans Value Free Ad-Supported Online Services at $1,400/Year; Annual Value Jumps More Than $200 Since 2016* (Sept. 28, 2020), located here.
[32] J. Howard Beales & Andrew Stivers, *An Information Economy Without Data*, 2 (2022), located here.

availability of free or low-cost educational content that is available online.

C. Consumers Prefer Personalized Ads & Ad-Supported Digital Content and Media

Consumers, across income levels and geography, embrace the ad-supported Internet and use it to create value in all areas of life. Importantly, research demonstrates that consumers are generally not reluctant to participate online due to data-driven advertising and marketing practices. One study found more than half of consumers (53 percent) desire relevant ads, and a significant majority (86 percent) desire tailored discounts for online products and services.[33] Additionally, in a recent Zogby survey conducted by the Digital Advertising Alliance, 90 percent of consumers stated that free content was important to the overall value of the Internet and 85 percent surveyed stated they prefer the existing ad-supported model, where most content is free, rather than a non-ad supported Internet where consumers must pay for most content.[34]

Unreasonable restraints on advertising create costs for consumers and thwart the economic model that supports free services and content online. For example, in the wake of Europe's General Data Protection Regulation, and the opt-in consent requirements under that regime, platforms that have historically provided products and services for free have announced proposals to start charging consumers for access to their offerings.[35] LD 1977, which would outlaw the use of data collected across websites over time for targeted advertising, would create a similar environment where many companies could be forced to charge for services and products that were once free to Maine residents. Indeed, as the Federal Trade Commission noted in one of its submissions to the National Telecommunications and Information Administration, if a subscription-based model replaces the ad-based model of the Internet, many consumers likely will not be able to afford access to, or will be reluctant to utilize, all of the information, products, and services they rely on today and that will become available in the future.[36] A subscription model will diminish the number of channels available to access information, increase costs to consumers, curtail access to a diversity of online voices, and create an overall Internet environment where consumers with means can afford to access content, while consumers with less expendable income will be forced to go without access to online resources.

Laws that restrict access to information and economic growth can have lasting and damaging effects. The ability of consumers to provide, and companies to responsibly collect and use, consumer data has been an integral part of the dissemination of information and the fabric of our economy for decades. The collection and use of data are vital to our daily lives, as much of the content we consume over the Internet is powered by open flows of information that are supported by advertising. We therefore respectfully ask you to carefully consider LD 1977's potential impact on advertising, the consumers who reap the benefits of such advertising, and the overall economy before advancing it through the legislative process.

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[33] Mark Sableman, Heather Shoenberger & Esther Thorson, *Consumer Attitudes Toward Relevant Online Behavioral Advertising: Crucial Evidence in the Data Privacy Debates* (2013), located here.

[34] Digital Advertising Alliance, *Zogby Analytics Public Opinion Survey on Value of the Ad-Supported Internet Summary Report* (May 2016), located here.

[35] *See, e.g.* Megan Cerullo, *Meta proposes charging monthly fee for ad-free Instagram and Facebook in Europe*, CBS NEWS (Oct. 3, 2023), located here; *see also* Ismail Shakil, *Google to block news in Canada over law on paying publishers*, REUTERS (Jun. 29, 2023), located here.

[36] Federal Trade Commission, *In re Developing the Administration's Approach to Consumer Privacy*, 15 (Nov. 13, 2018), located here.

We and our members support protecting consumer privacy. We believe, however, that LD 1977 would impose particularly onerous requirements on entities doing business in the state and would unnecessarily impede Maine residents from receiving helpful services and accessing useful information online. We therefore respectfully ask you to reconsider LD 1977 or amend it to reflect the recommendations set forth in this letter. Thank you in advance for consideration of this letter.

Sincerely,

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