



February 8, 2023

The Honorable Sharon Moriwaki, Chair  
Senate Committee on Labor And Technology  
State Capitol - Room 215  
415 South Beretania Street  
Honolulu, HI 96813

**Re: OPPOSE SB 1085 (Lee) - Relating to Biometric Information Privacy.**

Chair Moriwaki and members of the Committee:

Thank you for the opportunity to submit testimony for the record regarding SB 1085.

Our corporate partners include companies like Amazon, Apple, Pindrop, and CLEAR, but our partners do not have a vote on or veto over our positions. We urge your committee to **oppose SB 1085**, which would make it prohibitively costly to use biometrics for the safety and security of individuals, and could deny Hawaiians the benefits of rapidly evolving technology.

**SB 1085 would effectively ban advanced security measures and routine uses.**

Biometrics improve the security of important transactions, electronic devices, and online accounts by assigning a value unique to an individual that cannot be lost, forgotten, faked, or obtained via social engineering. This vastly improves the security of online accounts and phone transactions by eliminating some of the most common ways that hackers and identity thieves access private accounts.

But these security benefits for consumers are threatened because SB 1085's requirements are ill-suited to the online and phone environments. The bill's requirement to obtain "affirmative written consent" and lack of exceptions for security and anti-fraud measures will effectively ban the use of biometrics for security purposes.

For example, an insurance company might analyze a caller's voice to authenticate account ownership. Under this bill, a fraudulent caller who reached the stage where biometric authentication was applied could sue the insurance company for impermissibly analyzing their voice without prior written consent.

The bill's current approach to obtaining "affirmative written consent" also impacts some of the beneficial uses of services backed by biometrics. For example, augmented reality services can make it significantly easier for those with visual or hearing impairments to navigate the world. It might be possible to collect consent from work colleagues to wear glasses that recognize faces and tell the visually impaired person who entered a room, but it might not be possible when attending large conferences or meeting with external groups.

**Vague terms and standards could open the door to privacy and security risks for consumers.**

We are just at the early stages of exploring how biometric technology can improve our lives, but SB 1085 stands to deny Hawaii residents the choice to take advantage of these advances.

In addition to security benefits, biometric technology benefits consumers in a number of ways. For example:

- Biometrics enable important transactions, such as buying or selling a home, to be conducted remotely—something that has benefited many during the pandemic.
- Biometrics can allow remote unlocking of a car when the keys are locked inside.
- They can offer peace of mind through the ability to monitor one's home while away or to see who is at the door before answering.
- Frequent travelers can speed through the airport security line using biometric verification systems.
- Families with voice-enabled smart home devices can set unique preferences for each family member who can be recognized by voice.

However, a combination of the bill's private right of action that opens the door to frivolous and excessive litigation, as well as vague terms such as "otherwise

profit” and “legally authorized representative” could result in a degradation and outright ban of certain products.

### ***“Otherwise profit”***

Section 3(c) states: “No private entity in possession of a biometric identifier or biometric information shall sell, lease, trade, or **otherwise profit** from a person's biometric identifier or biometric information” (emphasis added). One application of this section could either be applied broadly as a prohibition on the use of biometrics as part of a service offered to consumers or as any other part of a for-profit enterprise. Another application could have companies failing to personalize and update their products and services with biometric identifiers for fear of litigation under this section. Finally, another application of this section could have industry interpreting this provision as a de facto prohibition given the high threat of litigation, therefore pulling products and services out of the State of Hawaii.

### ***“Legally authorized representative”***

SB 1085 does not provide guidance for companies to authenticate a “legally authorized representative,” increasing the risk of delays to consumer requests or outright fraud. A non-native English speaking customer might want to designate a representative to exercise their rights, but the bill does not lay out the proper forms or authentication required. Even worse, a scammer could pose as an authorized representative to collect vast amounts of sensitive information. Without more guidance as to how to authenticate authorized representatives, companies could be forced to give up information to bad actors.

