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Senator Anne Carney, Senate Chair
Representative Amy Kuhn, House Chair
Joint Standing Committee on Judiciary
100 State House Station
Augusta, ME 04333

Re: MSCC Testimony on LD 1224 & 1822

Senator Carney, Representative Kuhn, and Members of the Judiciary Committee:

I am Managing Partner at Brann & Isaacson, a Maine law firm which has, for decades, represented catalog companies, ecommerce entities, and other online and multichannel businesses on matters of relevance to the industry. In my personal practice, I advise companies in Maine and across the country with respect to their compliance obligations under state consumer privacy laws, and am CIPP/US certified by the International Association of Privacy Professionals. On behalf of the Maine State Chamber of Commerce ("Chamber"), I write in support of LD 1224, a privacy bill in harmony with those of other New England states, and in opposition to LD 1822, a bill that would make Maine an outlier in its treatment of personal information.

First and foremost, the Chamber welcomes the adoption of a consumer privacy bill, and appreciates the time, effort, and thoughtfulness that the Judiciary Committee has shown in considering this subject matter over the last year or more. The fact that there are three pending bills on consumer privacy in and of itself indicates that attention is rightly being paid to this topic.

Ideally, each and every one of my clients would like to see a comprehensive federal privacy bill that offers a single suite of consumer rights and a well-defined set of privacy policy requirements and procedures to guide business operations. Short of that, a uniform set of state privacy laws which offer consistency from region to region is the common goal. Commerce does not stop at the New Hampshire/Maine border, especially in an interconnected online ecosystem, and compliance burdens increase exponentially when states differ wildly in their expectations of consumer data handling.

It is in that light that I respectfully submit the Chamber's comments to you on LD 1224, which closely tracks the framework that other New England states, and at least 15 states across the country, have adopted. This framework now covers over 100 million Americans. LD 1224 represents a well understood and clearly laid out path, as opposed to a nonconformist bill that—while well intentioned—would result in unintended or untested consequences. LD 1224 ensures consumer control over personal data, establishes a fair enforcement mechanism, and aligns Maine's privacy structure with both New England and national standards.

Sensitive Data. LD 1224 requires ***explicit, opt-in consent*** before businesses can collect or process sensitive data such as race, health information, biometric data, precise geolocation, and immigration status. Accordingly, the bill allows for *consumers* to actively decide how their most private information is used, rather than businesses automatically collecting it by default.

In contrast, LD 1822 takes a less flexible approach, limiting the collection, processing and sharing of sensitive data to what is "strictly necessary" for providing a requested product or service. While clearly intended to be more consumer-protective, by shifting the focus from consumer consent to disclosed purposes to whatever the business can characterize as needed to provide "or maintain" a requested product or service, the bill actually eliminates consumer choice and control, and potentially leaves room for businesses to justify broad data collection practices without the consumer's clear, informed consent. Moreover, it potentially decimates the ability of certain businesses to do any meaningful advertising. Take, for example, the retailer of religious books or LGBTQ products. Because the very nature of any customer purchase may "reveal" religious beliefs or sexual orientation about an individual, the retailer could arguably be prohibited under LD 1822 from "sharing" this data with any marketing partners to the extent it is not "strictly necessary" to fulfill the original customer request—even if the customer would welcome advertisements for similar products from the retailer.

Data Collection. LD 1224 protects consumers from unnecessary data collection by requiring that businesses only collect data that is "***adequate, relevant, and reasonably necessary***" for the specific purpose disclosed to the consumer. Companies, therefore, are prevented from hoarding excessive consumer information, reducing privacy risks and the potential for data misuse. This is drawn from the same standard used in the California (CCPA/CPRA) and European (GDPR) privacy frameworks.

By contrast, LD 1822's experimental approach may ultimately give businesses more discretion by once more cutting the consumer out of the equation. Businesses are allowed to determine what data is "reasonably necessary and proportionate" to provide the "specific product or service requested by the consumer to whom the data pertains," a standard that does not have the same well-established track record in other jurisdictions as the framework deployed by LD 1224. Not only does this give businesses greater discretion, the limiting language regarding the specific product or service requested by the consumer is likely to result in less access to new

products, services, updates to existing products, etc., that consumers have come to expect, and to which consumers elsewhere in New England will have access.

More specifically, LD 1822's framing puts in serious jeopardy the ability of companies to measure the digital advertising that they have purchased or sold. Without ad measurement, the value of digital advertising for both targeted ads *and* contextual ads is lost and the free and open Internet falls apart. Brick-and-mortar businesses, plumbers, banks, etc. would all have trouble reaching their existing customers or finding new ones.

Likewise, this provision puts in jeopardy the ability of companies to offer personalized services by default (e.g. which have not been explicitly "requested"). Personalization is what organizes the massive quantities of Internet-available information into something manageable and usable – making it easier and faster for everyone to find what's most helpful and meets their needs. It is the foundation for a positive online experience. You can see and feel the benefit of it in many ways, including the search results that appear in your native language; and the way that small businesses get help finding – and being found by – the right customers.

