



May 2, 2024

Senator Virginia Lyons
Chair of the Senate Committee on Health and Welfare
241 White Birch Lane
Williston, VT 05495

Senator David Weeks
Vice Chair of the Senate Committee on Health and Welfare
35 Warner Ave.
Proctor, VT 05765

RE: Letter in Opposition to a Private Right of Action in Vermont H. 121

Dear Senator Lyons and Senator Weeks:

We write to oppose Draft 1.1 of Vermont H. 121, which would reintroduce a private right of action mechanism into Vermont’s omnibus privacy legislation.¹ We remain concerned that certain provisions of H. 121 would hinder Vermont consumers’ access to online resources and create a challenging environment for the continued operation and success of the state’s small and mid-size business community, as discussed in our letter to the Vermont Senate on Draft 4.1 of H. 121 dated April 26, 2024. Draft 1.1 of H. 121 is particularly troublesome, however, due to its reinsertion of a private right of action into the bill.

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, 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 Our group has more than a decade’s worth of hands-on experience it can bring to bear on matters related to consumer privacy and controls.

Private enforcement would not help to protect the privacy of Vermont citizens, but instead would disproportionately benefit plaintiff’s attorneys at the expense of consumers. Even entirely meritorious private claims against companies for legal violations that impact multiple consumers rarely result in material compensation to individuals as redress.³ Private rights of action

¹ Vermont H. 121, Draft 1.1 (Gen. Sess. 2024), located [here](#).

² John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, INTERACTIVE ADVERTISING BUREAU, 15 (Oct. 18, 2021), located [here](#) (hereinafter, “Deighton & Kornfeld 2021”).

³ Class action settlement amounts, for example, are usually underwhelming from the individual consumer’s perspective. To make the point: under a truth-in-advertising labeling legal regime that allowed a private right of action in a lawsuit targeting a well-known food manufacturing company, lawyers pocketed millions—an amount equal to \$2,100 per hour they spent on the case. Their clients, on the other hand, took home a mere \$15 per consumer *at most*—an amount that is dwarfed by the sum their attorneys received. American Tort Reform Foundation, *State Consumer Protection Laws*

also hinder innovation by subjecting businesses to excessive legal costs to defend suits and potential penalties for mere technical violations of law. Enforcement regimes adopting a private right of action oftentimes subject entities to bet-the-company lawsuits that threaten their very existence due to the potential for exorbitant costs resulting from ongoing litigation. This threat is particularly acute for small and mid-size businesses.⁴ The harm caused from companies being reticent to innovate, or worse still, shutting down ultimately falls to consumers. With every business closure or reluctance to innovate due to overpowering legal costs, consumers are less enriched by a vibrant marketplace of companies with which they can engage and choose to do business.

Moreover, no other state that has enacted an omnibus data privacy law has included a broad private right of action for violations. Even the California Consumer Privacy Act (“CCPA”) only allows *limited* private enforcement for violations of its data breach terms related to a subset of personal information; the law does not bestow a broad private right of action on residents to bring suits for *any violation* of the law.⁵ Enforcement for the vast majority of CCPA violations is left to the California Office of the Attorney General and the California Privacy Protection Agency, which serves to better protect consumers and foster the development of consistent and clear rules for businesses. Private enforcement creates incongruity in legal rules, as each lawsuit is assessed on a case-by-case basis and can yield fragmented, inconsistent, and sometimes even contradictory results. We therefore encourage Vermont to adopt the approach taken by others in this area by placing enforcement responsibilities in the purview of the Vermont Office of the Attorney General.

* * *

Unhinged: It's Time to Restore Sanity to the Litigation 4 (2003), located [here](#) (hereinafter, “ATR Report”). The result is similar in Telephone Consumer Protection Act litigation, as individuals often walk away with a minimal portion of a settlement fund that pays out to class members pro rata, while 25 to 30 percent of that fund goes directly to class counsel. Amounts paid out to consumers have proven to be insignificant, even though only 4 to 8 percent of eligible claim members make themselves available for compensation from the settlement funds. U.S. Chamber Institute for Legal Reform, *Ill-Suited: Private Rights of Action and Privacy Claims* 7-8 (Jul. 2019), located [here](#).

⁴ Low pleading standards allow private litigants to proceed in court with minimal showings of injury, leading to excessive costs for entities to defend lawsuits when claims may be questionable or even unsupported. For example, trivial protections the state of California maintained for stopping gratuitous private actions under its Unfair Competition Law (“UCL”) “launched an unending attack on businesses all over the state.” ATR Report at 8. Consumers brought suits against homebuilders for abbreviating “APR” instead of spelling out “Annual Percentage Rate” in advertisements. These lawsuits disproportionately impacted small businesses, ultimately resulting in citizens voting to pass Proposition 64 in 2004 to stem the tide of abuse from the state’s broad private right of action under the UCL. *Id.*

⁵ Cal. Civ. Code §§ 1798.150, 155, 199.90.

Thank you for your consideration of this letter. As an alternative to private enforcement, we ask the Vermont Senate Committee on Health and Welfare to take steps to ensure consumer data privacy enforcement responsibilities rest with the Vermont Office of the Attorney General. This enforcement framework would lead to stronger and more consistent outcomes for consumers while better enabling businesses to allocate funds to developing processes, procedures, and plans to facilitate compliance with new data privacy requirements.

Sincerely,

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CC: Members of the Vermont Senate Committee on Health and Welfare

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