### **Coupling the bill’s requirements with a private right of action for violations would deter businesses from offering Hawaii’s residents these benefits.**

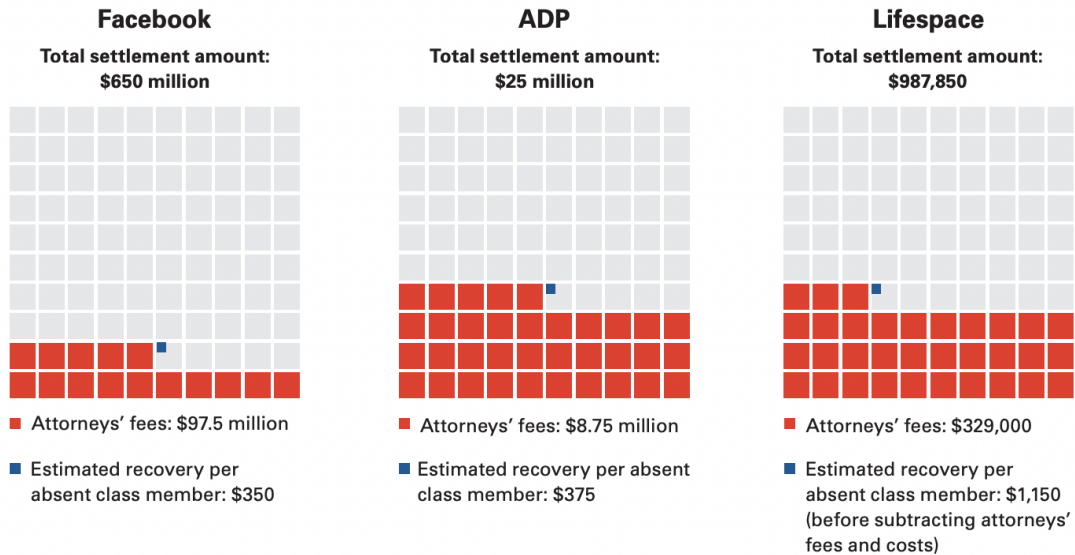
In Illinois, similar legislation to this bill was passed and class action lawsuits subsequently skyrocketed.<sup>1</sup> Unfortunately, those lawsuits primarily benefited trial attorneys rather than individual plaintiffs. The graphic below illustrates in more detail.<sup>2</sup>

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<sup>1</sup> <https://institutelegalreform.com/wp-content/uploads/2021/10/ILR-BIPA-Briefly-FINAL.pdf>

<sup>2</sup> <https://institutelegalreform.com/wp-content/uploads/2021/10/ILR-BIPA-Briefly-FINAL.pdf>  
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**Figure 4: Attorneys' Fees as a Proportion of BIPA Settlements**<sup>23</sup>



These lawsuits also had a chilling effect for consumers: augmented reality products, like face filters, were preemptively blocked for users in the state,<sup>3</sup> and some companies opted not to sell their products<sup>4</sup> in the state at all.<sup>5</sup>

We welcome the opportunity to work with the committee to create alternative legislation that will benefit consumers without denying them the security and convenience biometric technology can provide. For example, allowing a cure period of 30 days would give companies acting in good faith the opportunity to address inadvertent violations without stifling innovation.

Privacy laws and safeguards are crucial to the protection of Hawaii consumers. While we urge the committee to oppose SB 1085, we are happy to be a resource in future efforts to protect consumers' security and privacy without stifling innovation.

Sincerely,

Koustubh "K.J." Bagchi  
Senior Director, Technology Policy

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<https://www.chicagotribune.com/business/ct-biz-meta-pulls-augmented-reality-biometrics-cb-20220518-rp7a6bd7afae5djil24yjy6pgy-story.html>

<sup>4</sup> <https://support.google.com/googlenest/answer/9268625?hl=en>

<sup>5</sup> <https://www.sony.com/electronics/support/smart-sports-devices-entertainment-robots/ers-1000/articles/00202844>  
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