AARON M. FREY
ATTORNEY GENERAL

TEL: (207) 626-8800
TTY USERS CALL MAINE RELAY 711

STATE OF MAINE
OFFICE OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0006

REGIONAL OFFICES
84 HARLOW ST. 2ND FLOOR
BANGOR, MAINE 04401
TEL: (207) 941-3070
FAX: (207) 941-3075

125 PRESUMPSCOT ST., SUITE 26
PORTLAND, MAINE 04103
TEL: (207) 822-0260
FAX: (207) 822-0259

14 ACCESS HIGHWAY, STE. 1
CARIBOU, MAINE 04736
TEL: (207) 496-3792
FAX: (207) 496-3291

Testimony in Opposition to L.D. 1973, *An Act to Enact the Maine Consumer Privacy Act*

Senator Carney, Representative Moonen, and distinguished members of the Judiciary Committee, my name is Aaron Frey, and I have the privilege of serving as Maine's Attorney General. I am here today to speak in opposition to L.D. 1973, which would roll back significant privacy protections enacted by the 129th Legislature and successfully defended in federal court by my office.

In 2019, the Legislature enacted L.D. 946, "An Act to Protect the Privacy of Online Customer Information," codified at 35-A M.R.S. § 9301. This first in the nation law restricted the extent to which Internet Service Providers ("ISPs") may use, disclose, or sell their customers' personal information, such as their web browsing history, their location, the content of their communications, and their financial and health information. As the Federal Trade Commission recognized, because ISPs are essentially the onramps to the Internet, they can collect vast amounts of information regarding their customers' online activity. Maine's Legislature protected Maine residents by restricting the disclosure of what is likely some of their most private and personal information. The nation's largest telecommunication providers promptly sued the State, and my office vigorously litigated the case for two years. After we achieved initial victories in court, the industry chose to drop their lawsuit. The 2019 law remains in effect and continues to protect the private information of Maine consumers.

Late last week, L.D. 1973 was printed. It is a lengthy and complicated bill, and my office has not had time to thoroughly review it. One thing that stands out, though, is that it would repeal the 2019 ISP privacy law. That would be a mistake. The Legislature was wise in safeguarding Mainers' online information, and it should not now retreat from its zealous protection of our residents' privacy.

Moreover, based on the limited review we were able to undertake between the printing of L.D. 1973 and this hearing, we have concerns:

- The bill applies only to businesses that either control or process the personal data of at least 100,000 consumers or control or process the personal data of at least 25,000 consumers and derive more than 25 percent of their gross revenue from the sale of personal data. This means that many, if not most, businesses in Maine will not be subject to the law.

- The bill has 21 other categorical exemptions. While some of these exemptions may make sense, we are concerned that others may be inappropriate. The exemptions could also make the law vulnerable to constitutional challenge.
- The bill allows a controller to sell a consumer's personal data to an "affiliate" of the controller, thus creating what could be a significant loophole.
- The definition of "targeted advertising" is too narrow. For example, it exempts advertisements "based on activities within a controller's own publicly accessible websites or online applications."
- By authorizing "loyalty and rewards programs," the bill appears to permit controllers to essentially offer financial incentives to consumers to waive privacy rights, thus creating class-based differences where only the more affluent can afford full protection.
- The bill seems to permit controllers and processors to disclose personal information in order to comply with laws of another state, creating the possibility that actions taken in other states could undermine the privacy protections of Maine residents.
- The bill precludes the Attorney General from promulgating interpretative rules. Given the complexity of the bill, rules clarifying certain provisions could be useful, and it is not clear why the Attorney General should be prohibited from that.
- While L.D. 1973 declares that violations constitute violations of the Maine Unfair Trade Practices Act ("MUTPA"), it states that only the Attorney General may bring enforcement actions. The MUTPA generally authorizes actions by both the Attorney General and consumers, and it is not clear why this bill would exclude private enforcement. The availability of a private cause of action is important because it allows for enforcement even when my office might not have the necessary resources, and the potential for private enforcement has a significant deterrent effect.
- The Attorney General must give a controller a "right to cure" a violation and cannot bring an enforcement action if the controller ceases the violation within 30 days. This undermines the bill's deterrence, since controllers know that they can violate the law with impunity so long as if they are caught, they stop the violation.

At a time when our privacy is increasingly under attack, now is not the time to roll back hard-fought gains. While there may be worthwhile elements of this complex bill, it warrants a thorough vetting by all interested stakeholders that may not be possible this late in the legislative session. I urge the Committee to vote ought not to pass.