This uncertainty around the future of digital advertising will likely negatively impact Maine's small businesses and leave them at a disadvantage against their competitors in neighboring states. This is not because these businesses are processing much, if any, of their customers' data directly. Rather, these businesses are themselves the customers of large online advertising platforms, including platforms sending emails to potential customers. A recent survey conducted by the Retail Association of Maine in partnership with the Connected Commerce Council of small and mid-sized businesses which sell products or services to businesses and/or consumers, including 200 from Maine, concluded that 66% use data-driven online advertisements. 61% of these Maine businesses answered that without access to personalized ads and analytics, they wouldn't be able to reach new customers efficiently. Tools such as Google Analytics and Google Ads drive customers to specialty companies around Maine, from the eleven-employee blanket store in Portland (where 30-40% of sales are driven by Google Ads) to the fourth-generation mustard business in Eastport utilizing Google Analytics to assess how best to reach customers. *See* "Google Economic Impact," Maine State Report, *available at* https://economicimpact.google/state/me/ (last visited May 2, 2025). While these companies may not be large enough to be directly regulated under LD 1822, they are heavily reliant on platforms that are, and their ability to take advantage of services from Google and others will be hindered by the passage of LD 1822 and its restrictions on the usage of Maine consumer data.

Responsible targeted advertising like that which is taking place every day under the New England privacy framework lowers costs for small businesses and allows them to reach their customer base. An incompatible privacy bill like LD 1822 risks raising advertising costs and making online advertising less accessible for small advertisers with small marketing budgets, who must carefully choose the right markets and audiences in which to spend their advertising dollars. Large national brands will always be able to afford national, blanket ad campaigns to sell their products, but Maine's small businesses need the tools to allow them to effectively compete.

Other Concerns With LD 1822:

- **Section 9602[34], Sensitive Data definition.** The characterization of "billing, financial or payment method information" as sensitive data is ambiguous and uncertain in scope. It could potentially encompass data regarding the price paid for a particular product or service, which is important to business analytics. At least two states already include certain financial information within the definition of sensitive data, New Jersey and California. They share very similar definitions: (1) "*financial information, which shall include a consumer's account number, account log-in, financial account, or credit or debit card number, in combination with any required security code, access code, or password that would permit access to a consumer's financial account*" [New Jersey Data Protection Act] and (2) "*A consumer's account log-in, financial account, debit card, or credit card number in combination with any required security or access code, password, or credentials allowing access to an account*" [California Privacy Rights Act]. We would urge the adoption of either of these formulations in lieu of the current recitation, a replacement which would protect sensitive payment details without the potential to sweep in broad categories of other, non-sensitive billing-related information. (Note that this type of formulation can be found in the definitional section of LD 1088, Representative Henderson's bill. *See* Section 9602 [26]G).

- **Section 9610, "Third-party" responsibilities.** This provision is problematic for several reasons. First, it assumes that third parties will know the exact promises and disclosures made to the consumer at the time of data collection. Third parties certainly receive assurances that they have the needed rights to use the data procured from another party but would likely not know the exact wording of each initial consumer notice. Second, in many cases, third parties will not have any means of contacting consumers because they do not have contact information for individuals. Ironically, in such circumstances, in order to comply with this provision, third parties would need to obtain *more* personal information on consumers than they otherwise would want – which cannot be the intent.

- **Section 9611 [2], Algorithm usage.** As with the majority of state consumer privacy statutes, LD 1822 contains an obligation to conduct a data protection assessment in instances where there is a heightened risk of harm to consumers. Confusingly, however, the bill adds that an assessment must be done "for each algorithm that is used." Inasmuch as data protection assessments focus on the *purpose* and *effects* of data processing (i.e. for what reasons is a company handling personal data, and what are the benefits and risks to consumers in doing so?), it seems out of place to add a requirement

that an assessment must be done *whenever* an algorithm is used, which seems to be a question of *methodology*. The term "algorithm" in this context is not defined, and considering that the word can encompass any set of instructions or rules that can be followed to solve a problem, its inclusion here would easily transform this provision into the tail that wags the dog. To the extent that deployment of a particular algorithm in the context of data processing causes a risk to consumers, it will *already* be subject to these requirements. To the extent it does not, it is unclear why these extra steps should be taken. In addition to the likelihood that this clause may cause a significant increase in compliance burdens unrelated to any danger of consumer harm, algorithmic designs and operations are often trade secrets of companies, which makes their exposure in a data protection assessment subject to production to the Attorney General's Office particularly alarming.

Regional Alignment. LD 1224 ensures that Maine businesses can follow consistent privacy rules across multiple states, including New Hampshire, Rhode Island, and Connecticut. By aligning with the regional framework, the bill reduces compliance burdens for businesses and ensures that consumers have the same privacy rights and protections as residents in neighboring states, while also receiving similar access to goods and services.

Aligning with New England's privacy framework ensures that Maine consumers benefit from a harmonized set of privacy protections, rather than being subject to a patchwork of different rules that could weaken enforcement or create confusion. A regional approach enhances consumer rights by providing a predictable and enforceable privacy framework that encourages businesses to adopt uniform, high-standard data protection measures across multiple states. Consumers benefit from greater transparency, stronger enforcement mechanisms, and more effective privacy safeguards when laws are cohesive and consistent across jurisdictions.

LD 1822, in contrast, creates a Maine-specific privacy framework, forcing businesses to develop a separate compliance system solely for Maine—or to potentially avoid the Maine market altogether. This fragmented approach drives up costs for businesses and is likely to reduce the services available for Maine consumers.

Thank you for the opportunity to present these remarks on behalf of the Chamber, and your consideration of the same.

Very truly yours,

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